

Preventing Maladministration in Indonesian Public Procurement

(A Good Public Procurement Law Approach and
Comparison with the Netherlands and the
United Kingdom)

Richo Andi Wibowo

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Preventing Maladministration in Indonesian Public Procurement

(A Good Public Procurement Law Approach and Comparison with the Netherlands and the United Kingdom)

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door

Richo Andi Wibowo
geboren op 3 mei 1985
te Yogyakarta, Indonesia

Promotor: Prof. dr. G.H. Addink

Abbreviations

| | | |
|----------|---|---|
| CPRs | : | Civil Procedural Rules (the UK) |
| DPPA | : | Dutch Public Procurement Act |
| E proc | : | Electronic Procurement |
| EU | : | European Union |
| FOI | : | Freedom of Information |
| GALA | : | General Administrative Law Act (the Netherlands) |
| GG | : | Good Governance |
| GPP | : | Good Public Procurement |
| LKPP | : | <i>Lembaga Kebijakan Pengadaan Pemerintah</i> (National Public Procurement Agency in Indonesia) |
| MEAT | : | Most Economically Advantageous Tender |
| OECD | : | Organisation for Economic Co-operation and Development |
| PCRs | : | Public Contracts Regulations (A Statutory Instrument concerning Public Procurement Regulations in the UK) |
| PD | : | Presidential Decree or <i>Keputusan Presiden (Keppres)</i> . It is a form of regulation in Indonesia which was used to regulate public procurement before 2004. Since then Presidential Decree is used only for an administrative decision. |
| PR | : | Presidential Regulation or <i>Peraturan Presiden (Perpres)</i> . A form of regulation in Indonesia introduced in 2004. The PR has been used to regulate various matters including public procurement. |
| UDHR | : | Universal Declaration of Human Rights |
| UK | : | United Kingdom (in this research context, it focuses on England, Wales, and Northern Ireland) |
| UN | : | United Nations |
| UNCAC | : | United Nations Convention against Corruption |
| UNCITRAL | : | United Nations Commission on International Trade Law |
| UNDP | : | United Nations Development Programme |
| UNEP | : | United Nations Environment Programme |

UNICEF : United Nations Children's Fund
UNODC : United Nations Office on Drugs and Crime
WB : World Bank

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Preface

My preliminary research found that distrust is evident amongst Indonesian public procurement stakeholders. Bidders have no, or at least little, confidence in procuring entities due to the high rate of corruption in this sector. However, trustworthy representatives in some procuring entities shared the other side of the story.

It was admitted by these trustworthy representatives that some public procurement practitioners may have undertaken in corrupt activities. Nevertheless, they claimed to be without fault. They subsequently shared experiences in which they were certain that they had not breached the law and that none of their team had undertaken in corrupt practices, but despite this, they were defamed as having conducted corruption by the aggrieved bidding participants.

They explained further that the aggrieved bidders had not only submitted an objection against the procuring entities, but had also exerted 'extra-legal' pressure by reporting the accusation of corruption to parliament members, journalists, NGOs, and so forth. According to the representatives, allegations are made simply because of a grudge held by bidders due to their failure in succeed the procurement contract. Similar information was also gathered from other representatives in many different areas. Therefore, it seems that the distrust may be widespread throughout the country.

The abovementioned example illustrates the need to objectively analyse this situation by conducting legal research. The preliminary assumption was that there may be a problem with the transparency of the award decision. In addition, the legal complaint procedure may not work properly both within the administration and the judiciary.

As will become evident later, the abovementioned assumptions have been validated. This research has also been broadened to embrace other relevant issues. It clarifies that there are five fundamental problems that usually occur in the pre-contractual phase of the Indonesian public procurement procedure. This research attempts to provide legal solutions through the so-called good public procurement approach and comparative law approach (with the Netherlands and the United Kingdom). Arguably, although this book discusses the legal solutions for certain problems in Indonesia, the solutions and the reasoning behind them may be applicable to other countries facing similar problems.

It took more than four years to prepare this book. However, as a wise man once said, 'a perfect book is the book which has never been written'. Therefore, the opportunity to improve this book is always open; the readers' feedback is always welcome.

Utrecht, 4 November 2016

Richo Andi Wibowo

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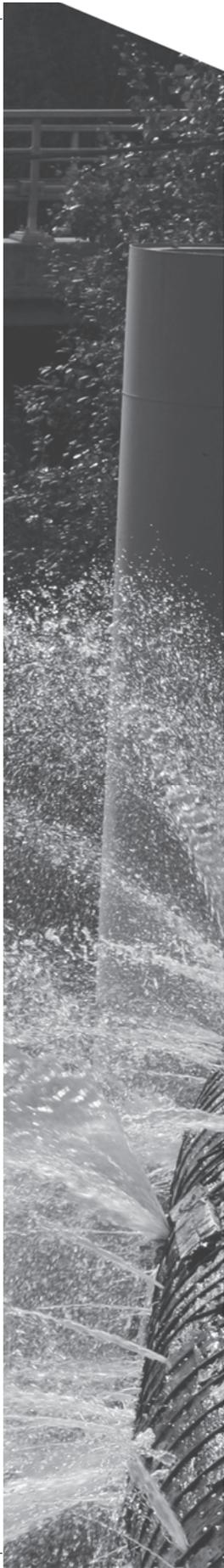
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Chapter 1

Introduction

1.1. Introduction

Public procurement refers to a government's activity when purchasing the goods and services it needs to carry out its functions.¹ This activity is regulated by both public and private law. Over the past few years, governments in all countries have come under pressure as they are expected to engage in this activity by 'doing more with less.'² This pressure is exerted by public procurement stakeholders, i.e. economic operators and citizens. Economic operators call upon the government to act fairly, transparently, accountably, etc. The citizens have also voiced the same demands; as taxpayers, they urge the government to spend public funds efficiently.

This expectation also occurs in Indonesia, and the Indonesian Government has attempted to respond to this call through numerous activities, such as strengthening the capacity of officials who work on public procurement,³ and establishing an electronic procurement ('e proc') system.⁴ According to some research, the latter point has showed various positive results.⁵

¹ Arrowsmith, S. 2010. *Public Procurement Regulation: An Introduction*. Nottingham: University of Nottingham, p. 1. Logically speaking, there are two possibilities when a government engages in public procurement: (i) the goods or services needed cannot be supplied internally; or (ii) the required goods or services can be supplied more effectively and efficiently by external parties, i.e. because they are more experienced in this activity than the government.

² Thai, K.V. "International Public Procurement: Concepts and Practices", in Thai, K.V (Ed). 2009. *International Handbook of Public Procurement*, Boca Raton: Taylor and Francis Group, p. 2.

³ Strengthening capacity building has been conducted by the National Public Procurement Agency (LKPP). This institution offers training, certification, assistance, etc. Information on these services can be found at: <http://www.lkpp.go.id/v3/#/pelayanan>, last visited 5 July 2016.

⁴ The Indonesian government first mentioned an electronic procurement system in 2003, but only very briefly (see: Article 22 of the Presidential Decree 80/2003). Since 2010, the government has been streamlining the public procurement system in electronic form – subject to a certain degree of flexibility (see: Article 131 of Presidential Regulation 54/2010).

⁵ National research has shown that e-proc leads to fair competition. See: Djojosoekarto, A. 2009. *E-Procurement di Indonesia (Electronic Procurement in Indonesia)*, Jakarta: Kemitraan, p. 47-49. In addition, e-proc can ensure that economic operators are not obstructed by physical barriers when they want to participate in a public tender. Previously, it was reported that criminals had been hired by a certain economic operator in order to block other economic operators from submitting (manually) their bidding proposals in Jogjakarta Municipality. This has no longer been the case since the municipality initially implemented e-proc. The municipality was one of the pioneers in the implementation of e-proc. It had been implemented two to three years before this system was streamlined by national regulation in 2010. See: Haryati, D., Anditya, A., Wibowo, R.A. 2011. "Pelaksanaan Pengadaan Barang/Jasa Secara Elektronik Pada Pemerintah Kota Yogyakarta" ("Implementation of Electronic Procurement in Yogyakarta"), *Jurnal Mimbar Hukum*, Vol. 32, No. 2, p. 337. In a later development, the national government also simplified the electronic system by announcing the introduction of the so-called electronic catalogue. With this, procurement officials can flexibly purchase products which have been listed in the system. The products have been guaranteed at the lowest price found in the market, because agreements have been made between the producers of the products and the national public procurement agency. See: Arfani, N. 2015.

Nevertheless, some problems still occur. According to a report issued by the Indonesian Audit Board in 2010, numerous problems can be identified in the public procurement procedure: (i) deficiency in the volume of goods/services, (ii) overpayment, (iii) unnecessary procurement, (iv) procurement outputs not being based on users' needs, (v) fictitious procurements, (vi) mark-up in the price, and (vii) economic operators failing to provide the required goods/services.⁶ According to the latest report issued by the same institution in 2015, similar problems still take place.⁷ Also, from the data issued by the Commission on the Eradication of Corruption it can be seen that public procurement is still classified as one of the government activities suffering from the most corruption.⁸

The situation outlined above indicates that certain regulations related to Indonesian public procurement may not produce the desired result as was previously intended during the drafting of the regulations.⁹ It is, thus, an unfortunate realisation that the Indonesian Government spends 25% of its national budget via public procurement.¹⁰ If the budget can be managed more effectively,

"Efisiensi Pengadaan Barang dan Jasa dengan E-Catalogue" ("Electronic Catalogue Leads to Efficiency in Public Procurement"), *Jurnal Pengadaan*, Vol. 4, No. 1, p. 47, 50.

⁶ Hardian, I. 2011. "Kasus Pengadaan Barang Jasa Berdasarkan Temuan BPK RI" ("Public Procurement Cases Founded by the Audit Board"), *Jurnal Pengadaan*, Vol. 1, No. 1, p. 88-9.

⁷ These are referred to as being similar because factual cases may vary. In addition, it is not possible to compare the previous report with the latest report due to differences in the style of the presentations. See: Badan Pemeriksa Keuangan, *Ikhtisar Hasil Pemeriksaan Semester 1 2015* (Summary Examination Reports Semester 1 2015), Jakarta: Setjen BPK. The problems found are for instance: procurement outputs are not based on users' needs and, therefore, cannot be used (xxii); overpayments in public procurement (p. 25); and deficiencies in the volume of goods/services (p. 31), etc.

⁸ From the annual reports by the Commission on the Eradication of Corruption from 2004 to 2014, it can be seen that the Commission has dealt with 411 corruption cases, of which one third thereof occurred in public procurement. See: Wibowo, R.A. 2015. "Mencegah Korupsi di Pengadaan Barang dan Jasa: Apa Yang Sudah dan Yang Masih Harus Dilakukan?" ("Preventing Corruption in Public Procurement: What Has Been Done and What Should be Done?"), *Jurnal Integritas*, Vol. 1, No. 1, p. 39.

⁹ In other words, it is predicted that ineffectiveness has occurred. Effectiveness articulates whether or not a regulation has produced the desired result as was initially intended. Sometimes, the principle of effectiveness is meant by the concept of efficacy or efficiency. However, these three are different. "Efficacy is getting things done. This means agreed on targets, just realising the outcome as such. Efficiency is doing things in the most economical way; minimising input and maximising output. Effectiveness is doing the 'right' things. This means setting the right targets to achieve an overall goal, including the different elements in the process." See: Addink, G.H. Forthcoming. *Good Governance: Concept and Context*, Oxford: OUP, p. 118. In my opinion, effectiveness is a legal principle whereas the two others are considered as concepts. In chapter two, I will discuss the difference between the principle and concept.

¹⁰ Direktorat Penyusunan APBN. 2016. "Informasi APBN 2016 (Information on State Annual Budget 2016)", Jakarta: Kementerian Keuangan, p. 18. Available at: <http://www.kemenkeu.go.id/sites/default/files/bibfinal.pdf>, last accessed 3 July 2016. As a

the remaining government budget could be allocated to other important expenditures.

Public procurement procedures are usually driven by competition. The competition is pivotal in public procurement because the government has a fiduciary duty toward society. Conceptually speaking, 'the government is required to ensure all members of the public are enabled equal opportunity to enjoy the public benefits allocated by the government- subject to technical restrictions'.¹¹ In other words, the government is required to facilitate competition among economic operators who wish to participate in a public tender. Secondly, competition is necessary in order to justify the government awarding the contract. This is reflected in the aim of public procurement where the contract shall only be awarded to the bidding participant who has made the best offer or the lowest price.¹² Finally, competition is required to ensure that bidding participants respond to contract opportunities by offering their best proposals. The issue of competition will result in a necessity for the procuring entity to treat the bidding participants equally; to conduct transparency as well as to protect sensitive information; and to oversee whether efficient levels of equality and transparency have taken place.

Some of the apparent problems with public procurement will be highlighted in the following paragraphs. Although the examples provided in this research occur in Indonesia, it is necessary to note that these may also occur in other countries. An economic operator bribes official(s) in the administration, and in return the officials provide favourable treatment to the briber to ensure they are awarded the contract. It is also possible that the officials in question undertake actions or take decisions which, according to them, comply with the law; however, the other bidding participants considers this as non-transparent, unreasonable, or unfair actions or decisions. These situations can sometimes qualify as maladministration.

There is no common definition of this term. Research shows that there are 175 forms of maladministration which are most frequently found and identifiable;

comparison, governments associated with the Organisation for Economic Cooperation and Development (OECD) spend from less than 20% of the general government expenditure to more than 35% on public procurement. See: OECD. 2015. *Government at a Glance 2015*, Paris: OECD Publishing, p. 136. Available at: http://dx.doi.org/10.1787/gov_glance-2015-42-en, last accessed on 3 July 2016.

¹¹ Dekel, O. 2008. "The Legal Theory of Competitive Bidding for Government Contracts", *Public Contract Law Journal*, Vol. 37, No. 2, p 246.

¹² OECD. 2011. "Competition and Procurement", Paris: OECD Publishing, p. 8. Available at: <http://www.oecd.org/daf/competition/sectors/48315205.pdf>, last visited 3 July 2016.

some of these are:¹³ an abuse of power or a position, arbitrariness, bribery, carelessness, conflict of interests, corruption, delay, failure to act/answer/respond, illegality, improper reasoning, inaccessibility, irregularity, negligence, unfairness, unreasonableness, etc.

Citizens who believe that they have suffered from maladministration may lodge the complaint in order to have the action or decision explained, justified, modified, or cancelled.¹⁴ This can be dealt with by means of legal redress provided by the courts, tribunals, and certain kinds of inquiries.¹⁵ The legal redress is related to the general right to remedies; the remedies “should be available where a person suffers loss as a result of wrongful administrative action (...)”.¹⁶ The remedies here refer to administrative law remedies such as administrative orders and the awarding of damages.¹⁷

Maladministration may be caused by a violation of the law by government officials. It can also be the result of ‘bad’ legislation, for instance if the law is ambiguous, obscure, self-contradictory, obstructive, discriminatory, biased, or unjust.¹⁸ It may be true that having good legislation does not necessarily mean that maladministration will automatically vanish, but it is better, as the maladministration conducted by the officials will not occur on such a large structural scale.

¹³ Caiden, G.E. 1991. “What is Public Maladministration?”, *Public Administration Review*, Vol. 51, No. 6, p. 492. In the literature it is explained that maladministration is closely related to another term which is so-called ‘bureaupathologies’. In my understanding, maladministration is a term used more frequently by lawyers while bureaupathologies is exercised more by social scientists. The following legal publication can be an instance where the term maladministration is used. Kirkham, R., Brian, T. and Trevor, B. 2013. *The Ombudsman Enterprise and Administrative Justice*, Farnham: Ashgate, p. 110. The public administration book below can be an example where the term of bureaupathologies is employed. Thompson, V.A. and Thompson, V.A. 2016. *Modern Organization*. Tuscaloosa: University of Alabama Press, p. 153-177. Another article clarifies that maladministration refers to the actions of officials whereas bureaupathologies refer to “the failure of the bureaucracy to adjust in time to changes in their environment.” See: Caiden, G.E. 1991. “What is Public Maladministration?”, *Public Administration Review*, Vol. 51, No. 6, p. 491. Having considered these, I will employ the term maladministration.

¹⁴ Wheare, K.C. 1973. *Maladministration and its Remedies*. London: Stevens and Sons, p. 18.

¹⁵ Wheare, K.C. 1973. *Maladministration and its Remedies*. London: Stevens and Sons, p. 18-9.

¹⁶ Fordham, M. 2003. “Reparation for Maladministration: Public Law’s Final Frontier”, *Judicial Review*, Vol. 8, Issue 2, p. 104.

¹⁷ It should here be underlined that awarding damages hardly takes place due to the availability of administrative law remedies, except where the Court is satisfied otherwise. See: Fordham, M. 2003. “Reparation for Maladministration: Public Law’s Final Frontier”, *Judicial Review*, Vol 8, Issue 2, p. 106-7.

¹⁸ Wheare, K.C. 1973. *Maladministration and its Remedies*. London: Stevens and Sons, p. 12.

Based on field research and desk research, the following five problems in the pre-contractual phase of the Indonesian public procurement system have been identified. Each of these will be elaborated further in chapter three; the following is the brief summary. First of all, some situations have been detected where the procurement document has been drafted in such a way as to hamper competition, including favouring certain bidding participants. However, it is doubtful that forms of legal redress are available to correct a wrongful procurement document (decision).¹⁹ The problem concerns situations where the heads of contracting entities had instructed their subordinates to favour certain bidding participants, and the subordinates duly followed their orders. With regard to this situation, it is doubtful whether an administrative review procedure (an objection and particularly an administrative appeal) within the contracting authorities can be carried out impartially, especially when the official who evaluates the administrative appeal is the same person who had instructed such favourable treatment.²⁰ Another problem is the lack of clarity concerning the award decision. In addition, it has been determined that bidding participants in Indonesia cannot understand the reasons as to why the contracting authority has awarded the contract to a certain bidder.²¹ Besides these three problems related to the contracting authorities (the 'administration'), there are two additional problems within the judiciary. The fourth problem is that the Indonesian judiciary is not unanimous when it comes to determining which court has competence to deal with a procurement dispute.²² The final problem highlights the situation where the judiciary has not succeeded in utilising the legal remedies available for a public procurement dispute.²³

The last two problems are still classified as problems in the pre-contractual phase for two reasons. First of all, the substance of the disputes relates to the allegation of the maladministration, which itself occurs during the pre-contractual phase. Moreover, the disputes itself arises before the contract has been concluded. The contract can be concluded if the award decision is not annulled by the contracting authority itself (i.e. due to the merit objection) or by the review body such as the court (which satisfied with the complaint of the aggrieved bidder).

Arguably, the three first mentioned problems indicate that maladministration occurs in the Indonesian public procurement system. The situation is more complex because the judiciary does not always provide legal

¹⁹ This matter will be discussed further in section 3.2.

²⁰ This matter will be discussed further in section 3.3.

²¹ This matter will be discussed further in section 3.4.

²² This matter will be discussed further in section 3.5.

²³ This matter will be discussed further in section 3.6.

protection as indicated in the latter two problems. These five problems are fundamental because these do not occur incidentally. Moreover, the problems seriously violate the concepts of the rule of law, democracy, and good governance. They infringe the rule of law as these problems illustrate that some administrative officials conduct their actions illegally.²⁴ These problems violate democracy, as the abuses that occur are undesirable from the perspective of the will of citizens.²⁵ These problems infringe upon good governance since they do not reflect the principle of accountable action by the government.²⁶ Moreover, they do not show that the legal accountability forum has functioned properly.²⁷

1.2. Research question

Departing from the abovementioned starting points, this research aims to answer the following question: how should the Indonesian Government deal with the five fundamental problems which occur during the 'pre-contractual phase' of its public procurement procedure? Two following sub-research questions will be used as guidelines to answer this question: (i) what is the appropriate approach to address these fundamental problems? and (ii) how do the other countries selected for this research deal with these fundamental problems?

It is relevant to distinguish three main phases in public procurement: the pre-contractual phase, the contract signing phase, and the contract implementation phase. The research focuses on the first mentioned phase; a phase commencing from the moment the procurement document is prepared up until the finishing of the stage prior to the contract being concluded. The phase may embrace the discussion on administrative review and judicial review which take place after the award decision has been made (including the issue of remedies), insofar as these

²⁴ The rule of law is a concept whereby the government exercises its power by law (legality). The elements of the rule of law include, *inter alia*, a legal basis and legal implementation preceding state activities; and the protection of fundamental rights. Addink, G.H. Forthcoming. *Good Governance: Concept and Context*, Oxford: OUP, p. 57.

²⁵ Democracy is about government and governance by the people in a direct or an indirect way. See: Addink, G.H. Forthcoming. *Good Governance: Concept and Context*, Oxford: OUP, p. 71.

²⁶ Good governance is considered as the third cornerstone of the modern state after the rule of law and democracy. Good governance adds the element of the accountability and efficiency of the government. See: Addink, G.H. Forthcoming. *Good Governance: Concept and Context*, Oxford: OUP, p. 1-2.

²⁷ Accountability can be concisely defined as "the obligation of an actor to explain publicly and justify conduct to some significant other" See: Bovens, M. "From Financial Accounting To Public Accountability" in H. Hill (ed.). 2005. *Bestandsaufnahme und Perspektiven des Haushalts- und Finanzmanagements*, Baden Baden, Nomos Verlag, p. 184. Pertaining to this, there are five accountability forums, one of these is the legal accountability forum which provides oversight that is represented by the court. See: Bovens, M. 2006. "Analysing and Assessing Public Accountability. A Conceptual Framework", European Governance Papers No. C-06-01, p. 15-18.

forms of review occur prior to the contract being concluded. Nonetheless, it is also possible to include the discussion of the judicial review which takes place after the contract is concluded; however the context of the dispute is tightly related to administrative law, for instance, an aggrieved bidder has just realised that an infringement of the administrative law had happened at the pre-contractual phase, but he realised this after the contract has been concluded.²⁸

The nature of the fundamental problems outlined above are concerned with the obligations of the procuring entities ('administration') and the rights of the bidding participants. These problems fall within the field of administrative law. This is the law related to the relationship between the administration (the executive or the government) and private individuals; administrative law also concerns the right of the individual to access the courts relating to the decision-making process.²⁹ Since this research focuses on public procurement, it is unavoidable to discuss public procurement law as a functional field of law. The research will also embrace a discussion on other laws that influence public procurement systems, such as constitutions, general administrative law, civil code, etc.

1.3. Approach used to address the research question

The perspective which is utilised to address the research question is known as the good public procurement approach. This approach will be applied to analyse the situation in Indonesia, as well as the selected countries.

Good public procurement approach

As the problems are fundamental, the approach to address these problems shall also be given fundamentally. In order to do so, the five 'concrete' problems listed above will be generalised and conceptualised, and then viewed from the perspective of principles, namely good public procurement principles. The following is a brief discussion of this approach; a detailed discussion will be provided in Chapter 2.

As previously mentioned, this research focuses on administrative law and the principles thereof. Previously, these principles were known as the principles of

²⁸ It will be discussed in chapter four that, although the dispute is regulated by the civil procedure law, the judge may exercise the administrative law argument.

²⁹ Seerden, R. "Comparative Remarks", in Seerden, R.J.G.H (ed.). 2007. *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia, p. 402.

proper administration.³⁰ Later, this definition was developed to become the principles of good administration.³¹ In a further development, the preferred term of use is now the principles of good governance (GG). The principles of GG may apply to a narrow context, namely the administration, although it may also apply to a broader context, i.e. to all state branches.³² The principles of GG can refer to the norms for the government as well as the rights for the citizen³³ containing good values that can force the government to carry out its tasks better. Violating a legal principle may entail legal consequences due to its legal character.

GG contains numerous principles. Three of these are the principles of equality, transparency and accountability.³⁴ These three have been chosen to shed light on the fundamental problems caused by the following considerations. First of all, from the conceptual perspective, these are considered as three most important components within the concept of good governance.³⁵ Secondly, these three principles are suitable to explore the problems that have been mentioned earlier.³⁶ Finally, these three principles are linked because they are the cornerstones of the

³⁰ Principle of fair or proper administration includes: the prohibition of misuse of power; the prohibition of arbitrariness; the principle of legal certainty; the principle of legitimate expectations; the principle of equality; the principle of proportionality; the principle of due care; and the principle of justification (providing sufficient grounds for a decision). See: Addink, G.H. 'Principles of Good Governance: Lessons from Administrative Law', in: Curtin, D.M. and Wessel, R.A. 2005. *Good Governance and the European Union, Reflections on Concepts, Institutions and Substance*. Intersentia, Antwerp, p. 43

³¹ The principles of good administration contain not only the principles of proper/fair administration, but also transparency, participation, effectiveness, accountability, and human rights. Addink, G.H. 2015. "Good Governance in the EU Member States", Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Den Haag, p. 44. Electronic version available at: <http://dspace.library.uu.nl/handle/1874/327316>, last visited 19 October 2016. See also: Addink, G.H. 'Principles of Good Governance: Lessons from Administrative Law', in: Curtin, D.M. and Wessel, R.A. 2005. *Good Governance and the European Union, Reflections on Concepts, Institutions and Substance*. Intersentia, Antwerp, p. 39

³² "(...) the broad conception of good governance can be specified according to the three types of state powers. It is about principles of good legislation for the legislator, principles of good administration for the administration; and principles of good judicial procedures for the judiciary". See: Addink, G.H. Forthcoming. *Principles of Good Governance: Concept and Context*, OUP, Oxford, p. 3.

³³ Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*. Oxford: OUP. p. 2.

³⁴ This will be discussed in section 2.2., 2.3., and 2.4.

³⁵ It will be discussed in section 2.3.2 that three international organisations: United Nations, the World Bank, and the OECD have, either explicitly or implicitly, recognised equality, transparency, and accountability as components of good governance in their concepts. However, the meaning of each of these three terms may have differences between one organisation and another.

³⁶ It will be argued that public procurement activities are mostly financed by public funds and, as a consequence, the government is bound by a certain public norm. This norm can be seen in public procurement laws and in the relevant general laws which concern the procurement procedure.

modern state; equality underpins the rule of law, transparency reflects democracy, and accountability is the main pillar of good governance.³⁷

Chapter 2 will discuss the principles of equality, transparency, and accountability, which can also be found in public procurement. Arguably, the principle of equality can be split into two folds, the principle of equal opportunity and the principle of equal treatment. The former will be used to analyse the first problem while the latter will be employed to scrutinise the second problem. The principle of transparency will be used to assess the third problem. The principle of accountability will be utilised to elucidate the fourth and fifth problems. The fourth is called the principle of accountability regarding the clarity of legal accountability forum, whereas the fifth is called the availability of remedies. Therefore, the five fundamental problems will be examined utilising five principles, which in turn will be referred to using the umbrella term “the principles of good public procurement” (GPP).

It does not necessarily mean that the principles of GPP only contains these five principles. Other relevant principles may be apparent. However, it is not the object of the research to delve into detail what other principles (besides these five principles) should fall within the concept of GPP. The focus of this research is to analyse the five fundamental problems using these five determined GPP principles. Shedding light of these principles on the public procurement problems will be referred to as the good public procurement approach.

One may question why it is necessary to discuss the principles of good governance; why are the principles of good public procurement not discussed directly? Academically speaking, it is useful to check whether the principles of equality, transparency, and accountability under the umbrella of the principles of good governance have the same meaning and function as the principles of good public procurement. It is perhaps possible that their names are the same, but they are applied and interpreted differently in public procurement. The findings of this matter will be provided in Chapter 2.

It is noteworthy to recall the earlier discussion on maladministration. It has been highlighted that preventing maladministration can be achieved by enacting good legislation. This will produce clear regulations, which not only contain good content, but also clear procedures to protect the content. This also serves to protect the (legal) principles; according to academic literature, one of the reasons for

³⁷ Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*. Oxford: OUP, p. 2. See the discussion on the matter in section 2.2.

establishing the law is to protect legal principles.³⁸ Therefore, this research will also qualify whether the law in Indonesia and in the other countries included in this research has sufficiently protected the good public procurement principles.

Comparison with selected countries

The abovementioned approach will be utilised to evaluate the public procurement situation in Indonesia and in the countries compared (i.e. the Netherlands and the United Kingdom). To do so, it will be argued that the five selected principles have been codified in the public procurement regulations in Indonesia and the compared countries – although the quality of the enactment of these principles differs from one jurisdiction to the other. Thereafter, it will be analysed whether the five fundamental problems as exemplified in Indonesia also occur in the compared countries. The situation in each country will then be generalised and conceptualised. These results will be examined from the perspective of good public procurement principles. Finally, the result of this examination in each country will be compared.

According to one scholar, comparative law has been in existence since the era of Hammurabi due to its advantage of providing insights in order to engage in legal reform.³⁹ By exercising comparative law, inspirations can be gathered,⁴⁰ and better law can be detected.⁴¹

³⁸ This statement was made by Scheltema. The context of his statement was that he criticised the Dutch Parliament when it explained its reasons for creating a Public Procurement Act (merely) to accommodate the EU Directive. According to him, this was not a good reason. The Act has to be implemented due to the need: (i) to protect the good market; (ii) to serve the interest of society; (iii) to treat the citizen equally and carefully. Stemming from the latter, he then pointed out that the Act shall exist in order to protect the principle. See: Scheltema, M. "De Nieuwe Aanbestedingswet: Een Duurzaam Bouwwerk? (The New Public Procurement Act: A Sustainable Construction?)" in: Hebly, J.M., Manunza, E.R., Scheltema, M. 2010. *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet (Reflections on the Public Procurement Bill)*, Instituut Voor Bouwrecht, p. 123 and 127.

³⁹ Watson, A. 2000. "Legal Transplants and European Private Law", Vol. 4.4, *Electronic Journal of Comparative Law*, page reference not available.

⁴⁰ Hage, J. 2014. "Comparative Law as Method and the Method of Comparative Law", Maastricht European Private Law Institute Working Paper No. 2014/11, p. 14, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441090, last visited 22 December 2015.

⁴¹ Michaels, R. "The Functional Method of Comparative Law", in Reimann, M., and Zimmermann, R. (Eds.) 2006. *The Oxford Handbook of Comparative Law*, Oxford: OUP, p. 342. Electronic version available from: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2033&context=faculty_scholarship, last visited 22 December 2015.

The first point – gaining insight – is self-explanatory. By engaging in a legal comparison, Indonesia (and other countries) may gain inspiration in order to reform its public procurement law(s) by learning from certain countries. However, the second point gives rise to the question: how does one determine what is in fact ‘better’?⁴² This question underlines the necessity for a benchmark indicating under which conditions a regulation can be considered to be good (or better). The benchmark will be based upon the normative framework that has been discussed above: the good public procurement approach. The extent to which the laws of Indonesia and the countries compared have embodied and exercised the selected principles of good public procurement will be evaluated. It will be analysed whether the laws of Indonesia and the countries compared have been successful in protecting the selected principles of good public procurement.

As previously mentioned, laws here refer to the public procurement laws and any other general laws which function within the public procurement system. These also include rulings from relevant independent administrative bodies such as the procurement review bodies and court decisions. A legal comparison will be carefully conducted in order to ensure that the laws compared have the same function (i.e. that they serve the same purpose).⁴³ It is possible to compare an article in a codified law of a country with a certain ruling from the court of another country as long as they deal with the same factual situation.

It should be emphasised that this research will focus on providing insights so that legal reform can take place in Indonesia. Also, the research will suggest that the administration and the judiciary should solve relevant issues related to public procurement problems in Indonesia. Although the point of departure in this research is Indonesia, this research does not intend to visualise in detail how the insights gained are to be incorporated in the Indonesian legal system (‘legal transplantation’⁴⁴). As has been previously mentioned, the research aims to make

⁴² Hage, J. 2011. “Comparative Law and Legal Science”, Maastricht European Private Law Institute Working Paper No. 2011/11, p. 7, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600108, 22 December 2015.

⁴³ Zweigert and Kötz explained that “as long as in law things fulfil the same function, then they are normally comparable”, as cited by Platsas, A.E. 2008. “The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks”, *Electronic Journal of Comparative Law*, Vol. 12 (3), p. 2, available at: <http://www.ejcl.org/123/art123-3.pdf>, last visited 22 December 2015. See also: Platsas, A.E. 2008. “The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks”, *Electronic Journal of Comparative Law*, Vol. 12 (3), p. 9, available at: <http://www.ejcl.org/123/art123-3.pdf>, last visited 22 December 2015.

⁴⁴ Legal transplantation concerns transferring a certain legal rule from the donor country to the recipient country which, according to Watson, ‘is socially easy’ and the “historical roots and social context of the creation of law are less important”. See: Watson, A. 1993. *Legal Transplants: An Approach to Comparative Law*, Athens: the University of Georgia Press, p. 95 and 100. However, this opinion has been criticised by Legrand who has argued that a legal transplantation is impossible.

the discussion open in order to increase the transferability⁴⁵ of the information gained from the research.

Having explained the author's perspective of comparative law, the following section will discuss the countries that have been selected for the comparison, as well as the reasons such a choice. The two countries are the Netherlands and the United Kingdom⁴⁶ (hereinafter: the UK).⁴⁷ These countries have different legal systems; the Netherlands is a civil law country whereas the UK is a common law country. The laws used in the public procurement system both in the Netherlands and the UK refer to the same legal sources (the EU Directives). As a result, the academic justification for comparing these two countries, which refer to the same legal source may be brought into question. The answer to this question will now be discussed briefly.

According to him, the rules are not autonomous entities which are free from historical, epistemological, or cultural baggage; therefore, these cannot be embedded from the world of meaning that characterises a legal culture. See: Legrand, P. 1997. "The Impossibility of Legal Transplants", *Maastricht Journal of European and Comparative Law*, Vol. 4.111, p. 114 - 116.

⁴⁵ The transferability of this research is likely, because public procurement is an area with a 'loose coupling with social discourses'. As a consequence, the possibility of 'legal irritants' is minor. The following is my explanation. Teubner classifies law into loose and tight couplings. Usually, legal rules are a loose coupling; however, there are certain situations which can be classified as a tight coupling, and this refers to "legal rules which are formulated in ultracyclical processes between law and other social discourses which bind them closely together while maintaining at the same time their separation and mutual closure". In the loosely coupled area of the law, "a transfer is comparably easy to accomplish", as opposed to a tight coupling. See: Teubner, G. 1998. "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", *The Modern Law Review*, Vol. 61 (1), p. 18-9. To provide an additional illustration, a tight coupling usually has something to do with the law which is related to moral value backed up by the religious beliefs of society, such as family law.

⁴⁶ The UK consists of Great Britain and Northern Ireland, and Great Britain is made up of England, Wales and Scotland. However, I would like to clarify that this research concentrates on England, Wales and Northern Ireland. This is because the regulations and the case law which will be examined in this chapter emanate from those jurisdictions. Scotland has its separate regulation (although the substance of that regulation is in line with the EU Directives). This will be discussed in section 5.1.

⁴⁷ When this research was carried out, these two countries were EU Member States. However, approaching the end of this research, the UK held a referendum to vote on whether the UK should remain or leave the EU (See: UK Government, "EU Referendum", available at: <https://www.gov.uk/government/topical-events/eu-referendum/about>, last visited 24 June 2016.). The media estimates were that the British prefer to leave the EU (it was estimated that 52% of British people prefer to leave the EU. See: BBC, "EU Referendum", available at: <http://www.bbc.com/news/live/uk-politics-36570120>, last visited 24 June 2016.). The referendum was held on 23rd June 2016. If the British decide to leave the EU, the decision will not have any consequences for this research. This limitation of this research is from 1st of September 2012 to 1st of June 2016.

It can be stated that although these countries refer to the same legal sources, the laws that function in the public procurement system in the Netherlands are different from the laws in the UK. These differences occur because the Directives stipulate general obligations and allow each Member State to regulate the precise form and method of implementation.⁴⁸ Also, a specific doctrine is applied and this is the so-called national procedural autonomy.⁴⁹ This allows the Member States to regulate specifically on the legal procedure to ensure legal protection in certain aspects. The implication of this doctrine is that there is no uniformity in the legal procedures for dealing with the above issue.

After demonstrating the above argument, one may question why the Netherlands and the UK were chosen for comparison, and why other EU countries, such as France, were not selected. This question is approached in the following paragraph.

Indonesia has been classified as a civil law country, but the third amendment of the Constitution, enacted on 9 November 2001, has somewhat changed this position. It can be argued that Indonesia no longer belongs to the classical civil legal system. The latest version of Article 1(3) of the Indonesian Constitution states: "Indonesia is a state based on law".⁵⁰ The drafters of the Constitution decided not to place the term '*rechtsstaat*' in brackets after that sentence. Their intention was to enable Indonesia to absorb the substance of '*rechtsstaat*' (civil law) and the 'rule of law (common law) simultaneously.⁵¹ Since then, it can be argued that Indonesia has

⁴⁸ Article 288 Treaty on the Functioning of the European Union (TFEU): "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

⁴⁹ It departs from the European Court of Justice's (ECJ's) judgement on the refusal of an import licence known as the *Salgoil* case. The ECJ provided the first clear ruling on a Member State's competence in the field of judicial organisation, but then the Italian Court requested a further explanation. The ECJ then replied that [...] it is for the national legal system to determine which court or tribunal to give the protection. See: Wouters, K. "Public Procurement Review Bodies (including Anti-Fraud Measures)", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law: Public Procurement and Beyond*, Brussels: Bruylant, p. 352.

⁵⁰ The 1945 Constitution of the Republic of Indonesia; an official English translation is available at: <http://www.mahkamahkonstitusi.go.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf>, last visited 15 June 2016.

⁵¹ Sekretariat Jenderal MPR RI. 2007. *Paduan Masyarakat Undang Undang Dasar Negara Republik Indonesia (Guide on the Socialisation of the Indonesian Constitution)*, Sekretariat Jenderal MPR RI, Jakarta, p. 52-53.

declared to switch into a 'mixed legal system':⁵² a legal system where the law in force may derive from more than one legal system.⁵³

Arguably, this research will be more beneficial to Indonesia by framing the discussion using countries that have a different legal system to Indonesia's former situation (e.g. the UK). The UK position is clear in that it is a common law country with a strong private law emphasis. The case for choosing the Netherlands is henceforth explained. It may be true that this country has long been recognised as a civil law country.⁵⁴ However, from a methodological approach, the judiciary in the Netherlands is given the authority to develop the law in a pragmatic way if a code is silent;⁵⁵ this expansive role that is given to the judiciary is typical of common law systems. This role is pivotal to be instilled by the Indonesian judiciary. Moreover, as with regards to public procurement, the Netherlands has been classified as a 'mixed model' country. The literature explains three different legal patterns that can be observed in public procurement laws across the EU Member States; the French model which is heavily regulated by public law; the British model which is strongly regulated by private law; and the mixed model which relies on certain regulations, but whenever these regulations are silent, private contract law is used.⁵⁶

Research methods

The following two methods are used for this research: field research and desk study. What is meant by field research is the gathering of information based on interviews with academia and practitioners in the three selected countries, in Indonesia (Jakarta, East Java and Jogjakarta), in the Netherlands (Utrecht,

⁵² Mahfud, M. 2008. "Hukum, Moral dan Politik" ("Law, Moral, and Politics"). He delivered this paper during an academic speech at Universitas Diponegoro, Semarang. A softcopy of his paper is available on his personal website <http://www.mahfudmd.com/public/makalah/Makalah_2.pdf>, last visited 09 July 2013.

⁵³ Tetley, W. 1999. "Mixed Jurisdictions: Common Law vs Civil law (Codified and Uncodified)", *Uniform Law Review*, Vol. 3, p. 597. Available from: <http://www.unidroit.org/english/publications/review/articles/1999-3-tetley1-e.pdf>, last visited, 15 June 2016.

⁵⁴ Jury Globe World Legal System Research Group University of Ottawa, "Alphabetical Index of the Political Entities and Corresponding Legal Systems", available from: <<http://www.juriglobe.ca/eng/sys-juri/index-alpha.php>> last visited 20 October 2013.

⁵⁵ Smits, J.M. 2003. "Import and Export of Legal Models: The Dutch Experience", *Transnational Law and Contemporary Problems*. Vol. 13, p. 555-556.

⁵⁶ It has been argued that three models for regulating public procurement in the EU member countries have converged. See: Comba, M.E. "Principles of EU Law relevant to the Performance of Public Contracts", in Trybus, M., Caranta, R., Edestam, G. (eds.) 2014. *EU Public Contract Law: Public Contract Law and Beyond*, Brussels: Bruylant, p. 330.

Amsterdam and The Hague), and in the UK (Oxford, Bristol, Birmingham and London). Academia as used here refers to the scholars who are specialising in public contract (public procurement) law, whereas practitioners are civil servants who are in charge of public procurement. Interviews have also been conducted with anti-corruption activists and public procurement regulation makers in certain fields during the field research in Indonesia. Practitioners as used here refer to (i) economic operators who have experience in participating in public bidding, and (ii) civil servants who are in charge of public procurement procedure. Desk study entails conducting research by examining the relevant laws, documents, and the literature, which pertain to public procurement, administrative law, and any other laws, including the legal systems of the three selected countries. Where relevant literature has inspired discussion or ideas it is quoted and mentioned in the footnotes. As it may be seen later, on many occasions, the wording has been paraphrased. However, in certain situations, the wording is kept as it is, either in the body text or in the footnote.

1.4. Research functions

This research may serve a number of different functions. First of all, it is in line with the development of public procurement in Indonesia, which aims to continue the reform of this sector. As has been mentioned at the beginning of this chapter, guided by the National Public Procurement Agency (LKPP) the public procurement system has improved significantly over the course of the last six years. Currently, the LKPP is in the early phase of preparing the Public Procurement Bill to modernise the current Presidential Regulations on Public Procurement.⁵⁷ Therefore, the results of this research will be useful and may be adopted for the substance of that bill.

The research promotes administrative law so that it is able to cope with maladministration. This is consistent with the latest objective of the Indonesian Government, which aims to combat corruption by means of a preventive approach rather than a repressive approach.⁵⁸ Conceptually speaking, criminal law shall only

⁵⁷ Prabowo, A. and Pramita, W.K. 2011. "Peninjauan Satu Tahun Pelaksanaan Perpres 54/2010 tentang Pengadaan Barang/Jasa Pemerintah" ("One Year Evaluation of the Presidential Regulations 54/2010 on Public Procurement"), *Jurnal Pengadaan*, Vol. 1, No. 1, p. 42. See also: LKPP. 2014. "Prosiding Aspek Hukum dan Urgensi Pembentukan Undang Undang Pengadaan" ("Proceedings on the Legal Aspects and Urgency of the Public Procurement Act", Jakarta: LKPP. Available at: <http://www.lkpp.go.id/v3/#/read/3048>, last visited 4 July 2016.

⁵⁸ The Indonesian government has realised that using a preventive approach is more promising when dealing with corruption because it will create sustainability for the anti-corruption programme. See: the Annex to Presidential Regulation No. 55/2012 concerning the Medium and Long-Term National Strategy to Prevent and Eradicate Corruption (p. 22-23). However, the

be used as a last resort (*'ultimum remedium'*). Criminal law shall not be employed whenever the problems can be dealt with using other legal approaches - such as by administrative laws (*'primum remedium'*). After all, administrative law can be seen as a prominent instrument to prevent corruption ('maladministration'), because administrative law can increase efforts to detect maladministration.⁵⁹ Since maladministration has been detrimental to the Indonesian economy, dealing with the matter will also provide additional benefits for Indonesia. Combating maladministration will increase Indonesia's competitiveness.⁶⁰

It is necessary to outline how public procurement practice is undertaken in Indonesia. The heavy reliance on criminal law has resulted in at least two negative consequences. First of all, research has shown that some legal enforcers use the criminal law to intimidate procurement officials for personal gain.⁶¹ A similar finding has also been found through the means of field research. Representatives from two

Indonesian government may still need insights with regard to how to visualise and break down this purpose. This research, therefore, can be seen as a concrete solution for the government.

⁵⁹ Therefore, it matches the strategies to prevent crime. The other relevant strategies are: removing excuses; reducing rewards; reducing provocation. See: Graycar, A. and Prenzler, T. 2013. *Understanding and Preventing Corruption*. Basingstoke: Palgrave Macmillan, p. 72. In the Netherlands, administrative law has been utilised as a pivotal tool to cope with corruption. See: Addink, G.H and ten Berge, J.B.J.M. 2007. "Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands", *Electronic Journal of Comparative Law*, available from: <http://www.ejcl.org/111/art111-1.pdf>, last visited 12 July 2016. In public procurement context, administrative law has also been considered as a promising tool to curb corruption, for instance by implementing exclusion mechanism. See: Wibowo, R.A. "Strengthening the Effectiveness of Exclusion Mechanism in Public Procurement: A Comparative Legal Study between Indonesia and the Netherlands", in: Thai, K.V. (Ed.). 2016. *Global Public Procurement Theories and Practices*, Springer, Cham, p. 213-227.

⁶⁰ According to research conducted by the World Economic Forum (WEF), the most problematic factor in doing business in Indonesia is corruption. Therefore, it reduces Indonesia's competitiveness. According to the WEF, competitiveness is "the set of institutions, policies, and factors that determine the level of productivity of a country which set the level of prosperity and growth rates". See: Schwab, K. 2014. "The Global Competitiveness Report 2014-2015", available at: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf, p. 4 and 214, last accessed: 14 April 2015.

⁶¹ This information is based on research interviews on corruption and public procurement in Aceh. The police officers "were able to claim projects for themselves by launching corruption investigations at a suspect government agency, with the investigations being ended once new projects were directed their way". See: Van Klinken, G. and Aspinall, E. "Building Relations: Corruption, Competition, and Cooperation in the Construction Industry", in Van Klinken, G and Aspinall, E. (Eds.). 2011. *The State and Illegality in Indonesia*. Leiden: KITLV Press, p.153. Unlike other provinces, Aceh had suffered from a long separatist conflict until the peace resolution was signed in 2005. This province has experienced the early stages of the implementation of good governance; therefore, the situation in Aceh may not always be comparable with other areas in Indonesia. Nonetheless, as is explained in the main text, my field research still confirms some similarities with the situation described by Klinken and Aspinall above, although it is not as gloomy as the situation in Aceh.

different contracting authorities explained that police officers had intimidated them and their staff.⁶² The representatives explained that the investigations were odd; they sensed that the police officers tried to intimidate them verbally in order to annul the award decision and grant it to another bidder.⁶³

Secondly, due to the situation mentioned above, many civil servants have been fearful of becoming involved in public procurement activities.⁶⁴ As a consequence, they purposefully ensure that they fail the national examination test to become public procurement practitioners.⁶⁵ This situation may reduce the quantity of human resources in the public procurement system. In the end, the situation may have consequences for the citizen in general; goods or services that should be delivered may face delays because the contracting authorities are understaffed.

Moreover, this research may also assist Indonesia in complying with a certain international obligation. Indonesia has ratified the United Nations Convention Against Corruption (UNCAC). Therefore, the Convention binds Indonesia.⁶⁶ The Convention requires a state party to “develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and

⁶² It is necessary to underline that the integrity and the impartiality of the law enforcers in handling procurement cases can be questioned. According to the Indonesian Anti-Corruption Act, a case of corruption can be dealt with by one of the following institutions: the Police, the Prosecutor, and the Corruption Eradication Commission (the KPK). Fortunately, the information gathered during my field research showed that no officers from the KPK were involved in illegal activities.

⁶³ Based on interviews with three officers from the procurement service unit of a local government in East Java province (interview conducted on 15 April 2013). Also based on an interview with an officer from the procurement service unit of a central government institution situated in East Java province (interview conducted on 20 December 2013). It is also worth explaining that they called the police and prosecutor institutions as “Jajaran Samping”. According to a legal scholar in the same region who was concerned with this issue, this term means institutions that have no hierarchical position with those who participate in public procurement activities, but have significant power, and therefore, they should be given “attention” by giving money to them. By doing so, the legal enforcers will not “disturb” government activities (interview conducted on 15 April 2013).

⁶⁴ Based on an interview (hukumonline.com) with Rustam Syarif, ex-chief of the Government Procurement Policy Institute (LKPP), on 26 May 2008. Available from: <<http://www.hukumonline.com/berita/baca/hol19321/ketua-lkpp-kita-butuh-uu-procurement>> last accessed 23 May 2014. Although the interview was conducted more than eight years ago, it is believed that the current situation has not significantly changes

⁶⁵ Suara Merdeka, “Pejabat Pengadaan Tak Perlu Takut” (“Procurement Committee Should not be Afraid”), news firstly published on 3 June 2014. <<http://www.suaramerdeka.com/v1/index.php/read/cetak/2014/06/03/263207/Pejabat-Pengadaan-Barang-Tak-Perlu-Takut>> last visited 8 July 2014.

⁶⁶ Law No. 7/2006 on the Ratification of the UNCAC.

public property, integrity, transparency and accountability”.⁶⁷ These issues also relate to the field of public procurement. It is stipulated in the Convention that the State Parties shall “take the necessary steps to establish appropriate systems of (public) procurement, based on transparency, competition and objective criteria in decision-making (...) in preventing corruption”.⁶⁸ The ‘objective criteria’ are closely related to the principle of equality, as the UN refers to objective criteria as “striving to reduce to eliminate biases, prejudices and subjective evaluations”.⁶⁹ This Convention also requires the ratifying state in which to establish “an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies (...)”.⁷⁰ Therefore, to some extent, the UNCAC is also in line with this research approach focused on the principles of equality, transparency, and accountability.

Furthermore, the research can contribute to the academic discussion, especially the elaboration of a good public procurement approach and utilising the principle of good governance to enact laws related to public procurement. Another academic benefit that can be acquired through this research is information on how countries from different legal systems attempt to solve the same or similar problems based on the perspective of principles.

Moreover, this research can provide practical insight into the Indonesian economic operators. Some of Indonesia’s neighbouring countries, such as Singapore, Malaysia and Australia, belong to the common law legal system. When Indonesian economic operators are allowed and interested in participating in public tender in these countries, they may be able to obtain basic ideas as to how the countries in this legal system deal with public procurement.

⁶⁷ Article 5 (1) of the UNCAC.

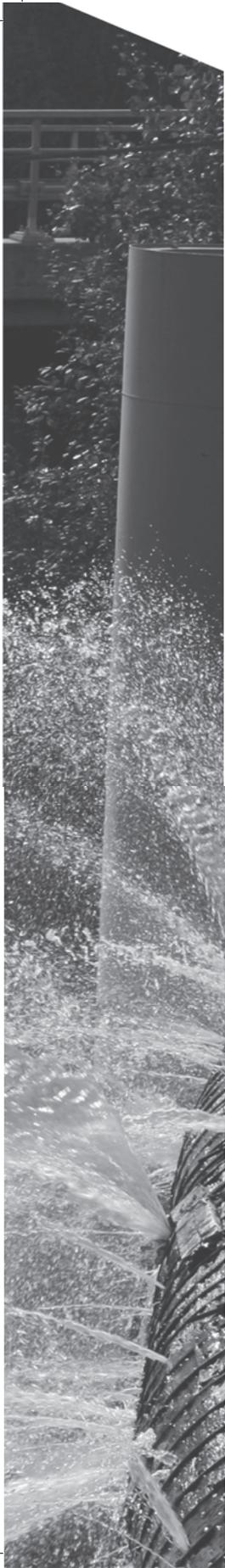
⁶⁸ Article 9 (1) of the UNCAC.

⁶⁹ United Nations Office on Drugs and Crime (UNODC), 2013. “Guidebook on Anti-corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption” United Nations Office, Vienna, p. 9. In that guidebook, the UNODC explains further that, “Objectivity can be safeguarded in many ways, for instance, through requirements to disclose all criteria for participation and qualification of suppliers, rules on technical specifications drafted with the express intention of ensuring that procuring entities do not discriminate against and among (international) suppliers, and requirements guiding technical and price evaluations”. The bracket is my personal emphasis. Although the bidding participants shall be treated equally, it is worth clarifying that Indonesia and some other developing countries are not bound by certain international procurement agreement(s). Therefore, Indonesia does not have to treat the international bidding participants as equal as their national bidder. This issue will be discussed later in section 3.1.1.

⁷⁰ Article 9 (1) (d) of the UNCAC.

1.5. Structure and the presentation of the book

This book contains seven chapters. This first introductory chapter will be followed by Chapter 2, which will discuss the normative framework of this research. Chapter 2 provides a conceptual foundation from which the research question may be addressed in a fundamental manner. Therefore, this chapter will provide the answer to the first sub-question of the research. The subsequent chapter will discuss the failure of the Indonesian Government to protect selected good public procurement principles, leading to the existence of the five fundamental problems. Chapters 4 and 5 contain information on the Netherlands and the UK, respectively. Each chapter will discuss how the selected principles are exercised in each country in order to tackle the five fundamental problems. Chapter 6 will provide the discussion from a comparative perspective. The evaluation will be provided outlining which of the countries has the best protection, which country has provided sufficient protection, and which county should provide better protection to the good public procurement principles. The final chapter contains the overall conclusions and recommendations. In that chapter, the final answers to the research question (including the sub-questions) will be provided.



Chapter 2

Normative Framework: Good Public Procurement

2.1. Introduction

This chapter aims to provide the normative framework regarding the good public procurement approach to address the fundamental problems in the pre-contractual phase of the public procurement law in Indonesia. The framework can also be used to analyse the quality of public procurement law, the implementation of the law by the administration and the judiciary, and the protection and the legal development made by the judiciary in the compared countries.

The chapter will be divided into four main subsections as described below. It will begin with a discussion on GG as a concept, including three relevant components of GG, namely equality, transparency and accountability. Then, the second subsection will elaborate on the principle of GG. It will be discussed that under 'the umbrella' of the principle of good governance, one can find numerous elements; three of these are the principle of equality, the principle of transparency, and the principle of accountability.

The third subsection will then explain the concept of public procurement and the principles of good public procurement. It will be shown that the principles of equality, transparency, and accountability can also be found in public procurement laws. It can be argued that these can be called the principles of good public procurement (hereinafter: GPP). The discussion will continue by explaining how these principles are exercised in fundamental problems as mentioned earlier in Chapter 1. This elucidation will be referred to as the GPP approach.

It is relevant to clarify the difference between the words "concept"⁷¹ and "principle"⁷². The subsection on "concepts" will contain a more abstract and an interdisciplinary discussion. On the other hand, in the subsection on "principles", the elaboration will be narrower; it will focus on the legal discussion. Later on, in

⁷¹ A concept is "an idea or thought which corresponds to some distinct entity or class of entities, or to its essential features, or determines the application of a term (...), and thus plays a part in the use of reason (...)". See: Pearsall, J. (Ed). 1998. *The New Oxford Dictionary of English*, Clarendon Press, Oxford, pg. 380. Here I interpret a concept as the ideas or thoughts that have been discussed by non-legal scholars and therefore may not have directly influenced the legal system.

⁷² A general dictionary defines a principle "as a fundamental truth or preposition that serves the foundation for a system of belief or behavior or for a chain of reasoning". See: Pearsall, J. (Ed). 1998. *The New Oxford Dictionary of English*, Clarendon Press, Oxford, pg. 1474. A legal dictionary explains the above meaning more narrowly by stating that a principle is "a fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis origin of others; a settled rule of action, procedure, or legal determination. A truth or preposition so clear that it cannot be proved or contradicted unless by a preposition which is still clearer. (...)". See: Black, H.C., et al. 1990. *Black's Law Dictionary*, West Publishing, St Paul, p. 1193. Here, I interpret a principle as a continuation of the concept discussed by legal scholars, regulations, or cases, and therefore may indeed have directly influenced the legal system. The discussion on a principle will also be provided extensively later on in the text.

Section 2.3.1, it will be explained that the principle here refers to the legal principle. It is also important to underline that, in the conceptual discussion, the term “components” will be used to specify parts of the concept of good governance. During the discussion regarding the principle, the term “elements” will be used to specify parts of the principle of GG. Both “components” and “elements” actually refer to the same meaning; the distinction is made solely to distinguish between the discussion on the first and the second subsection.

2.2. Good governance as a concept and its components

This subsection will provide an elaboration of the “concept” of GG in general and of the three relevant components under the ‘umbrella’ of GG, namely: equality, transparency, and accountability. This subsection will embrace interdisciplinary discussions stemming from numerous literary works. The legal discussion will be provided in Subsection 2.3 on the “principle” of good governance, including the principles of equality, transparency, and accountability.

In the following paragraphs, it will be demonstrated that governance was exercised in some locations both in Eastern and Western civilizations, and that this occurred long before the definition of governance was coined. The illustration aims to highlight that, due to its historical roots, GG and its content (in this research context: equality, transparency, and accountability) may be suited to be applied in the selected countries of this research.

After this, the elaboration will shift to a discussion that has been taking place since the 1990s, including the conceptual development of governance towards GG, and the shifting of the object of governance from only the government to also include non-government actors.

In the literature, it has been explained that the concept of governance is as old as human history⁷³ and can be traced back both to Eastern and Western civilizations. In Eastern civilizations, for instance, Ashoka, an Indian Emperor who ruled the Maurya Dynasty, which had a territory covering almost the whole Indian subcontinent from 270 to 232 BC, already practised the idea of good governance.⁷⁴ It was noted that King Ashoka ruled by *dhamma*, which can be translated as law,

⁷³ Weiss, T.G., 2000. “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges”. *Third World Quarterly*, 21:5, p. 795.

⁷⁴ Strong, J.S. as cited by Binda, M. 2015. *Good Governance and Foreign Direct Investment: A Legal Contribution to a Balanced Economic Development in East African Community*. Ph.D. Dissertation at Utrecht University, Utrecht, p. 50.

duty or righteousness.⁷⁵ Another work also showed that Ibn Khaldun, a Tunisian/Egyptian scholar called the Caliphate/Sultan, adhered to eight wise principles which are in essence (the) governance.⁷⁶ In brief, these principles call upon the Sultan to ensure justice, the fulfilment of contracts, and compliance with the rules of behaviour under *sharia*, the rules of behaviour of any society.⁷⁷

Similar to the above, in the Western civilization it is also believed that good governance had been practised from time immemorial. In this opening part, it is relevant to underline that the concept of good governance first came in to being when societies established the rational legal system and bureaucracy, and this idea stems from Weber.⁷⁸ Weber classified three types of authority: traditional, charismatic and rational.⁷⁹ The first type was rooted in a blind faith in tradition and the inviolability of the rulers, whereas the second was based on the acknowledgement of unique qualities of the leader.⁸⁰ Weber considered that the third model (the rational type) is the best format,⁸¹ because it creates a system driven by a legal code that should be obeyed by society.⁸² This rational model also requires bureaucracy, so that when the citizen has contact with the government,

⁷⁵ J.S. Strong as cited by Binda, M. 2015. *Good Governance and Foreign Direct Investment: A Legal Contribution to a Balanced Economic Development in East African Community*. Ph.D. Dissertation at Utrecht University, Utrecht, p. 50.

⁷⁶ Chapra, M.U., 2008. "Ibn Khaldun's Theory of Development: Does It Help Explain the Low Performance of the Present-Day Muslim World?", *The Journal of Socio-Economic*, Vol. 37, p. 842.

⁷⁷ The eight wise principles are as follows: (a) the strength of the sovereign (*al-mulk*) does not materialize except through the implementation of the *Shariah*; (b) the *Shariah* cannot be implemented except by the sovereign (*al-mulk*); the sovereign cannot gain strength except through the people (*al-rija*); (c) the people cannot be sustained except by wealth (*al-mal*); (d) wealth cannot be acquired except through development (*al-imarah*); (e) development cannot be attained except through justice (*al-adl*); (f) justice is the criterion (*al-mizan*) by which God will evaluate mankind; (g) the sovereign is charged with the responsibility of actualizing justice. See: Chapra, M.U., 2008. "Ibn Khaldun's Theory of Development: Does It Help Explain the Low Performance of the Present-Day Muslim World?", *The Journal of Socio-Economic*, Vol. 37, p. 839.

⁷⁸ Botchway, F. 2001. "Good Governance: the Old, the New, the Principle, and the Elements". *Florida Journal of International Law*, Vol. 13, p. 165 and 169.

⁷⁹ Weber, M. 1978. *Economy and Society: An Outline of Interpretative Sociology*. University of California Press, Berkeley, p. 215.

⁸⁰ Weber, M. 1978. *Economy and Society: An Outline of Interpretative Sociology*. University of California Press, Berkeley, p. 215-227; p. 241-245.

⁸¹ Weber, M. 1978. *Economy and Society: An Outline of Interpretative Sociology*. University of California Press, Berkeley, p. 217-223. See also: Botchway, F. 2001. "Good Governance: the Old, the New, the Principle, and the Elements". *Florida Journal of International Law*, Vol. 13, p. 169.

⁸² In order to do so, the regulation should be logical, not arbitrary, and should be accepted by the public. Botchway, F. 2001. "Good Governance: the Old, the New, the Principle, and the Elements". *Florida Journal of International Law*, Vol. 13, p. 169.

the system should ensure that the citizen is able to calculate the output of the contact by examining/understanding regulations.

In later discussion, the term “governance” first appeared. It was coined by the World Bank (WB). The WB defines governance as the manner in which power is exercised in the management of a country’s economic and social resources. The WB classified three types of governance: (i) the form of the political regime; (ii) the process by which authority is exercised in the management of a country’s economic and social resources for development; and (iii) the capacity of government to design, formulate, and implement policies and discharge functions.⁸³ A scholar has noted that the WB operationalises “good governance” as the opposite of “bad governance” which is the personalisation of power, the lack of human rights, endemic corruption and an unelected and unaccountable government.⁸⁴

Although recognising the importance of the political dimension, the WB is more concerned with the management of a country’s economic and social resources for development rather than the equity of the economic system and the legitimacy of the power structure.⁸⁵ Accordingly, the WB focuses on the economic dimension, and is less concerned with whether a government is democratic.⁸⁶

A more comprehensive concept is offered by the United Nations Development Programme (UNDP). Governance is considered to be the exercise of economic, political and administrative authority with the aim to manage a country’s affairs at all levels in which it comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations, and mediate their differences.⁸⁷ The UNDP defines the characteristics of a population that lives in a society in which governance is good. From this, the UN system evolves the human development approach to governance

⁸³ World Bank. 1994. *Governance: The World Bank’s Experiences*, Washington, p. xiv.

⁸⁴ Boas, M. 1998. “Governance as Multilateral Development Policy: the cases of African Development bank and Asian Development Bank”, *European Journal of Development Research*, p. 119.

⁸⁵ Santiso, C. 2001. “Good Governance and Aid Effectiveness: the World Bank and Conditionality”. *The Georgetown Public Policy Review*, Vol. 7, No. 1, p. 4.

⁸⁶ On the later developments, the Bank has gradually reformed its institution and has supported legal and judicial reform and the fight against corruption around the world. See: Santiso, C. 2001. “Good Governance and Aid Effectiveness: the World Bank and Conditionality”. *The Georgetown Public Policy Review*, Vol. 7, No. 1, p. 5. Nonetheless, a commentator has noted that “the Bank treats political and civic dimension of governance as second order concerns (...) that are not valuable in and of themselves but rather desirable insofar as they contribute to efficiency and growth”. See: Weiss, T.G., 2000. “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges”. *Third World Quarterly*, 21:5, p. 804.

⁸⁷ UNDP. 1997. as cited by Weiss, T.G., 2000. “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges”. *Third World Quarterly*, 21:5, p. 795.

by providing democracy and freedom that are integral to the political and civic dimensions of governance.⁸⁸ The United Nations Children’s Fund (UNICEF) released reports on the lives of vulnerable children and women, which considers that social problems should be taken into account as an indicator of the achievement of governance, whereas the UNDP released the Human Development Index as an acceptable means to measure a society with GG.⁸⁹

Regarding the above discussions, it is safe to say that the concept of good governance has been apparent in Eastern and Western civilizations for a long time. In addition, it can be concluded that the concept of good governance guides the government to perform in a certain way so that its performance can be classified as “good”. By stating this, it does not necessarily mean that the ‘subject’ of good governance is only the government. Governance may also embrace non-state actors such as multinational organisations or (international) non-government organisations.⁹⁰ Nevertheless, for the sake of the relevance of this research, the focus lies upon the government in its classical sense.

2.2.1. Good governance and the concepts of the rule of law and democracy

As will be seen below, good governance contains numerous components. However, three components will be focused upon, namely: equality, transparency and accountability. There are two main reasons for doing so. The first stems from conceptual reasoning while the other is based on logical reasoning. Referring to a conceptual reason, it is necessary to highlight the line of thinking offered in the literature. There are three cornerstones of the modern state: the rule of law,

⁸⁸ Weiss, T.G., 2000. “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges”. *Third World Quarterly*, 21:5, p. 802; 804. On its latest report, UNDP stresses that “to ascertain whether governance is ‘good’, actors look at the mechanisms that promote it, the processes used, and the outcomes achieved”. In so doing, the mechanism of good governance can include transparent, democratic institutions as well as efficient and effective public services. Pertaining to this process, the UNDP underlines the necessity of participation including (or particularly from) the most vulnerable group. Regarding the outcomes, good governance could achieve peaceful, stable and resilient societies. See further on: UNDP. 2014. *Governance on Sustainable Development*, p. 4.

⁸⁹ Weiss, T.G., 2000. “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges”. *Third World Quarterly*, Vol. 21, Issue 5, p. 802.

⁹⁰ Bevir, for instance, provides a definition of governance as follows: “all processes of governing, whether undertaken by a government, market, or network; whether over a family, tribe, corporation, or territory; and whether by laws, norms, power, or language”. Furthermore, he continues his explanation by emphasising that governance is broader than government as “it focuses not only on the state and its institutions but also on the creation of rule and order in social practices.” See: Bevir, M. 2013. *A Theory of Governance*, University of California Press, Berkeley, p. 1.

Thirdly, *good governance* will be discussed. It is believed that GG can be represented in the form of public accountability. In some countries, accountability and good governance are even considered to be two interchangeable concepts.⁹⁸ It occurs due to the broad nature of the concept of accountability, meaning that it may embrace various issues and overlap with the concept of good governance. If this situation applies, conceptually speaking, it is called broad accountability.⁹⁹ However, this research will only focus on narrow accountability, meaning 'to explain and justify'.

Following the conceptual reasoning of the term, the logical argument will follow in the proceeding section. Three components of good governance (equality, transparency and accountability) have been selected because these are considered to be the most important components by the leading international organisations in this field: the WB and the UN, although, as previously explained, these two organisations do not always hold the same perspective in defining governance. For the sake of complementing the comparison, a briefly elaboration of the concept of good governance offered by the Organisation for Economic Co-operation and Development (OECD) will be provided.

Since 1996 the WB, for instance, recognises six components of governance as follows:¹⁰⁰ (i) voice and accountability, (ii) political stability and the absence of violence, (iii) a government's effectiveness, (iv) regulatory quality, (v) rule of law, and (vi) control of corruption. As can be seen, of the three studied components, only accountability has been explicitly referred to. However, the first component actually incorporates transparency too. This brings forth the question of where equality comes in to play. The concept of equality is indeed embraced by component (v) pertaining to the rule of law, as this explains equality before the law and its enforcement.

Moving the discussion to the UN, this organisation considers the following eight components of good governance:¹⁰¹ (i) participation, (ii) consensus orientation, (iii) accountability, (iv) transparency, (v) responsiveness, (vi) effectiveness and efficiency, (vii) equity and inclusiveness, and, (viii) adhering to the

⁹⁸ Bovens, M. 2006. "Analysing and Assessing Public Accountability: A Conceptual Framework". European Governance Papers No. C-06-01, p. 8.

⁹⁹ Bovens, M. 2006. "Analysing and Assessing Public Accountability. A Conceptual Framework". European Governance Papers No. C-06-01, p. 8.

¹⁰⁰ World Bank. 2015. "Worldwide Governance Indicators", available from: <http://info.worldbank.org/governance/wgi/index.aspx#doc>, last visited 16 March 2016.

¹⁰¹ UNESCAP. No year. "What is Good Governance?", available from: <http://www.unescap.org/resources/what-good-governance>, last visited 16 March 2016.

rule of law. It is immediately apparent that transparency and accountability are included. Additionally, equality is embraced by equity.

Considering the concept provided by the OECD, it has been noted that the organisation promotes six elements of good governance, namely:¹⁰² (i) transparency, (ii) efficiency and effectiveness, (iii) accountability, (iv) responsiveness, (v) forward vision, and (vi) the rule of law. Similarly to the UN, the OECD explicitly includes transparency and accountability whereas the concept of equality can be seen as being implicit in (vi) pertaining to the rule of law.

Based on the above explanations, it is evident that these organisations do not always explicitly include each concept of equality, transparency and accountability. Moreover, as has been previously discussed, these organisations may differ in the extent to which they emphasise the concept of GG, i.e. the WB devotes more attention to the concept of efficiency and effectiveness whereas the UN emphasises equity and the legitimacy. Nonetheless, all the organisations above embrace the concepts of equality, transparency and accountability. The above elaborations have explained the robust reasons as to why this research focuses on those three GG components. In the following discussions, each component will be expanded upon even further. As will be seen later, the finding will more-or-less be similar to the (general) concept of GG; each component has been in existence for a long time.

2.2.2. The concepts of equality, transparency, and accountability

Before coming to the main conceptual discussion of these three components, it is firstly beneficial to provide an insight into the historical developments of the components. Firstly, the concepts of equality, transparency, and accountability will be elaborated upon respectively. As mentioned earlier, the discussion of a “concept” aims to provide an interdisciplinary discussion, before the discussion is narrowed into a legal discussion in the following subsection (2.3).

The concept of equality

The concept of equality was first distinguished in a moral context. According to Aristotle, equality means that things that are similar should be treated in a similar manner, while things that are not similar should be treated not be treated as similar

¹⁰² OECD. No year of publication. “Regulatory Governance and the Rule of Law”, available from: <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/>, last visited 16 March 2016.

in proportion to their magnitude in which they are not similar.¹⁰³ When Europe entered the period of Enlightenment in the 18th Century, the concept of equality began to expand.¹⁰⁴ It is explained in the literature that the concept of equality was promoted by Locke, Paine and Rousseau by declaring that each person matters equally.¹⁰⁵ The above perspective has also been shared by Rawls in his commentary on the French Revolution, which promoted liberty, equality and fraternity. In his line of thinking, these three things have not developed at an equal rate. The concepts of liberty and “equality” were developed first, while the concept of fraternity lagged behind. The concept of fraternity is indeed contained in the value of “equity”.¹⁰⁶ With regard to this aspect, the following discussion will continue by elaborating on differences between equality and equity.

The close relationship between these terms may contribute to confusion for some people; some argue that these terms share a definition, while others perceive the terms as two notions that are related, but have different meanings. Victor Hugo, for instance, defined it as follows: “equity is the highest quality of equality”.¹⁰⁷ In this respect, it is interesting to note the debate by scholars as shown below.

In 1974, John Rawls offered the concept of justice as fairness. He stated that the position of every person who lives in society is not equal.¹⁰⁸ Hence, justice can be present if the policy decision is set to create the highest favour for those who are the least fortunate.¹⁰⁹ This point indicated that Rawls was promoting equity instead of equality. Three years later, Rawls obtained a serious response from Robert Nozick. He rejected Rawls’ notion by providing the illustration that if people knew that their individual rights would be violated by public policies under notions of fairness, they

¹⁰³ Aristotle in *Ethica Nicomache*, cited by Bernard, C. 1998. “The Principle of Equality in the community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?”, *Cambridge Law Journal*, Vol. 57, No. 2, p. 363.

¹⁰⁴ K. Dyson considers that the state tradition in Western Europe has been rooted in the values of democracy, equality and political participation. See: Anthony, G. et al. 2011. *Values in Global Administrative Law*, Hart, Oxford, 2011, p. 2.

¹⁰⁵ E. Meehan in *Citizenship and the European Community*, cited by Bernard, C. 1998. “The Principle of Equality in the community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?”, *Cambridge Law Journal*, Vol. 57, No. 2, p. 363.

¹⁰⁶ Rawls, J. 1971. *Theory of Justice*, Harvard College, Cambridge, p. 105.

¹⁰⁷ He further stressed that “by good distribution, we must understand not equal distribution, but equitable distribution. The highest equality is equity”. Hugo, V. 1994. *Les Miserables Volume 2*, Wordsworth, Hertfordshire, p. 575.

¹⁰⁸ Rawls, J. 1971. *Theory of Justice*, Harvard College, Cambridge, p.12.

¹⁰⁹ Rawls, J. 1971. *Theory of Justice*, Harvard College, Cambridge, p. 14-15.

would have fewer incentives to carry out their activity.¹¹⁰ Furthermore, Nozick explained that those who are the least advantaged will realise that whatever else happens, the government will support them. Therefore, they will be less responsible for themselves.¹¹¹ This can be seen in the debate on equity (proposed by Rawls) and equality (offered by Nozick).

If the term equality is used to embrace the above debate, it is my understanding that the concept discussed by Rawls refers to a terminology of so-called substantive equality, whereas Nozick's concept falls within procedural equality. While procedural equality ensures that the state affords equal opportunity and equal treatment for all citizens, substantive equality means that the state may engage in positive affirmation, whenever it is needed, to ensure that the less fortunate group are equal to others.¹¹² This conceptual discussion therefore borders on a legal discussion. Accordingly, the "concept" of equality used in this research will remain as it stands. The discussion will continue in Section 2.3 by focusing on the legal perspective (the "principle of equality").

The concept of transparency

The history of transparency can be traced back to China. According to Lamble, a regulation was made under Emperor Tai Zhong which instructed the administration to record official government decisions and correspondence, so that these could be used as a mechanism to provide oversight and protect the public interest.¹¹³ Lamble continued by explaining that this regulation inspired Anders Chydenius to design a similar law (in the form of an Act) in Sweden. This Act was enacted in 1766, and this contained public access to government documents.¹¹⁴

¹¹⁰ Martinez, J.M. and Richardson, W.D. 2008. *Administrative Ethics in the Twenty First Century*, Peter Lang, New York, p. 30-31.

¹¹¹ Martinez, J.M. and Richardson, W.D. 2008. *Administrative Ethics in the Twenty First Century*, Peter Lang, New York, p. 30-31.

¹¹² Formal equality is "colour blind," demanding that "likes be treated alike...". Substantive equality, however, requires a careful evaluation of the context and the actual disadvantage faced by identifiable groups and individuals as a result of their group membership. See: Loper, K. 2011. "Substantive Equality in International Human Rights Law and Its Relevance of the Resolution of Tibetan Autonomy Claims", *North Carolina Journal of International Law and Commercial Regulation*, Vol. 37, p. 9-10.

¹¹³ Hood, C. "Transparency in Historical Perspective", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 8.

¹¹⁴ Hood, C. "Transparency in Historical Perspective", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 8.

The concept of transparency can also be seen in France. In 1774, Louis XVI was crowned as the King of France.¹¹⁵ Unlike Louis XV, his father, Louis XVI tried to reform the French Kingdom in order to increase legitimacy. In order to do so, he released propaganda and published detailed information on particular policies (i.e. war policies).¹¹⁶ This can be interpreted as the King wanting to open communications (i.e. be transparent) to his citizens in order to gain public confidence.

A few years later, transparency was being discussed more deeply by the thinkers of the day. It is believed that Bentham in 1797 was the first scholar who conceptually pointed out the urgency of transparency. Indeed, he employed the term “publicity” as a concept that not only refers to the accessibility of information, but also ensures how it is received, proceeded with, and consumed by society.¹¹⁷ Unfortunately, Bentham discussed publicity more in its relationship with public opinion, something that is less relevant for the purpose of this research. However, Bentham did stress the urgency of transparency. He stated: “the more strictly we are watched, the better we behave.”¹¹⁸ Besides Bentham, Rousseau also devoted attention to the need for transparency. He stated that “public servants should operate ‘in the eyes of the public’, and that a transparent society (...), is a key mechanism for avoiding destabilising intrigues and cabals”.¹¹⁹

This can also be seen as the turning point at which the emphasis of the discussion shifts from historical to conceptual. The discussion pertaining to the concept of transparency will, therefore, be continued below. Referring to an economic approach, the relationship between the government and the citizen can also be explained by the “principal agent” model. This refers to a situation where a *principal* requires a certain service, but neither have the time nor the ability to take care of this directly and, therefore, enters into a contractual relationship with an

¹¹⁵ Biography, *Louis XVI*, available from: <http://www.biography.com/people/louis-xvi-9386943?page=2>, last visited 20 November 2012.

¹¹⁶ Melton, J.V.H. 2001. *The Rise of the Public in Enlightenment Europe*, Cambridge University Press, Cambridge, p. 57.

¹¹⁷ Baume, S and Papadopoulos, Y. 2012. “Bentham Revisited: Transparency as a “Magic” Concept, its Justifications and its Skeptics”, Paper on Transatlantic Conference on Transparency Research, University of Utrecht, p. 3-4.

¹¹⁸ Grimmelikhuijsen, S. 2012. *Transparency and Trust: An Experimental Study of Online Disclosure and Trust in Government*, Ph.D. Dissertation at the Utrecht School of Governance, Utrecht, p. 47. Related to this, Grimmelikhuijsen also considered that transparency can reduce corruption, enhance performance, and restore citizen trust in government.

¹¹⁹ Hood, C. “Transparency in Historical Perspective”, in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 7.

agent who can potentially provide the service.¹²⁰ The agent (in this context: the government staff) can abuse their powers for their own private gain while the principal (the citizen) does not have the capacity to overview or even to recognise that moral hazard.¹²¹ This can occur because asymmetric information lies in that relationship.

Pertaining to this, transparency can minimise that information gap between the agent and the principal. The agent may be required to conduct disclosure in order to ensure that the principal knows about the agent's behaviour. By so doing, the agent will act in the principal's interest.¹²² Nevertheless, there are issues which raise red flags regarding complete disclosure, namely:¹²³ (i) the right to privacy, (ii) the direct cost of disclosure, (iii) the risk that hostile parties discover sensitive information, and (iv) the risk that people may misunderstand and misinterpret information. Unlike the first and second points that are clear, the third and fourth points need further explanation, as discussed below.

With regard to point (iii), a good example of this is that a government cannot keep the citizen fully informed about security operations without divulging these details to hostile organisations.¹²⁴ Having considered the disadvantage of point (iii) above, there is an argument for delaying transparency for a period of time long enough to make the information of little value to hostile parties.¹²⁵ Pertaining to this, in the literature a distinction has been made between *retrospect transparency* versus *real time transparency*.¹²⁶ Retrospect transparency is considered to be the

¹²⁰ Prat, A. "The More Closely We Are Watched, the Better We Behave", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 92. See also: Buijze, A. 2013. *The Principle of Transparency in EU Law*, Uitgeverij Box Press, 's-Hertogenbosch, p. 57.

¹²¹ Baume, S and Papadopoulos, Y. 2012. "Bentham Revisited: Transparency as a "Magic" Concept, its Justifications and its Skeptics", Paper on Transatlantic Conference on Transparency Research, University of Utrecht, p. 21.

¹²² Prat, A. "The More Closely We Are Watched, the Better We Behave", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 92-93.

¹²³ Prat, A. "The More Closely We Are Watched, the Better We Behave", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 101.

¹²⁴ Prat, A. "The More Closely We Are Watched, the Better We Behave", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 95.

¹²⁵ Prat, A. "The More Closely We Are Watched, the Better We Behave", in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 95.

¹²⁶ Heald, D. "Varieties of Transparency" in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 32-33.

solution to balancing the situation as to prevent fraudulent behaviour (e.g. insider trading) and promoting trust in the market.¹²⁷

Turning to point (iv), it may explain why sometimes “agents refuse to disclose information to the principals on the grounds that the principals would not evaluate it in a right way”, with the result that an agent may keep his private information and act on behalf of the “state of the world”.¹²⁸ The following is an illustration.¹²⁹

“Facing a crisis, a smart leader is more likely than a dumb leader to understand the cause of the crisis and to identify the right solution. Leaders who keep the status quo would be perceived as more likely to be dumb, and would be replaced. Hence, the smart leader tends to adopt radical policies even when they are not necessarily optimal”.

Given the above statement, the concept of transparency has a long history of discussion and is generally understood as a positive practice. Nonetheless, as has been shown above and will be further expanded upon later, depending upon the contextual factors transparency can be either good or bad.¹³⁰

The concept of accountability

From a historical point of view, it can be argued that accountability was practised in the 17th Century in the Bugis Kingdom (nowadays, the territory of South Sulawesi province in Indonesia). I should first explain the implementation of the patron-client political system in practice at that time. The client, who is the citizen (*joa'*), promised to serve the patron, i.e. the King, and the royal family (*ajjoareng*). Nonetheless, referring to and interpreting the ethnologist Christian Pelras, the *ajjoareng* could be impeached by the *joa'* if he failed to protect safety and had not brought prosperity to the *joa'*.¹³¹ Interestingly, historians have also noted that two

¹²⁷ Heald, D. “Varieties of Transparency” in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 33.

¹²⁸ Prat, A. “The More Closely We Are Watched, the Better We Behave”, in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 95 and 99.

¹²⁹ Prat, A. “The More Closely We Are Watched, the Better We Behave”, in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 100.

¹³⁰ Heald, D. “Varieties of Transparency” in Hood, C. and Heald, D. (Eds.). 2006. *Transparency, the Key to Better Governance?*, OUP, Oxford, p. 40.

¹³¹ The *joa'* actually did not care whether or not the tax which they had paid had been written correctly by *ajjoareng's* staff; *joa'* cared more about the output result: prosperity. See: Yani, A.A. 2007. “Budaya Politik Orang Bugis dalam Dinamika Politik Lokal” (“Political Culture of the Bugis in the Dynamics of Local Politics”). *Jurnal Masyarakat dan Budaya*, Vol. 9, No. 2, p. 16-17. In Javanese

ajjoareng, La Ica Matinroé ri Addénenna and La Ulio Botéqé Matinroé ri Iterrang were impeached by the *joa*.¹³² The impeachment reflects the implementation of the concept of accountability.

In the European context, the concept of accountability can also be traced back to the 17th Century. Huntington noted that in 1630 Louis XIII had refused a request from his mother and her family. He had done so by saying: “I am more obligated to the state.”¹³³ It was not clear what the family had asked, however it indicated that as the policy-maker he preferred to prioritise the interest of his state (and his citizens) rather than his royal family interest. In other words, it can be seen as the “seed” of the idea of accountability. Afterwards, it is believed that the conceptual development continued, and this resulted in the implementation of the checks and balances in the UK in the 19th Century.¹³⁴

After providing information of two examples above, attention will now shift to a more conceptual discussion. In order to do so, it is essential to return to the principal-agent theory as previously discussed. As said, this theory concerns the relationship in which the principal authorises an agent to act in his interest.¹³⁵ Hence, on the one hand, there should be a delegation of power from the principal

tradition, arguably, accountability has been embedded in a concept of so-called *topo pepe*. This refers to a ritual movement in the Javanese tradition used to express the gesture of Javanese who object to or grieve on certain matters by standing or staying in the front of Palace to call for the King’s attention and assistance. It indeed still occurred until relatively recently in Jogjakarta Special Province, the only Province in Indonesia in which the King immediately sits as the Governor without any democratic election. See: Efendi, D. 2012. “Local Politics and Local Identity: Resistance to Liberal Democracy in Yogyakarta Special Regions of Indonesia”, M.A. Thesis the University of Hawaii, Manoa, pg. 96, 138-142. Unfortunately, it is unknown when *topo pepe* first occurred. Nevertheless, *topo pepe* had been legally considered as a communal right to criticise public authority, as had been embodied in Article 22 of the previous Indonesian Constitution: *Konstitusi Republik Indonesia Serikat (RIS)*. See: Asshiddiqie, J. “Konstitusionalisme Dalam Pemikiran Soepomo” (“Constitutionalism in Soepomo Thought”), in Asshiddiqie, J (et al.). 2015. *Soepomo: Pergulatan Tafsir Negara Integralistik, Biografi Intelektual, Pemikiran Hukum Adat, dan Konstitusionalisme (Soepomo: Interpretation on the Integral State, Intellectual Biography, Ideas on Adat Law, and Constitutionalism)*, Thafa Media, Yogyakarta, p. 92-3.

¹³² Pelras, C. 2000. “Patron Clients Ties Among the Bugis and Makasarese of South Sulawesi”, *Bijdragen tot de Taal-, Land- en Volkenkunde*, Vol. 156, No. 3, p. 405. It is unfortunate that no information is available concerning precisely in which year those impeachments occurred.

¹³³ Huntington, S. 2006. *Political Order in Changing Societies*, Yale University Press, New Haven, p. 95.

¹³⁴ Harlow, C. 2002. *Accountability in the European Union*, OUP, Oxford, p. 6-7. According to Harlow, the checks and balances in the UK were the first implementation of political accountability. By providing the above information on Bugis and France, it can be argued that political accountability was exercised long before the 19th century, although at a less advanced level.

¹³⁵ Gailmard, S. “Accountability and Principal Agent Theory”, in Bovens, M., Goodin, R.E., and Schillemans, T. (Eds). 2014. *The Oxford Handbook of Public Accountability*, OUP, Oxford, p. 90-91.

to the agent, but on the other, there should be a mechanism(s) to ensure that the agent acts in the principal's interest, and not his own personal interest.¹³⁶

According to Bovens, accountability can be concisely defined as "the obligation of an actor to explain publicly and justify conduct to some significant other".¹³⁷ Also, Bovens elucidates that there are seven constitutive components to qualify the performance of accountability. The components are as follows:¹³⁸ (i) there should be a relationship between an actor and a forum, (ii) (in which) the actor is obliged, (iii) to explain and justify, (iv) his conduct, (v) then, the forum can pose questions, (vi) and pass judgment, and (vii) the actor may face the consequences.

The relationship between the actor and the forum creates different accountability forums. It has distinguished five accountability forums for the government, as explained below.¹³⁹ The first one is *political accountability*, which refers to the oversight conducted by elected representatives, political parties, voters and the media. Afterwards, it is called *legal accountability*, which is an oversight that is represented by the courts. The next forum is *administrative accountability*, which refers to the oversight conducted by auditors, inspectors, and controllers. The following forum is *professional accountability*, which refers to the oversight conducted by professional bodies. Lastly, there is the so-called forum of *social accountability*; it is a variety of oversights manifested by NGOs or interest groups.

As argued by scholars, there are three perspectives concerning the urgency to implement accountability, namely: (i) a democratic perspective, (ii) a constitutional perspective, and (iii) a learning perspective. Regarding the first point, public accountability is an essential precondition for democratic processes, as it provides information for the citizens and their representatives in Parliament.¹⁴⁰ This

¹³⁶ Gailmard, S. "Accountability and Principal Agent Theory", in Bovens, M., Goodin, R.E., and Schillemans, T. (Eds). 2014. *The Oxford Handbook of Public Accountability*, OUP, Oxford, p.92-93.

¹³⁷ Bovens, M. "From Financial Accounting To Public Accountability" in H. Hill (ed.). 2005. *Bestandsaufnahme und Perspektiven des Haushalts- und Finanzmanagements*, Baden Baden, Nomos Verlag, p. 184.

¹³⁸ Bovens, M. 2006. "Analysing and Assessing Public Accountability. A Conceptual Framework". European Governance Papers No. C-06-01, p. 9. Two commentators in essence also share this similar argument by saying that accountability is a matter of answerability and enforcement. See: Stapenhurst, R. and O'Brien, M. No year. "Accountability in Governance". Available from: <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>, p. 1. last visited 16 March 2016.

¹³⁹ Bovens, M. 2006. "Analysing and Assessing Public Accountability. A Conceptual Framework", European Governance Papers No. C-06-01, p. 15-18.

¹⁴⁰ Bovens, M., Schillemans, T., and 't Hart, P. 2008. "Does Public Accountability Work? An Assessment Tool", *Public Administration*, Vol 86, No. 1, p. 230-1.

means they can oversee and address sanctions towards the government. With regard to the second point, public accountability is important to avoid a concentration of power and to minimise the potency of the abuse of power.¹⁴¹ Related to the last point, accountability can enhance the reflection and the learning capacity of the public authorities.¹⁴²

2.3. Good governance as principles

This sub-chapter is arranged in the following structure. It should first be clarified what is meant by 'principles' of GG. It is emphasised that the discussion surrounding 'principles' regards the legal principles. There is no unanimity regarding the number of principles that have been embraced under the principles of GG. The following argument will focus on the notion that three components of GG (equality, transparency and accountability) have legal characters. These three can be identified as principles of GG. For the sake of this research objective, the discussion on the other GG principles will not be provided. As will be evident later, the discussion on the interrelationship between the principle of equality, the principle of transparency, and the principle of accountability will be explored.

2.3.1. Focusing on legal principles

After providing an interdisciplinary discussion on the 'concept' of GG, this subsection will explain the narrow use of the term 'principles' of GG. The term principle is also used in non-legal fields, such as philosophy.¹⁴³ However, the discussion here strictly focuses on the use of the term principle in the legal field. In the literature, it is suggested that components of the concept of GG can only be legal principles when they have been integrated into the legal system, and there

¹⁴¹ Bovens, M., Schillemans, T., and 't Hart, P. 2008. "Does Public Accountability Work? An Assessment Tool", *Public Administration*, Vol 86, No. 1, p. 231-2.

¹⁴² Bovens, M., Schillemans, T., and 't Hart, P. 2008. "Does Public Accountability Work? An Assessment Tool", *Public Administration*, Vol 86, No. 1, p. 232-3.

¹⁴³ In the literature, it can be found that moral principles explain "why" certain phenomena obtain or occur. In addition, moral principles support counterfactuals or 'counterfactual conditionals'. Lastly, moral principles provide grounds for moral necessities, "necessary connections" between obligating reasons, or properties, and obligations. These three matters distinguish between moral principles and legal principles. The literature also provides an example of a moral principle: "why am I obligated to remain faithful to my wife?" Legal principles may not be a position to answer this question; however, moral principles may provide an answer: "because promises ought to be kept". See: Robinson, M. 2008, "Moral Principles are not Moral Laws", Vol. 2, No. 3, *Journal of Ethics Social Philosophy*, p. 1-3.

are legal impacts when these principles are applied.¹⁴⁴ With regard to this aspect, further clarification of the differences between a concept, principle and a regulation/rule will be provided below.

According to Jhering, the law that is applied and developed does not emanate merely from a “concept”, but also (more importantly) from “legal principles”.¹⁴⁵ Raz considers a principle to be a normative statement specifying a condition of application that is met by normative consequences. Therefore, principles only have *prima facie* force.¹⁴⁶ Moral theories that are embodied in principles include two parts: a doctrine of virtue determining how one must act and a doctrine of how others should be treated for their own well-being.¹⁴⁷

Although principles have a legal character, these may be differentiated from rules. Laporta pointed out that principles have unique characteristics.¹⁴⁸ Firstly, principles do not provide conclusive or definitive reasons for a solution as a rule, but they have *prima facie* reasons. Furthermore, principles hold a dimension of the weight of importance that rules do not have. In addition, principles are mandates of optimisation (i.e. they determine that something should be realised to the highest possible degree). Lastly, principles have a deep affinity with values, as well as political and moral goals. Therefore, a rule, when it applies to a situation, will prescribe certain legal consequences.¹⁴⁹ According to Van der Heijden, a principle will be applicable more often than a rule, but it does not prescribe the legal outcomes as a rule does. Instead, it will inspire the decision of a particular case.¹⁵⁰ However, one should note that an unwritten principle is no less valid than a written principle. As Dworkin stated, the principle remains valid due to moral

¹⁴⁴ Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*. OUP, Oxford, p. 10.

¹⁴⁵ Gardillo, A. 2003. *An Introduction to Law*. Esperia Publication and European Public Law Centre, London, p. 19.

¹⁴⁶ Raz, J. 1978. 'Principles of Equality', *Mind*, Vol. 87, No. 347, p. 322. According to Cornell University, *prima facie* may be used as an adjective meaning "sufficient to establish a fact or raise a presumption unless disproved or rebutted". See: Legal Information Institute, *Prima Facie*, available from: http://www.law.cornell.edu/wex/prima_facie, last visited 29 October 2013.

¹⁴⁷ Raz, J. 1978. 'Principles of Equality', *Mind*, Vol. 87, No. 347, p. 323.

¹⁴⁸ Aarnio, A. 1997. *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics*, Dartmouth, Aldershot, p. 175.

¹⁴⁹ Buijze, A. 2008. 'On the Justification and Necessity of Legal Effectiveness Norms'. LLM Thesis on Research Master Program at Utrecht University, Utrecht, p. 23.

¹⁵⁰ Buijze, A. 2008. 'On the Justification and Necessity of Legal Effectiveness Norms'. LLM Thesis on Research Master Program at Utrecht University, Utrecht, p. 23.

deliberation.¹⁵¹ Unwritten principles are absorbed into written principles to ensure that their legal consequences are bound and can be enforced.

Based on the above elaboration, it can be said that what is meant by GG as a concept is that it is a good value by which to guide the government to achieve a better performance to serve its main duty, namely that of serving the citizen.¹⁵² In addition, GG as a principle contains the legal character in which, according to the literature, the principle of GG is “a norm for the government and a right for the citizen.”¹⁵³

By considering these two terms and with reference to the above discussions, the principles of GG should be interpreted as norms for the government and rights for the citizen containing a value that can drive the government towards performing better in carrying out its tasks. In this regard, in order to be operationalised, generally speaking, principles need rules to operate.¹⁵⁴ However, if such rules do not in fact exist, the courts may also utilise the matter of principle to guide the judge in dealing with the case. This can be seen in *Riggs v Palmers*, which was used by Dworkin to argue against legal positivism,¹⁵⁵ or in the *Wednesbury*

¹⁵¹ Aarnio, A. 1997. *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics*, Dartmouth, Aldershot, p. 177.

¹⁵² From a conceptual perspective, a commentator has argued that good governance contains axioms regarding the good conduct of governmental and bureaucratic processes. See: Griffin, L. 2013. *Good Governance, Scale and Power: A Case Study of North Sea Fisheries*, Routledge, London, pg. 15. Nonetheless, it is also worth underlining that the “concepts” of good governance (as suggested by international organisations like the World Bank and the United Nations) can be considered as the “principles” of good governance. See: Addink, G.H. “Good Governance: A Principle of International Law”, in Ryngaert, C., Molenaar, E.J., Nouween, S.M.H. (Eds.). 2015. *What's Wrong with International Law?*, Brill Nijhof, Leiden, p. 296. In my view, this shift may occur when these concepts have successfully influenced certain states by requesting them to embody and implement good governance in their legal systems.

¹⁵³ Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*. OUP, Oxford, p. 2.

¹⁵⁴ Botchway, F. 2001. “Good Governance: the Old, the New, the Principle, and the Elements”. *Florida Journal of International Law*, Vol. 13, pg. 185.

¹⁵⁵ *Riggs v. Palmers* was decided in 1889. The case concerned the plaintiffs, Mrs. Riggs and Mrs. Preston, who sought to invalidate the will of their father, Francis Palmer. The defendant was Elmer Palmer, a grandson of Francis Palmer. The will left small legacies to Mrs. Preston and Mrs. Riggs, but left large legacies to Elmer Palmer. Elmer feared that his grandfather might change his will, so he poisoned him. The plaintiffs argued that by allowing the will, Elmer would be profiting from his crime. However, although the criminal law existed to punish Elmer for the murder, there was no statute which could invalidate his claim to the will based on his role in the murder. Pertaining this, Judge Robert ruled in favour of the plaintiffs. His main argument was universal law and the maxim that “no one shall be permitted to take advantage of his own wrong”. In addition, the court decision to intervene was also based on the fact that the legislature could not be reasonably expected to address all contingencies when drafting laws. Dworkin used this argument to argue against legal positivism. See: Dworkin, R. 1978. *Taking Rights Seriously*, Harvard University Press, Cambridge, pg. 23-33.

case.¹⁵⁶ These cases demonstrate that infringing a principle may bring legal consequences, for instance an administrative decision may be annulled by the courts.

2.3.2. The principles of equality, transparency, and accountability

The principle of good governance comprises numerous principles. Three of these are the principle of equality, the principle of transparency, and the principle of accountability. Each of these will be discussed below. The elaboration of each principle will begin with an explanation of the principle itself, its development, or its specifications. Thereafter, examples will be provided of where the discussed principles have been laid down in international, regional, and national law. The discussion will end with an examination of the function of the principle discussed.

The principle of equality

The principle of non-discrimination will be discussed first. From a historical development perspective, this principle is an earlier form of the principle of equality. Focus will then shift to the principles of formal and substantive equality. Afterwards, a link between (the principle of) substantive equality and (the concept of) equity will be provided. This link is useful to explain the relationship between the principle of equality and the concept of equity.

The principle of non-discrimination is also called the prohibition of discrimination. It has been understood to mean that “individuals should not have their autonomy and fundamental rights constrained and distorted by the arbitrary imposition of the irrationalities and prejudice which may be contained in the will of others”.¹⁵⁷ This principle is distinguished as direct and indirect discrimination. *Direct discrimination* is an action intended to cause adverse outcomes through less favourable treatment, whereas *indirect discrimination* assumes that unequal

¹⁵⁶ This case, *Provincial Picture Houses v. Wednesbury Corporation*, will be discussed later on in the chapter 5 on the UK; therefore, I will not explain the case extensively here. What is important to be stressed at this point is that the court faced a concrete case and found that it was necessary to intervene. However, the concrete norms were absent. The court therefore established a test as an entry point to intervene. The test later came to be known as the principle of reasonableness. Pertaining to this, the principle of reasonableness is indeed still recognised and is not regarded as unfashionable. See: Hickman, T.R. 2004. “The Reasonableness Principle: Reassessing its Place in the Public Sphere”, the Cambridge Law Journal, Vol. 63, Issue 1, p. 170 and 198.

¹⁵⁷ McLaughlin, E. 2007. “From Negative to Positive Equality Duties: the Development and Constitutionalisation of Equality Provisions in the UK”. *Social Policy and Society*, Vol. 6, p.112.

outcomes are *prima facie* evidence that the processes leading to those outcomes contained some less favourable treatment.¹⁵⁸

After focusing on the principle of non-discrimination, attention is given to the matter of ensuring the achievement of the principle of equality.¹⁵⁹ This may be considered as the new wave or new generation of equality law. The difference between the former and the latter is as follows. The former is called negative equality as this contains the prohibition on discrimination whereas the latter is called positive equality, as it aims to prevent and take precedence over inequality by encouraging preventive behaviour and practices.¹⁶⁰

In a further discussion, the principle of equality has been divided into formal equality and substantive equality. Formal equality is also called 'equality as consistency,' as it dictates that similar cases should be treated alike, and thus different cases should be treated differently.¹⁶¹ Substantive equality is also called 'equality of results,' as this "goes beyond a demand for consistent treatment of likes and requires the result to be equal."¹⁶² Substantive equality aims to address the structural causes and symptoms of inequality by guaranteeing the principle of equal opportunities and equal results.¹⁶³ Hence, substantive equality demands greater intervention and a more aggressive use of positive action instruments.¹⁶⁴

Positive action is also referred to as affirmative action. It is represented in three situations below.¹⁶⁵ First of all, it is not regarded as the equal distribution of benefits, but as equal opportunities to achieve a substantive level of equality. Moreover, affirmative action will only work temporarily until actual equality is established. Finally, the implementation of this action is dependent on the level of political will.

¹⁵⁸ McLaughlin, E. 2007. "From Negative to Positive Equality Duties: the Development and Constitutionalisation of Equality Provisions in the UK". *Social Policy and Society*, Vol. 6, p.112.

¹⁵⁹ Bell, M. 2004. "Equality and the European Union", *Industrial Law Journal*, Vol 33, No. 3, p. 251.

¹⁶⁰ McLaughlin, E. 2007. "From Negative to Positive Equality Duties: the Development and Constitutionalisation of Equality Provisions in the UK". *Social Policy and Society*, Vol. 6, p. 115.

¹⁶¹ Craig, P. 2006. *EU Administrative Law*, OUP, Oxford, p. 545.

¹⁶² Fredman, S. 2011. *Discrimination Law*, OUP, Oxford, p. 8.

¹⁶³ Bell, M. 2004. "Equality and the European Union", *Industrial Law Journal*, Vol. 33, No. 3, p. 247.

¹⁶⁴ Although this promotes positive equality, it does not necessarily mean that no sanction applies, i.e. when the target is not achieved. See: Bell, M. 2004. "Equality and the European Union", *Industrial Law Journal*, Vol. 33, No. 3, p. 247.

¹⁶⁵ Gerapetritis, G. "Affirmative Action: A New Challenge for Equality" in: Anthony, G., et al. 2011. *Values in Global Administrative Law*, Hart, Oxford, p. 290.

The above discussion can be linked to the two following explanations. Direct discrimination may be addressed by conducting negative equality, and once this has been executed, it can be said that formal equality has been attained. Similar to this, indirect discrimination may be addressed by conducting positive equality, and when this has been executed, it can be said that substantive equality has prevailed.

Prior to the discussion regarding the embodiment of the principle of equality in regulation, the analysis will revert to the discussion of the concept of equality. Previously, it was conceptually discussed that there are two classifications, namely equality and equity. If this classification is brought into the legal discussion, then it is found that those two actually refer to the same term: equality. 'Equality' in the conceptual discussion refers to the principle of formal equality, whereas 'equity' in the conceptual discussion refers to the principle of substantive equality. Therefore, in legal discussion, both equality and equity refer to the same terminology: equality. As this research focuses on a legal discussion, reference will no longer be made to the term equity, but instead the term equality will be used.

The principle of equality has indeed been laid down in international, regional, and national law. Below, an example of the sequential orders from the former to the latter is provided. The principle of equality occupies a central position in the Universal Declaration of Human Rights (UDHR) as its substance can be seen immediately in the first sentence of the preamble. It states that "inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Besides, Article 2 of the UDHR clearly states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, (...). Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs (...)".

At a regional level, such as within the EU, the principle of equality lies at the very heart of the treaty on European Union; it is stated that "the Union is founded on the values of (...) equality (...)".¹⁶⁶ In the treaty on the Functioning of the European Union, it is stipulated that "(...) any discrimination on grounds of nationality shall be prohibited (...)".¹⁶⁷ Moreover, a Council Directive on the principle

¹⁶⁶ The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (See: Article 2 of the Treaty on European Union).

¹⁶⁷ Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may

of equal treatment contains, *inter alia*, the prohibition of non-discrimination, both direct and indirect forms.¹⁶⁸

A similar situation is evident at the national level. In Indonesia, for instance, the principle of equality can be found both implicitly and explicitly. The former point will be discussed first, and therefore an example of the latter will be provided. Under the symbol of the Republic of Indonesia, *Garuda Pancasila*, there is a written slogan, which can be translated as “unity in diversity”. Indonesia’s founding fathers realised that the country was composed of hundreds of tribes that should be unified.¹⁶⁹ In order to ensure unity, it is, therefore, mandatory for the government to treat citizens equally.¹⁷⁰ This issue has been explicitly addressed in the Indonesian Constitution, which also compels equality before the law (Articles 27 (1) and 28 D (1)), and equality in participating in government affairs (Article 28 D (3)).¹⁷¹ Moreover, the right to a positive affirmation in order to achieve the principle of substantive equality has also been considered (Article 28 H).

In the Netherlands, the principle of equality is laid down at the very beginning of the Dutch Constitution. The first article of the Dutch Constitution states that all persons in the Netherlands shall be treated equally in equal

adopt rules designed to prohibit such discrimination (Article 18 of the Treaty on the Functioning of the European Union).

¹⁶⁸ Council Directive 2000/43/EC of 29 June 2000 on Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin. Article 2 of this Council Directive explains that *direct discrimination* occurs where one person is treated less favourably than another in a comparable situation whereas *indirect discrimination* happens where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless there is any objective justification in so doing.

¹⁶⁹ One of Indonesia’s founding fathers, Soekarno, stated on 1 June 1945: “*Kita hendak mendirikan suatu negara ‘semua untuk semua’ (...) Kebangsaan Indonesia yang bulat! Bukan kebangsaan Jawa, bukan kebangsaan Sumatera, bukan kebangsaan Borneo, Sulawesi, Bali, atau lain-lain, tetapi kebangsaan Indonesia yang bersama sama menjadi dasar suatu nationale staat.*” (“We would like to build a nation of ‘all for all’ (...) the whole Indonesia nation! It is not Java nation, it is not Sumatra nation, not Borneo nation, Sulawesi, Bali, or others, but Indonesia nation which is based on togetherness becoming *nationale staat*”). See: Latif, Y. 2012. *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila (A Perfect State: Historicity, Rationality, and Actuality of Pancasila)*, Gramedia, Jakarta, p. 249.

¹⁷⁰ On the preamble of the Indonesian Constitution, there is an implicit statement about the right of every nation to independence from colonisation. There are two aspects of the nature of equality. It explicitly obliges Indonesia to oppose any colonisation or oppression of a human or a nation. Besides, it implicitly obliges Indonesia to glorify human rights which in this context amounts to equality among Indonesia’s citizen. See: Latif, Y. 2012. *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila (A Perfect State: Historicity, Rationality, and Actuality of Pancasila)*, Gramedia, Jakarta, p. 181.

¹⁷¹ See also Article 34 (a) of the Public Services Act which mandates that all public officials should serve the citizen equally and in a non-discriminatory fashion.

circumstances and should never be treated in a discriminatory fashion. Furthermore, the principle of equality can also be seen in Article 2:4 of the Dutch General Administrative Law Act. It mandates that “an administrative authority shall perform its duties impartially”.

A similar situation is also apparent in the UK. Due to a lack of availability of a written constitution, in 1994 a UK scholar raised the question of whether the UK Constitution acknowledges the principle of equality.¹⁷² More than 20 years later, the same question has again been raised. By referring to certain cases, as well as the Human Rights Act 1998 and the Equality Act 2010, it has been argued that the UK Constitution does acknowledge this principle.¹⁷³ Recently, the UK Parliament has attempted to enact legislation with the aim of devising a written constitution. It may be finalised in the coming period. In the most recent draft version of the codification of the constitution, it can be seen that the principle of equality has been mentioned on some occasions in the preliminary document.¹⁷⁴ The codification recognises “every citizen as an equal partner in government”. In addition, it also affirms that “all persons shall be equal before the law and shall be entitled to the equal protection of the law”.

Besides the above matter, it is relevant to underline the function of the principle of equality. It ensures that public agencies do not discriminate against the citizen (neither in economic activities, nor against market actors). By so doing, this promotes integration and unity. This principle may also serve as a ground for review.¹⁷⁵

The principle of transparency

The previous discussion has explained the principle of equality. The following will focus on the legal principle of transparency. The discussion will commence with the development and/or the specifications of the principle of transparency. Thereafter, the existence of this principle in international,

¹⁷² O’Cinneide. 2011. “Equality: A Constitutional Principle?”, an article published by the UK Constitutional Association, available from: <https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/>, last visited 31 March 2016.

¹⁷³ O’Cinneide. 2011. “Equality: A Constitutional Principle?”, an article published by the UK Constitutional Association, available from: <https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/>, last visited 31 March 2016.

¹⁷⁴ The Political and Constitutional Reform Committee. 2015. *The UK Constitution, A Summary with Options to Reform*, House of Commons, London, p. 3.

¹⁷⁵ In this context, it aims to promote the Economic Community. See: Tridimas, T. 2006. *The General Principles of EU Law*, OUP, Oxford, p. 60-61.

multinational, and national law will be analysed. The function of the principle of transparency will be explained in the final part.

The central role of the principle of transparency can be sensed by its promulgation as a fundamental human right. It can be seen in Article 19 of the Universal Declaration of Human Rights, which states “the right to seek, receive, and impart information and ideas through any media and regardless of any frontiers.”¹⁷⁶ However, it has afterwards been questioned as to whether this only focuses on the right to seek and pass information, or whether this should be understood as being extended to include a right to government-held documents.¹⁷⁷ Regarding this question, in the literature, three following terms have been distinguished which are related to the scope of transparency. The scope of these three terms is different from one another; the narrowest scope belongs to the first mentioned while the broadest scope can be attributed to the last mentioned, as explained below.

Pertaining to the *freedom of information*, this means “access by individuals as a presumptive right to information held by public authorities.”¹⁷⁸ In order to be a right that imposes duties on others, this has to be defined in the law. Regarding *transparency*, this embraces not only freedom of information but also access to the records of official decisions and activities.¹⁷⁹ Moreover, transparency also includes the provision of reasoned explanations for decisions and providing adequate reasons when power affects the public in general or an individual.¹⁸⁰ Therefore, this principle is coupled with the principle of reasoning (see Section 2.3.3). The final term is *openness*, which is very similar to transparency, but goes beyond access to documents. *Openness* means concentrating on processes that allow the public to see the operations and activities of the government at work.¹⁸¹ The EU employs openness in that the institutions along with the Member States should work in an open manner by using language that is accessible and understandable for the

¹⁷⁶ Universal Declaration of Human Rights, see: <http://www.un.org/en/universal-declaration-human-rights/>, last visited 22 March 2016.

¹⁷⁷ Birknshaw, P. 2006. “Freedom of Information and Openness: Fundamental Human Rights?”, *Administrative Law Review*, Vol. 58, Issue 1, p. 184.

¹⁷⁸ Birknshaw, P. 2006. “Freedom of Information and Openness: Fundamental Human Rights?”, *Administrative Law Review*, Vol. 58, Issue 1, p. 188.

¹⁷⁹ Birknshaw, P. 2006. “Freedom of Information and Openness: Fundamental Human Rights?”, *Administrative Law Review*, Vol. 58, Issue 1, p. 189.

¹⁸⁰ By these concepts, documents and records can be monitored by public scrutiny. See: Birknshaw, P. 2006. “Freedom of Information and Openness: Fundamental Human Rights?”, *Administrative Law Review*, Vol. 58, Issue 1, p. 189.

¹⁸¹ Birknshaw, P. 2006. “Freedom of Information and Openness: Fundamental Human Rights?”, *Administrative Law Review*, Vol. 58, Issue 1, p. 190.

general public.¹⁸² These three terms indeed contain certain exceptions, i.e. to protect public safety, commercial secrecy and individual privacy.¹⁸³

Having said that, in the continuing discussion, focus will remain on the term transparency. As the term transparency is sufficiently broad it is often understood to embrace freedom of information (FOI). Besides this, openness is still regarded more as a non-binding concept which has not (yet) created rights.¹⁸⁴

With regard to this aspect, there is also another classification of transparency that is determined by the way the information/document is delivered, namely *passive* and *active transparency*. In some legal jurisdictions, the first concept is known as *reactive transparency* whereas the former term is referred to as *proactive transparency*.¹⁸⁵ Reactive transparency refers to when a person requests and receives information, whereas active transparency means that the information is already publicly available as a result of the initiative of a public body and may be obtained without a request for disclosure from anyone having been made.¹⁸⁶

The principle of transparency can be found in international, regional and national regulations. As previously discussed, Article 19 of the UDHR is an example of such an international regulation. In what follows, regional law, the EU regulation will be discussed. According to Article 11(1) of the Charter of Fundamental Rights of the EU, all persons have the right to freedom of expression, and this includes (...) the right to receive and impart information and ideas without interference by a public authority and regardless of frontiers.¹⁸⁷ A clearer stipulation is evident in

¹⁸² Commission of European Communities. 2001. "European Governance: A White Paper", European Commission, Brussels, available from: http://europa.eu/rapid/press-release_DOC-01-10_en.htm, last visited 22 March 2016.

¹⁸³ Birknishaw, P. 2006. "Freedom of Information and Openness: Fundamental Human Rights?", *Administrative Law Review*, Vol. 58, Issue 1, p. 188.

¹⁸⁴ "Open government (openness) means in this sense providing access to information under non-legally binding codes that do not create rights". See: Birknishaw, P. 2006. "Freedom of Information and Openness: Fundamental Human Rights?", *Administrative Law Review*, Vol. 58, Issue 1, p. 216.

¹⁸⁵ Darbshire, H. (Year of publication unknown). "Proactive Transparency: the future of the right to information?". Governance Working Paper Series, World Bank Institute, available from: http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbshire_Proactive_Transparency.pdf, last visited 22 March 2016, p. 1 and 45.

¹⁸⁶ The mechanism may range from publications and official gazettes, to publicly accessible notice boards, media, or internet, i.e. via the website of a public body. See: Darbshire, H. (Year of publication unknown). "Proactive Transparency: the future of the right to information?". Governance Working Paper Series, World Bank Institute, available from: http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbshire_Proactive_Transparency.pdf, last visited 22 March 2016, p. 1 and 45.

¹⁸⁷ Charter of Fundamental Rights is binding as a treaty. See: Article 6 of the Treaty on European Union.

Article 2(1) of the EC Regulation on Public Access to European Parliament, Council and Commission Documents. It is stated that “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions, and limits defined in this Regulation”. An example of the embodiment of the principle of transparency at the national level has been promulgated in information acts in many countries, *inter alia*, the Indonesian Public Information Act (2008), the Dutch Act Governing Public Access to Government Information (1991), and the UK Freedom of Information Act (2000). These examples provide robust evidence that the principle of transparency is recognised around the globe.

Regarding the functions of the principle of transparency, lawyers share the same opinion with social scientists pointing to the “virtue” of transparency. An example of this principle can be seen in the famous statement of Louis Brandeis who said: “sunlight is the best disinfectant, electric light the most efficient policeman”.¹⁸⁸ The following paragraphs will elaborate further on the functions of transparency. Before coming to those, the following sentences will be explained. To ensure that the principle of transparency functions optimally, the regulation should provide for the rights of public access to documents.¹⁸⁹ These rights may be given to different categories as follows: the citizen (*de citoyen*); economic actors (*homo economicus*); and individuals (*homo dignus*).¹⁹⁰ The scope of the rights may differ when it is applied to one category or another, as each category serves a different objective, as will be discussed below.

On the first category, transparency facilitates public debate, participation, accountability, and legitimacy in a public institution.¹⁹¹ Another author emphasises

¹⁸⁸ Brandeis, L.D. 1914. *Other People's Money and How the Bankers Use It*, Frederick A. Stokes Company, New York, p. 92. This publication is indeed about banking. Nevertheless, his statement is often cited to describe the urgency of transparency in government. After this publication was released, this classic maxim was used as guidance to prevent the abuse of power and to ensure public accountability. For instance, it has been quite recently argued that, by echoing Brandeis' maxim, the US Constitution should protect not only newsgathering and the free flow of information, but also the ability to make video recordings of the police. With this it is believed that it can prevent the U.S. Police from abusing power. See: Lutt, S.A., 2012. “Sunlight is Still the Best Disinfectant: the Case for the First Amendment Rights to Record the Police”, *Washburn Law Journal*, Vol. 51, Issue 2, p. 349 - 351, and 381.

¹⁸⁹ Prechal, S. and de Leeuw, M.E. “Transparency: A General Principle of EU Law”, in Bernitz, U. Nergelius, J., and Cardner, C. (Eds.) 2008. *General Principles of EC Law in a Process of Development*, Kluwer Law International, Alphen aan de Rijn, p. 205.

¹⁹⁰ Buijze, A. 2013. *The Principle of Transparency in EU Law*, Uitgeverij BOXPress, 's-Hertogenbosch, p. 267-272. See also: Buijze, A. 2013. “The Six Faces of Transparency”, *Utrecht Law Review*, Vol 9, Issue 3, p. 9.

¹⁹¹ Buijze, A. 2013. “The Six Faces of Transparency”, *Utrecht Law Review*, Vol 9, Issue 3, p. 8.

that the role of transparency in underpinning democracy is given by providing numerous sub-principles, such as:¹⁹² the principle of transparent governmental meetings;¹⁹³ the principle relating to the transparency of governmental acts; and the principle of the transparency of governmental information.

Besides this, transparency contributes to the proper functioning of the market which enables the market actor to make better decisions.¹⁹⁴ Additionally, this transparent environment allows individuals to observe whether they have been treated equally and enables them to decide whether they need to take further action.¹⁹⁵

Finally, transparency supports the realisation of individual rights by allowing an individual to make decisions that are better suited to his or her individual goals.¹⁹⁶ Similar to the logic of the market outlined above, transparency enables an individual to decide whether to take any further action whenever they feel aggrieved.¹⁹⁷

With regard to this last category (transparency towards individuals), it is considered essential to embrace the following matters. In order to ensure the functioning of transparency, the process of decision-making should be easy to follow (so that it is also about the clarity of the procedure). This may refer to legislative procedures, delegated legislative procedures, decisions, and so forth.¹⁹⁸ Moreover, the regulation should be clearly drafted by laying down the law in a simple, understandable, coherent and consistent manner so as to make it accessible to laypersons.¹⁹⁹ Lastly, the regulation should provide for the obligation to provide reasoned decisions.²⁰⁰ With this, the persons concerned can evaluate the decision

¹⁹² Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*, OUP, Oxford, p. 92.

¹⁹³ Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*, OUP, Oxford, p. 92. A good instance of this is attending parliamentary meetings.

¹⁹⁴ Buijze, A. 2013. "The Six Faces of Transparency", *Utrecht Law Review*, Vol 9, Issue 3, p. 8.

¹⁹⁵ Buijze, A. 2013. "The Six Faces of Transparency", *Utrecht Law Review*, Vol 9, Issue 3, p. 8.

¹⁹⁶ Buijze, A. 2013. "The Six Faces of Transparency", *Utrecht Law Review*, Vol 9, Issue 3, p. 8.

¹⁹⁷ Buijze, A. 2013. "The Six Faces of Transparency", *Utrecht Law Review*, Vol 9, Issue 3, p. 8.

¹⁹⁸ Prechal, S. and de Leeuw, M.E. "Transparency: A General Principle of EU Law", in Bernitz, U. Nergelius, J., and Cardner, C. (Eds.) 2008. *General Principles of EC Law in a Process of Development*, Kluwer Law International, Alphen aan de Rijn, p. 215-6.

¹⁹⁹ By citing L. Senden, the commentators agree that this requirement implies the law should be codified. See: Prechal, S. and de Leeuw, M.E. "Transparency: A General Principle of EU Law", in Bernitz, U. Nergelius, J., and Cardner, C. (Eds.) 2008. *General Principles of EC Law in a Process of Development*, Kluwer Law International, Alphen aan de Rijn, p. 219.

²⁰⁰ Prechal, S. and de Leeuw, M.E. "Transparency: A General Principle of EU Law", in Bernitz, U. Nergelius, J., and Cardner, C. (Eds.) 2008. *General Principles of EC Law in a Process of Development*,

to determine any further measure that may need to be taken, and this also enables the judiciary to exercise its power to review. If those mechanisms are followed, then consistency in the interpretation and application of the law will be enhanced, and this will consequently increase the predictability of the actions and behaviour of public authorities.²⁰¹

The principle of accountability

There are at least two similarities between what has been discussed in the concept and in the principle, namely the interpretation of how accountability works and the functions of accountability.²⁰² The discussion will now focus on the two distinct branches of ‘accountability forums’: administrative accountability and legal accountability.

A legal scholar considers that accountability contains two components: responsibility and a legitimate interest in how responsibility is to be discharged.²⁰³ In order for the principle of accountability to function properly, the following four key features are required: (i) setting the standard by which to judge the accountability, (ii) the obtaining of accountability, (iii) judging the accountability, and (iv) deciding the consequences, if any, stemming therefrom.²⁰⁴ These four requirements will be elaborated upon. The first feature may differ with regard to its context. It may be based on political grounds (i.e. determined or influenced by the political processes in Parliament), or it may be based on certain criteria to measure

Kluwer Law International, Alphen aan de Rijn, p. 223. In the EU context, stating the reason can be seen on Article 296 Treaty on Functioning the European Union. “Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties”

²⁰¹ Prechal, S. and de Leeuw, M.E. “Transparency: A General Principle of EU Law”, in Bernitz, U. Nergelius, J., and Cardner, C. (Eds.) 2008. *General Principles of EC Law in a Process of Development*, Kluwer Law International, Alphen aan de Rijn, p. 235 and 241.

²⁰² One author has argued that accountability is a means of concretising relations between institutions, delineating responsibilities, controlling power, enhancing legitimacy, and ultimately promoting democracy. See: Fisher, E. 2004. “The European Union in the Age of Accountability”, *Oxford Journal of Legal Studies*, Vol. 24, No. 3, p. 510. As can be sensed, similar positions have been argued by non-legal scholars.

²⁰³ By echoing Day and Klein’s explanation, the first component can mean that “one cannot be accountable to anyone, unless he has a responsibility for doing something”, whereas the second component can be interpreted as a person who is being called to account must not simply be acting on his own behalf. See: Davies, A.C.L. 2001. *Accountability: A Public Law Analysis of Government by Contract*, OUP, Oxford, p. 75-6.

²⁰⁴ Davies, A.C.L. 2001. *Accountability: A Public Law Analysis of Government by Contract*, OUP, Oxford, p. 81.

performance (i.e. certain regulations).²⁰⁵ The second feature requires the actor to explain and justify his or her actions. This is considered to lie at the very heart of the principle of accountability, as without information and explanation, the process of accountability cannot function.²⁰⁶ The third feature can be effectively illustrated with reference to a court delivering a judgment at the end of a hearing and examination. A similar situation can be discerned in administrative accountability where a judgement/opinion is delivered regarding a certain situation by an administrative body. This last feature could mean that a legal system may have certain mechanisms to enforce certain consequences.

By considering relevance with the legal discipline, the focus of this discussion will be the administrative and legal accountability forum. The administrative accountability forum is prominent in solving the problem and may also prove useful as a means to buffer certain problems. Therefore, not all of the cases are tunnelled to the judiciary. Hence, when someone feels aggrieved with the outcome of a decision and seeks remedies, administrative justice commences with the initial decision-making process.²⁰⁷ Logically speaking, administrative justice aims to solve the problem raised by an aggrieved individual by offering flexibility and a responsive solution at the earliest opportunity. With this, justice can be delivered without the need for an individual to lodge his or her complaint before the courts.

Nonetheless, administrative justice has been perceived as having a lack of independence.²⁰⁸ Despite this, "the complainants may be less concerned with the independence than lawyers like to think".²⁰⁹ It is, therefore, considered that administrative justice does not and will not holistically replace the traditional judicial review procedure. Therefore, it is still essential to discuss the judicial review.

On handling judicial review, the task of the judge is completely analytical; discovering the already existing law and applying it logically to the case.²¹⁰

²⁰⁵ Davies, A.C.L. 2001. *Accountability: A Public Law Analysis of Government by Contract*, OUP, Oxford, p. 82-3.

²⁰⁶ Davies, A.C.L. 2001. *Accountability: A Public Law Analysis of Government by Contract*, OUP, Oxford, p. 83.

²⁰⁷ Harlow, C., and Rawlings, R. 2009. *Law and Administration*, Cambridge University Press, Cambridge, p. 484.

²⁰⁸ At least this is what happened in the UK. See: Harlow, C., and Rawlings, R. 2009. *Law and Administration*, Cambridge University Press, Cambridge, p. 457.

²⁰⁹ At least this is what happened in the UK. See: Harlow, C., and Rawlings, R. 2009. *Law and Administration*, Cambridge University Press, Cambridge, p. 457.

²¹⁰ Harlow, C., and Rawlings, R. 2009. *Law and Administration*, Cambridge University Press, Cambridge, p. 95.

Moreover, using the statement of Lord Wilberforce, the judge has two possibilities: either to interpret the statute, to determine the extent of administrative powers, or to apply general principles of administrative law, such as the doctrine of reasonableness.²¹¹ Later on, this guidance was broadened by Lord Diplock based on three grounds: illegality, irrationality and procedural impropriety.²¹² These three grounds will now be left as they stand, and further elaborated upon in the Chapter on UK law.

After having amply discussed the development and concepts of the principle of accountability, this chapter will continue onto a description of how this principle has been embodied in international, regional and national law. According to literature from the international law perspective, the principle of accountability serves to protect the rule of law, to provide compensation and satisfaction to victims, and to provide lessons learned.²¹³ Therefore, the effects of the principle of accountability are also related to the prevention of an undesired situation.²¹⁴

A good example of administrative justice at the international level may be reflected in the existence of the resolution adopted by the General Assembly in 2007 concerning the Administration of Justice.²¹⁵ It contains, among other things, an explanation of the role of the Ombudsman in the United Nations, which was established in 2002.²¹⁶ In addition, an instance concerning a legal accountability forum can be witnessed with the existence of the International Court of Justice where a state may resolve a dispute with another state or states.²¹⁷

²¹¹ Harlow, C., and Rawlings, R. 2009. *Law and Administration*, Cambridge University Press, Cambridge, p. 100.

²¹² Harlow, C., and Rawlings, R. 2009. *Law and Administration*, Cambridge University Press, Cambridge, p. 107.

²¹³ Nollkaemper, P.A. and Curtin, D. "Conceptualizing Accountability in International and European Law" in Nollkaemper, P.A. and Curtin, D. (Eds). 2005. *Netherlands Yearbook of International Law*, Vol XXXVI, T.M.C. Asses Press, The Hague, p. 9.

²¹⁴ Nollkaemper, P.A. and Curtin, D. "Conceptualizing Accountability in International and European Law" in Nollkaemper, P.A. and Curtin, D. (Eds). 2005. *Netherlands Yearbook of International Law*, Vol XXXVI, T.M.C. Asses Press, The Hague, p. 9.

²¹⁵ General Assembly Res. No. 66/228 concerning the Administration of Justice at the United Nations, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/62/228, last visited 1 April 2016.

²¹⁶ General Assembly resolutions 55/258 and 56/253 concerning the Office of the Ombudsman — appointment and terms of reference of the Ombudsman, available at: http://www.un.org/ga/search/view_doc.asp?symbol=ST/SGB/2002/12, last visited 1 April 2016.

²¹⁷ Article 34 Statute of the International Court of Justice, available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II, last visited 1 April 2016.

Similar to the explanation provided above, the instance concerning administrative justice on the regional level can be seen with the existence of the Ombudsman of the EU. Referring to the Treaty on the Functioning of the European Union (TFEU), it can be seen that citizens of the Union shall enjoy the rights and be subject to the duties provided in the Treaties. They shall have, among other things, the rights (...) (d) (...) to apply to the European Ombudsman (Article 20(2)(d)). In Article 228 (1), it is also stated that the European Ombudsman (...) shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration (...). Besides this, an instance of a judicial review forum can be found in the establishment of the Court of Justice of the European Union.²¹⁸

Progressing to the discussion at national level, unlike in the elaboration above, regulations containing a legal accountability forum will not be highlighted. It remains very clear that the judicial organisation is pivotal and legally required.²¹⁹ Therefore, it must be available in every country. Referring to comparative research in some European countries (including the Netherlands and the UK) and the United States, similar findings have been found. In all of these countries, an administrative decision can always be challenged at a certain phase before the courts.²²⁰ Also, administrative justice has always been exercised in all the examined countries, albeit with variation.²²¹ Pertaining to this, the same situation occurs in Indonesia;

²¹⁸ On Article 19 of the Treaty on European Union, it can be found the following stipulation. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." In Article 263 of the Treaty on Functioning the European Union states that the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The role of Court of Justice can be seen from the Article 263 to 281 of the treaty on Functioning the European Union.

²¹⁹ See for instance the stipulation on Article 10 of the UDHR, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, (...)." See also Article 6 of the European Convention on Human Rights, "(...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)".

²²⁰ Seerden, R.J.G.H., "Comparative Remarks", in Seerden, R.J.G.H. (ed). 2007. *Administrative Law of the European Union, its member States and the United States*, Intersentia, Antwerp, p. 407.

²²¹ In continental countries, access to the courts probably has to pass through certain out of court proceedings, whereas in the common law system it seems that the previous use of out of court proceedings is not a prerequisite for an application for judicial review. See: Seerden, R.J.G.H.

this country has both administrative accountability forums such as the Ombudsman and a legal accountability forum.

This discussion will now be brought to a close by explaining the function of the principle of accountability. To this author's mind, its function is that of ensuring that things are being done based on criteria that have been stipulated in advance. If tasks are not being executed correctly, then there are various mechanisms – within the administration or in the judiciary – through which checks can be executed and the situation can be examined. Fisher has also argued that accountability is a means of concretising relationships between institutions, delineating responsibilities, controlling power, enhancing legitimacy, and ultimately promoting democracy.²²²

2.3.3. Interrelationship between the principles of equality, transparency, and accountability

Stemming from the above explanations, the general interrelationship (or as it may also be said, overlap or coupling) between the three principles will be discerned from three different points of view. The principle of equality means that the administration has to treat citizens equally. This also means that information shall be provided equally. By so doing, this can minimise the asymmetric information that exists between the administration and the citizens. On the contrary, the principle of transparency supports the implementation of the principle of equality, because the principle of transparency enables the citizen to measure whether the administration has performed its duties by implementing the principle of equality.

The connections between the principle of equality and the principle of accountability will be illustrated below. By making use of the principle of equality, the administration can be considered to be acting in accountably. In addition, the principle of accountability may help to enforce the implementation of the principle of equality whenever it is infringed.

The final relationship is that between the principle of accountability and the principle of transparency. The principle of transparency underpins the working of accountability. It is ensured by providing the "principal" or the "forum" with sufficient information to oversee or to evaluate the administration's (or the

"Comparative Remarks", in Seerden, R.J.G.H. (ed). 2007. *Administrative Law of the European Union, its member States and the United States*, Intersentia, Antwerp, p. 408

²²² Fisher, E. 2004. "The European Union in the Age of Accountability", *Oxford Journal of Legal Studies*, Vol. 24, No. 3, p. 510.

“agent’s”) performance and to pass judgment. The principle of accountability also ensures the implementation of transparency, as it provides sanction mechanisms whenever the administration does not function with the required transparency.

These explanations mean that each of these three principles work and support the implementation of each other. Regarding this (semi-)finding, it is noteworthy to underline that this is a general illustration of the interrelationship between these three principles. It is always possible of course that certain deviations may occur. As has been discussed previously, positive affirmation may be possible under the principle of equality. Also, the non-disclosure of certain information may be relied upon under the principle of transparency. Moreover, it is also important to reiterate that the principle of accountability may be imposed under certain conditions. In a forum deciding on legal accountability, for instance, the focus of the examination will be based on illegality and certain other criteria.

2.4. The concept of good public procurement

The following structure will be employed in this section. Firstly the concept of public procurement will be analysed from an historical perspective. Thereafter, public procurement will be conceptualised whilst underlining that public procurement has, for a long time, been susceptible to maladministration. Afterwards, it will be argued that the concept of GPP is a relevant point of discussion. In the final part of this section, the meaning of GPP will be discussed.

History and the concept of public procurement

It is believed that public procurement has been conducted since approximately 3000 BC by the Sumerians.²²³ Their civilization was highly developed, exemplified by the fact that the Sumerians were responsible for the invention of glass. Additionally, it is believed that the Sumerians were specialised craftsmen who were able to cast in bronze.²²⁴ This example of innovation raises further questions related to the origin of the raw materials, as there were no metals in southern

²²³ Roberts, R as cited by Callendar, G. 2007. “A Short History of Procurement”, CIPS Australia, p. 3. Available at: <http://www.globalpublicprocurement.org/Documents/Resources/White-Papers/A-Short-History-of-Procurement.pdf>, last accessed: 26 March 2016.

²²⁴ Roberts, R. as cited by Callendar, G. 2007. “A Short History of Procurement”, CIPS Australia, p. 3. Available at: <http://www.globalpublicprocurement.org/Documents/Resources/White-Papers/A-Short-History-of-Procurement.pdf>, last accessed: 26 March 2016.

Mesopotamia.²²⁵ Another author also noted that a red clay tablet found in Syria explained an order for “50 jars of smooth fragrant oil for 600 small weights in grain”.²²⁶ It was further assumed that these civilizations had an national, as well as international trading system in place for a very long time, which may be classified as public procurement whenever it was conducted by the kingdom or city state.

Another strong historical record is apparent in 1066, when William the Conqueror ordered the creation of the “Domesday Book” to provide a systematised record of land ownership.²²⁷ It is doubted whether this could amount to a sort of supplier at the time. However, it is believed that this established a basis for the orderly procurement of funds and services by the Crown.²²⁸ Historians have also recorded an interesting finding suggesting that the ancient procurement system already contained certain rules; the contractual styles we observe today existed as early as Roman times.²²⁹

It was later reported that the history of modern government procurement started in the 18th Century in the United States. According to Page, at that time printing was one of a few services that the government contracted out. Also, goods and services required by the government were supplied by commissioners or commissaries who received a commission on what they bought for the militia or other administrative units.²³⁰ It has been noted that in 1810 Oklahoma established a board to centrally procure on behalf of all state departments and agencies. Afterwards, many local governments followed Oklahoma’s example.²³¹

²²⁵ Roberts, R. as cited by Callendar, G. 2007. “A Short History of Procurement”, CIPS Australia, p. 3. Available at: <http://www.globalpublicprocurement.org/Documents/Resources/White-Papers/A-Short-History-of-Procurement.pdf>, last accessed: 26 March 2016.

²²⁶ It is predicted that this happened around 2400-2800 BC. See: Coe as cited by Thai, K.V. 2001. “Public Procurement: Re-Examined”, *Journal of Public Procurement* Vol 1, Issue 1, p. 11. Available at: <http://ippa.org/jopp/download/vol1/Thai.pdf>, last accessed: 26 March 2016.

²²⁷ Callendar, G. 2007. “A Short History of Procurement”, CIPS Australia, p. 5. Available at: <http://www.globalpublicprocurement.org/Documents/Resources/White-Papers/A-Short-History-of-Procurement.pdf>, last accessed: 26 March 2016.

²²⁸ Callendar, G. 2007. “A Short History of Procurement”, CIPS Australia, p. 5. Available at: <http://www.globalpublicprocurement.org/Documents/Resources/White-Papers/A-Short-History-of-Procurement.pdf>, last accessed: 26 March 2016.

²²⁹ Callendar, G. 2007. “A Short History of Procurement”, CIPS Australia, p. 4. Available at: <http://www.globalpublicprocurement.org/Documents/Resources/White-Papers/A-Short-History-of-Procurement.pdf>, last accessed: 26 March 2016.

²³⁰ Thai, K.V. 2001. “Public Procurement: Re-Examined”, *Journal of Public Procurement* Vol. 1, Issue 1, p. 11. Available at: <http://ippa.org/jopp/download/vol1/Thai.pdf>, last accessed: 26 March 2016.

²³¹ Thai, K.V. 2001. “Public Procurement: Re-Examined”, *Journal of Public Procurement* Vol. 1, Issue 1, p. 11. Available at: <http://ippa.org/jopp/download/vol1/Thai.pdf>, last accessed: 26 March 2016.

Since those early days, it has also been remarked that dishonesty first occurred in public procurement activities. This happened in defence procurement in order to acquire military equipment in the US Civil War. It was noted that the Government's suppliers had delivered spoiled meat, axes without heads, one-quarter size blankets, and boots and saddles that fell apart.²³² Responding to this situation, Congress created the False Claims Act in 1863 to combat fraud perpetrated against the government by civil war contractors.²³³ It was also reported that this activity remained susceptible to corruption, as the press reported various unreasonable claims in billing practices, for instance, the Navy having to pay \$345 for an ordinary hammer and \$640 for a toilet.²³⁴ Therefore, the regulation was extended and enhanced in 1986 and 2009.

Based on the above examples, public procurement can be conceptualised as follows. For a long time, governments have realised that they are unable to carry out certain activities without external support. Consequently, it is likely that governments will choose to contract out these activities to parties outside the government. Realising this, private entities have comprehended that carrying out these tasks provides opportunities to earn money. Therefore, it is instinctive that they should compete in order to be awarded the contract. Competition forces them to bid with their best offers, as well as having to prove that they can carry out the task in question. For the sake of fairness, the contract should be given to the best offer with regard to price and quality. By so doing, taxpayers will be satisfied that the public task is being carried out professionally and that public money is being spent efficiently.

Before continuing the discussion, it is worth emphasising that the call for competition is a general widely practised concept. This is usually called "open procedure";²³⁵ a default procedure that is applied in cases, except when it may be

²³² Keeney, S. 2007. "The Foundations of Government Contracting", *Journal of Contract Management*, p. 9. Available at: http://www.ago.noaa.gov/acquisition/docs/foundations_of_contracting_with_the_federal_government.pdf, last accessed 31 July 2014.

²³³ Nadler, D. "Top Ten Things Every Government Contractor Should Know about the False Claims Act", available from the website of Association of Corporate Counsel, in: <http://www.acc.com/legalresources/publications/topten/ttegcskatfca.cfm>, last accessed: 31 July 2014.

²³⁴ Kester, D. "Procurement and Defense Control Fraud", available from: <http://www.delaneykester.com/defense-contractor-fraud.html>, last accessed: 13 September 2014.

²³⁵ *Open procedure* is a procurement procedure in which any interested company, without any pre-selection, may submit a bid; bids are usually made against detailed government specifications, and the award is usually made to the bidder offering the lowest price. See: United Nations Office on Drugs and Crime (UNODC), 2013. "Guidebook on Anti-corruption in Public Procurement and the

deviated from with justified reason laid down by the regulation.²³⁶ The conceptual reasons to deviate from the default procedure are usually based on the consideration that the open procedure may not be effectively implemented or may not be able to meet the purposes of public procurement. The main situations where this may be envisaged include simple and low-value procurement, repeated or indefinite procurement, procurement of complex items or services and urgent/emergency procurement.²³⁷

The concept of good public procurement

In later developments, a discussion regarding GPP has been sparked. A few sources mentioning GPP will be discussed here. Transparency International (TI) consider GPP to be the action of the government (the procuring entity) to satisfy the needs of the people, to be fair to businesses, to avoid waste of public funds, and to use public procurement as a tool to implement public policy.²³⁸ Differing slightly

Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption" United Nations Office, Vienna, p. 5

²³⁶ Besides *open procedure*, there are three other general procedures. *Restricted procedure* is different from an open procedure as only pre-selected qualified companies are allowed to submit a bid. It may also mean that a public advertisement of a contract opportunity is not required, (...). This may happen, for instance, if the subject matter of the procurement is available only from a limited number of suppliers. *Negotiated procedure* is often used for cases in which it is not feasible to formulate exhaustive technical specifications and contractual terms. It is thus necessary to enter into a dialogue with the offerors to conclude the contract. A negotiated procedure is also often used for cases of failed tendering procedures (e.g., no tenders or only non-responsive tenders were delivered). Another frequent justification for a negotiated procedure is in the case of circumstances of urgency or a catastrophic event. *Single-source procurement (direct award or limited tendering)* often allows the procuring entity to choose the contracting partner without any form of transparency or competition. Grounds for direct contracting may include, for instance, the low estimated value of the contract, the fact that the goods or services at issue are available only from a particular provider, urgent needs, a catastrophic event, the need for additional supplies to be procured from an existing contractor, or special concern regarding national defence or national security. See: United Nations Office on Drugs and Crime (UNODC), 2013. "Guidebook on Anti-corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption" United Nations Office, Vienna, p. 5 and 16. The name of these procedures may be different in each jurisdiction. In chapter three, four and five, I will provide the description of public procurement in each compared country.

²³⁷ United Nations Commission On International Trade Law (UNCITRAL). 2011. "Guide for Enactment UNCITRAL Model Law on Public Procurement", Vienna: UNCITRAL Secretariat, p. 28. Available at: <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>, last visited 3 July 2016.

²³⁸ Kostyo, K. 2006. *Handbook for Curbing Corruption in Public Procurement*, Transparency International, Berlin, p. 28. Available at:

from TI's definition, the United Nations Environment Programme (UNEP) explains that GPP is not only about the concept of transparent, fair, non-discriminatory, competitive, accountable, efficient use of public funds, and verifiability. GPP is also about integrating those concepts to the three dimensions of sustainable development: social, environmental and economic.²³⁹ There are few other sources that use the phrase GPP. However, those sources do not explain what they mean with this term.²⁴⁰

What follows is a description of the concept of GPP to be used in this research. The problem that may occur in public procurement will first be discussed. The procuring entity's decision to award the contract may attract suspicion as to whether the selection process is indeed fair. It is possible that a certain bidder approaches an official of the administration in order to favour him in obtaining the contract. Alternatively, it is also possible that the official of the administration approaches a certain bidder and offers to use his authority to favour him. This favourable action may be implemented in various ways, i.e. by unequal opportunity and unequal treatment, which will be specified in a later subsection. This substandard situation is not always easy to oversee due to the complex nature of public procurement.

The difficulty to oversee is also caused by the asymmetric information that lies at a certain stage of the public procurement process. Transparency works on three different levels of the procurement process. At the beginning, it opens up competition. Thereafter, to ensure continuation of competition, transparency must be disabled temporarily during the bidding process; it is not possible for a bidder to ask both to his competitors and to the procuring entity to examine his competitors' offers. Lastly, transparency should be provided again to a certain degree; this should occur when the procuring entity provides information about the competition result in order to assess the fairness of the evaluation. In the final phase, it is not possible to provide full transparency, as this may harm business data protection. Hence,

http://www.transparency.org/whatwedo/publication/handbook_for_curbing_corruption_in_public_procurement, last visited 19 October 2016.

²³⁹ UNEP. 2015. "Principle of Sustainable Public Procurement", p. 2. Available at: <http://www.unep.org/10yfp/Portals/50150/10YFP%20SPP%20Programme%20Principles%20of%20Sustainable%20Public%20Procurement.pdf>, last visited 19 October 2016.

²⁴⁰ World Bank, "Why Reform Public Procurement", the World Bank, Washington, p. 8. Available at: http://www.worldbank.org/content/dam/Worldbank/document/MNA/Why_Reform_Public_Procurement_English.pdf, last visited 19 October 2016. See also: OECD. 2005. "Harmonising Donor Practices for Effective Aid Delivery, Volume 3: Strengthening Procurement Practices in Developing Countries". OECD, Paris, p.1. Available at: <https://www.oecd.org/dac/effectiveness/34336126.pdf>, last visited 19 October 2016.

asymmetrical information is something that by default should occur in public procurement.

Faced with a complex situation, it is possible that the official may make mistakes. Therefore, the administration may provide systems to review the output of the decision. The implementation of this may differ from one country to another. However, if a bidder is still aggrieved, the legal system must enable him or her to have access to the courts.

The above three paragraphs have explained the necessity to have equality, transparency, and accountability in public procurement system. It is fundamental that these three concepts are incorporated in every public procurement system. In so doing, the system shall incorporate a system encompassing 'good public procurement'. In other words, GPP is to be regarded as a concept that embodies the realisation of the concepts of equality, transparency and accountability in its system. Saying this does not necessarily mean that other concepts such as effectiveness or respecting the environment cannot be counted as good public procurement. Instead the decision has been taken to stress the concepts of equality, transparency and accountability, as it is believed that these provide the formula to address the fundamental problems mentioned earlier in Chapter 1.

2.5. The principles of good public procurement

This section intends to illustrate that there are principles which can be labelled good public procurement; these are found in public procurement regulations. Departing from the previous line of thinking, this section will focus on equality, transparency and accountability. As principles, these bind the government and provide rights to the citizen (especially bidding participants).

Before continuing the discussion, it is relevant to elaborate upon how scholars and I define principles of GPP. There is a publication that explicitly uses the term 'principles of good public procurement'. This publication states that corruption occurs due to the violation of principles of GPP: transparency, fair competition and accountability.²⁴¹ There are similarities (as well as differences)

²⁴¹ Fazekas, M., Tóth, I.J., King, L.P. "Corruption Techniques in Public Procurement with Examples from Hungary", Working Paper Series, Budapest: Corruption Research Centre, p. 3 and 9. Available at: http://www.crcb.eu/wp-content/uploads/2013/12/Fazekas-Toth-King_Corruption-manual-for-beginners_v2_2013.pdf, last visited 19 October 2016. In defining the principles of good public procurement, the authors refer to a publication made by prof. Arrowsmith, OECD and TI. However, the two first sources do not use either the terminology of "principles of good public procurement" or "good public procurement". TI does use the terminology of good public procurement, but

between this publication and how the principles of GPP are defined in this research. Both do recognise the principles of transparency and accountability as the principles of good public procurement. However, as it will be seen below, that in this research the phrases ‘the principle of equal opportunity’ and ‘the principle of equal treatment’ are preferred, rather than ‘the principle of fair competition’. An academic contribution may be made by providing the historical and conceptual line of thinking which determine why and how the principles of equality, transparency and accountability from good governance can be specified as the principles of good public procurement.

In the following, it will be shown that the principles of equality, transparency and accountability can also be found (codified) in public procurement laws. In doing so, the general aspect of public procurement laws in Indonesia and the EU Directives related to public procurement will be discussed.²⁴² These three GG principles are distinguished as being five GPP principles, namely: equal opportunity, equal treatment, transparency, accountability in terms of clarity of the accountability forum, and accountability in terms of the availability of remedies. In line with the argument explained earlier, the principle perspective will be utilised; echoing what has been explained by prof. M. Scheltema: the (legal) principle shall lie at the very centre of the reasoning of (public procurement) regulation.²⁴³

2.5.1. The principle of equality in public procurement

It can be argued that both the principles of negative equality and positive equality are recognised in public procurement. However, the principle of negative equality is considered to be the general standard in public procurement whereas the principle of positive equality is considered to be the exceptional norm. The

without the word principles (as it has been presented at the section of ‘the concept of good public procurement’ above).

²⁴² This will be done subject to the following considerations. First of all, Indonesia is the centre of this research. Moreover, by discussing the EU, an essence of the comparative aspect can be acquired without directly comparing countries under discussion, as this issue will be explained separately in chapters four and five.

²⁴³ The context of prof. Scheltema’s statement was that he criticised the Dutch Parliament when it explained its reason for creating a public procurement Act: (merely) to accommodate the EU Directive. According to him, this was not a good reason. The Act was to be implemented due to the need: (i) to protect the good market; serving the interest of society; (ii) to treat the citizen equally and carefully. Stemming from the latter, he then came to point out that the Act shall exist in order to protect the principle. See: Scheltema, M. “De Nieuwe Aanbestedingswet: Een Duurzaam Bouwwerk? (The New Public Procurement Act: A Sustainable Building?) in: Hebly, J.M, Manunza, E.R., Scheltema, M. 2010. *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet (Reflections on Public Procurement Bill)*, Instituut Voor Bouwrecht, p. 123 and 127.

principle of negative equality (which serves the formal equality) requires the administration to treat each bidder equally. Different to this, the principle of positive equality (which serves the achievement of substantive equality) enables the administration to deviate from the norm of negative equality.

The concrete standard for the principle of negative equality can be seen as follows. At the EU level, Article 18 of the Public Sector Directive stipulates that “contracting authorities shall treat economic operators equally and without discrimination (...)”. An interpretation of this is that, although bidders come from different member states, the procuring entity must not treat them differently by favouring national bidders.²⁴⁴ This interpretation stems from the TFEU, which guarantees free movement of goods (Article 28), freedom of establishment (Article 43), and freedom to provide services (Article 49).²⁴⁵ In Indonesia, a similar substance can also be found in the Presidential Regulation (‘PR’) 54/2010. Article 75 prohibits the procuring entity to obstruct or limit the participation of economic operators from other cities, regencies, or provinces.

Besides this general norm, it is also possible that the government will treat certain bidders differently as long as this is justified under certain laws, policies and procurement documents. The concrete standards for conducting the principle of positive equality are as follows.

In Indonesia, this is evident in Presidential Regulations 84/2012 concerning Public Procurement to Accelerate the Development of Papua and West Papua Provinces. The Indonesian Government has issued a positive affirmation policy. Less sophisticated procurement must only be carried out by local (Papuan) economic operators (Article 2(b)). Sophisticated procurement can be carried out by non-Papuan suppliers/contractors, but the company must cooperate with a local economic operator (Article 2(d) and 2(e)).

In the EU, in order to achieve certain objectives, the procuring entities may lay this down in the procurement document (sometimes also called a solicitation document), which can be considered as the detailed “rules of the game”. This document, unsurprisingly, may differ between one procurement and another. The document contains ‘technical requirements’ which have to be met by bidding

²⁴⁴ It has been noted in *the University of Cambridge Case* (Case C-380/98) that the aim of the Directive is to avoid both a risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities as explained by Poulsen, S.T., Jakobsen, P.S., Kalsmose-Hjelmborg, S.E. 2012. *EU Public Procurement Law: the Public Sector Directive, the Utilities Directive*, DJØF Publishing, Copenhagen, p. 34.

²⁴⁵ Arrowsmith, S. and Kunzlik, P. “EC Regulation in Public Procurement” in Arrowsmith, S. and Kunzlik, P. (Eds.). 2009. *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press, Cambridge, p. 56-57.

participants, such as: the procedures that must be used when awarding contracts; the criteria that must be applied in determining the sufficiency of technical capacity and the necessity to be financially sound in order to be allowed to participate in the award procedure; the exclusion criteria that must be implemented, etc.²⁴⁶ These rules must be published in advance. The reason for awarding a contract can be the lowest price or the ‘most economically advantageous tender’ (MEAT). The latter affords a greater area of discretion for the purchasing authority as it is allowed to use criteria related to other non-price factors, including environmental characteristics.²⁴⁷ The legal basis for conducting environmental characteristics was first triggered by the *Concordia Case*.²⁴⁸ Since then, public procurement has been used to promote and even to achieve certain policy goals such as environmental protection and/or social policy objectives.²⁴⁹

The principle of negative equality is considered to be the general standard in public procurement. This matter will be dealt with more specifically below. The principle of negative equality is divided into two aspects: equal opportunity and equal treatment. “Equal opportunity” refers to the widest possibility for economic operators to compete in a procurement procedure; whenever certain restrictions are laid down in the procurement document, this should be legally justified and should not intend to distort the competition. The conceptual reason for doing so is the fact that the transaction involves public funds and the government has a fiduciary duty towards society; therefore, the procuring entity is required to enable all members of the public to have equal opportunity to enjoy the public benefit that the government has decided to allocate.²⁵⁰ However, this principle may be deviated

²⁴⁶ Kunzlik, P. 2013. “Neoliberalism and the European Public Procurement Regime”, Cambridge Yearbook of European Legal Studies, Vol.15, Issue 1, p. 317-8.

²⁴⁷ The author uses this to argue that public procurement in the EU does not follow the concept of neoliberalism, because neoliberals consider the ‘non-economic’ goals as ‘inefficient’ and because they fear that it involves using the state’s dominium in a ‘regulatory’ manner. See: Kunzlik, P. 2013. “Neoliberalism and the European Public Procurement Regime”, Cambridge Yearbook of European Legal Studies, Vol.15, Issue 1, p. 318.

²⁴⁸ *Concordia Bus Finland* is a case which explains that the decision of the contracting authority to set ecological criteria complies with the fundamental principles of Community law particularly the principle of non-discrimination. This is because, inter alia, the criteria are linked to the subject-matter of the contract and do not confer an unrestricted freedom of choice on the authority. See: Case C-513/99, available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CJ0513>, last visited 09 December 2015.

²⁴⁹ Arrowsmith, S. 2012. “The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies”, Cambridge Yearbook of European Legal Studies, Vol.14, p. 47.

²⁵⁰ Dekel, O. 2008. “The Legal Theory of Competitive Bidding for Government Contracts”, Public Contract Law Journal, Vol. 37, No. 2, p 246.

from due to consideration of the effectiveness. As has been earlier explained, it is possible that the procuring entity exercises procedures other than open tender.

Besides this, “equal treatment” refers to the obligation of the procuring entity to treat the economic operators that have submitted the bidding proposals on an equal basis, so that the “level playing field” is preserved, and fair competition can take place. As may be sensed, the principle of equal opportunity is exercised more intensely during the early phases of the procurement process, before the submission of the bidding proposals, whereas the principle of equal treatment occurs after the submission of the proposals until the contract is signed. Therefore, the implementation of the principle also embraces the (administrative) review phase.

At the operational level, the principle of equal opportunity will be related to three main terms concerning public procurement, namely “specifications”, “selection criteria” and “the procurement procedure”.²⁵¹ “Specifications” means specifying what (services) need to be carried out or what goods need to be provided.²⁵² “Selection criteria” means qualifying which economic operators are capable of competing in supplying or working.²⁵³ There is another term that should also be discussed, namely the “award criteria”. This refers to which method will be used to determine the best bid.²⁵⁴ The last issue is the “procurement procedure”. As was elaborated earlier, there are numerous procedures where a contracting authority has the discretion to select which procedure shall be applied in a certain procurement. However, the selection shall not violate the principle of equality. The

²⁵¹ Telgen, J. 2014. “Supplier Selection in the Public Procurement Directive,” Brussels, p. 3. Available from: http://ec.europa.eu/internal_market/economic_analysis/docs/presentations/20140626-jan-telgen_en.pdf, last accessed 11 April 2016.

²⁵² Let it be said that a public body would like to acquire buses for mass rapid transportation. The “specifications” relating to the buses should not be overspecific (should not be “gold-plated”) (Arrowsmith, S. 2010. *Public Procurement Regulation: An Introduction*, University of Nottingham, Nottingham, p. 6.). This is so that the specifications will not distort competition and will serve the principle of “equal opportunity”. Specifications which adhere to equal opportunity will enable the producer or supplier of the buses to compete fairly in obtaining the contract.

²⁵³ For instance, a local government would like to build a kindergarten. The procuring entity should proportionally set the selection criteria to determine which economic operators are capable of competing. The procuring entity should not limit, for instance, the tender to specialist construction companies, as a kindergarten can be classified as an ordinary building.

²⁵⁴ There are two mechanisms to determine the best bid; the ‘MEAT’ and the lowest bidder. These two mechanisms are implemented in both the EU Member States and in Indonesia (In Indonesia, there are two other variations which are actually rooted in the two above, namely a combination between quality and price and based on a fixed budget (Article 49 PR 54/2010). Arguably, the issue of the award criteria is not closely related to the issue of equal opportunity and equal treatment. It is more about the principles of negative equality and positive equality as is explained in the earlier discussion.

contracting authority, for instance, is not permitted to appoint an economic operator directly for carrying out a certain task without justified reasoning.

Before turning to the discussion on the principle of transparency, it is necessary to emphasise the principle of equality. Whenever the procuring entity violates the principle of equal opportunity and the principle of equal treatment, the aggrieved potential bidder and the bidding participant may challenge the action/decision made by the procuring entity. On the one hand, the administrative procedure to challenge the matter can be seen as an issue embraced by the principle of accountability. However, in my opinion this can be regarded as an issue encompassed by the principle of equality, for the following three reasons. First of all, from a theoretical perspective, different legal principles can enshrine one single issue. Due to its abstract character, a principle may be intertwined with other principles. The output of this research will also confirm the matter; the interrelationship between the principle of good public procurement and the relationship with the other relevant principles.²⁵⁵ The second reason is that the scope discussion of the principle of equality (equal opportunity and equal treatment) works from the preparation of the procurement document to a phase before the contract is concluded. Therefore, the discussion of these principles may cover the (administrative) review process. The last argument will analyse a fundamental problem regarding distrust on the administrative appeal (in Chapter 3). Based on some cases, the impartiality of the head of procuring authority in handling the administrative appeal will be questioned. In each case, the head of the procuring entity was the one who previously instructed his subordinates to favour a certain bidding participant. It may be true that the administrative appeal can be counted as an issue of the (administrative) accountability. However, the intention is to highlight the illegal instruction conducted by the head of procuring entity. This gives justification to discuss the issue under the principle of equality.

2.5.2. The principle of transparency in public procurement

It is believed that public procurement does not only recognise the principle of freedom of information (FOI), but also acknowledges the principle of transparency and even (the principle of) openness. Relating to the FOI and transparency, the argument is based on the situation where the administration is requested not only to provide information, but also certain documents. Relating to the last principle, it is possible that the administration must simplify the information in accessible language. This is for the sake of the openness of the procedure, but also as a duty to protect confidential information such as a trade secret. Some

²⁵⁵ It can be found in section 7.1.

examples of the public procurement rule contained in these three variations will now be provided.

Some examples of FOI can be seen in the explanation on the Presidential Regulation (PR) 54/2010 which requires the procuring entities to provide an additional explanation whenever a bidder(s) is less clear on particular matters in the procurement ('solicitation') document (Article 11(2)(c)).²⁵⁶ FOI is also reflected in the requirements regarding a prior information notice on the request for proposals (Article 25). In addition, it is also visible in the instruction to announce the award decision on the official board and website (Article 80). A similar situation can also be found in the EU based on Directive 2014/24/EC. Contracting authorities are requested to issue a prior information notice on the early call for competition (Article 48).²⁵⁷ FOI can also be seen in the obligations of the procuring entity to provide information on the award decision. According to recital 82 of the Directive 2014/24/EC, contracting authorities are obliged to provide information concerning certain decisions that were taken during a procurement procedure, including the decision not to award a contract or not to conclude a framework agreement.

Concerning recital 82, it is worth underlining that this consideration also stresses the following: "this information should be sent by the contracting authorities without candidates or tenderers having to request such information." By referring to the previous discussion, this is classified as active transparency.

In addition, this consideration also explains that a summary of the relevant reasons for some of the central decisions made in the course of a procurement procedure must also be made available. The phrase "summary of the relevant reasons" indicates the existence of the principle of openness,²⁵⁸ meaning that the administration (the contracting authority) must determine and rephrase the information that must be provided, so that it can serve two purposes. On the one hand, it shall enable candidates or tenderers to understand the decisions in simple and accessible document(s). On the other hand, it adheres to the duty to protect confidential information and to prevent bid rigging.²⁵⁹ Related to the latter, it is

²⁵⁶ Although the clarification may have been requested by a particular bidder, the answer should be equally made available to all (interested) bidders.

²⁵⁷ There it is stated that the "contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice (...)".

²⁵⁸ Although one commentator has doubted that openness can have a binding character, in a public procurement context openness is embodied as a rule in public procurement law.

²⁵⁹ Disclosing information on the terms and conditions allows competitors to engage in collusive agreements by better coordinating future tenders. See: OECD. 2007. "Policy Roundtables: Public

relevant to emphasise that the procuring entity is not allowed to pass a bidding proposal by a certain bidder (say, the award winner) on to another bidder (to enable it to understand why the winner received the contract while it lost out). Thus, the procuring entity must extract and redact the information derived from the bidding proposals and to simplify it in more accessible language.

Recital 82, Directive 2014/24/EC also explains that the candidates and tenderers have a right to request more detailed information concerning the abovementioned reasons. The contracting authorities should be required to provide such information except in the situation where there would be serious grounds for not doing so. The right to request more information can, therefore, be classified as passive transparency. With regard to this aspect, it will be explained in a later chapter that this right is not recognised in Indonesian public procurement system.

The above elaborations have shown the existence of the principle of transparency in public procurement laws. The good public procurement approach will therefore be integrated into this principle throughout the rest of the discussion. The discussion in the following chapters will centre around the transparency of the award decision. Therefore, the following explanation of the transparency approach will not be extensive. Rather, I will emphasise two matters.

First of all, I consider that the information on the award decision serves the interest of each bidding participant (*homo dignus*). Logically speaking, each participant is interested in the information regarding who has been given the award and the reasons behind this decision. Furthermore, it is very likely that a participant may feel that they have made a similar or even better offer than the award winner. Therefore, it is relevant to provide a comparative explanation with regard to the winner and each bidding participant. However, as has been previously argued, it is important that the information should be clear and understandable. It should not only contain the result of the evaluation on a numerical basis, but should also provide an explanation of the meaning of the numerical basis of this comparative evaluation. To strengthen this argument, the theory of signs can be referred to. Numbers are signs,²⁶⁰ which can be falsified when these are interpreted. This is possible because a sign is anything that is so determined by two others: (i) the

Procurement", p. 7. Available from: <http://www.oecd.org/competition/cartels/39891049.pdf>, last accessed 27 March 2015.

²⁶⁰ A number is a word or symbol which represents an amount or a quantity. See: <http://www.merriam-webster.com/dictionary/number>, last visited 23 September 2015.

object and (ii) the interpretant, in which the second is determined by the first.²⁶¹ In the context of the award decision, the objects are the numerical marks. The interpretant is the reader: each bidding participant. If such an explanation is not provided, the bidding participants could interpret the lack of information pertaining to the numerical marks (signs) differently, and this may result in information bias and undermine the quality of transparency.²⁶² Some illustrations of this matter will be provided in Chapter 3.

Secondly, particularly concerning a complex procurement, the notice containing the award decision as mentioned above may not be sufficient in providing the necessary information. The bidding participants who are not satisfied with the information provided should, therefore, be allowed to request additional information. In procurement terminology this is called debriefing.

2.5.3. The principle of accountability in public procurement

The principle of accountability regarding administrative accountability (administrative justice) and legal accountability (the courts) can also be seen in certain rules of public procurement laws. The situation with respect to these two forums in Indonesia will first be discussed, before turning to the EU. However, at the end of this section, it will be stressed that the focus is on legal accountability.

The administrative justice system in Indonesian public procurement can be seen in the embodiment of an administrative review system ('bid protest mechanism') in the inside of contracting authorities. According to Article 81 PR 70/2012, aggrieved bidding participants that have received a document qualification or proposal may personally or together with other participants submit a bid protest in writing, whenever they find: (a) violation of the regulation or procurement document on the procurement process;²⁶³ (b) manipulation that

²⁶¹ Atkin, A. 2013. "Peirce's Theory of Signs", *The Stanford Encyclopedia of Philosophy*, available from: <http://plato.stanford.edu/archives/sum2013/entries/peirce-semiotics/>, last visited 23 September 2015.

²⁶² Pierce has warned that the interpretant is not a simple interaction between a sign and an object; the meaning of a sign is manifest in the interpretation that it generates in sign users. Atkin, A. 2013. "Peirce's Theory of Signs", *The Stanford Encyclopedia of Philosophy*, available from: <http://plato.stanford.edu/archives/sum2013/entries/peirce-semiotics/>, last visited 23 September 2015.

²⁶³ A violation here refers to two activities: a. it does not fulfil the requirements; and b. it does not follow the procedure according to the stages to be followed. See: the Explanation of Article 81 (1) (a) PR No. 70/2012.

amounts to unfair competition;²⁶⁴ (c) an abuse of authority by the procurement committee and/or other civil servants.²⁶⁵

There are two tiers to this administrative review procedure: an objection and an (administrative) appeal. The objection means that the protest should be submitted to an official or to the working group who has made the award decision based on an evaluation of the proposals. The aggrieved bidder should submit the protest promptly and the official or the group must also answer the objection promptly according to the regulation.²⁶⁶ If the protester subsequently still feels aggrieved, he may lodge an appeal with the superior of the official/working group.²⁶⁷ It can be debated whether Indonesia has another administrative forum (independent administrative body) to oversee administrative justice. However, this discussion will take place later in Chapter 3.

Turning to the discussion on legal accountability forums. According to Article 1(3) of the Administrative Court Act, an administrative decision is reviewable by the Administrative Court.²⁶⁸ However, certain types of decisions are excluded from the competence of the administrative court; such decisions are reviewable by the ordinary courts. Submitting a case to the ordinary courts is usually based on the argument that “every unlawful act that causes damage to another person obliges the wrongdoer to compensate such damage”.²⁶⁹ Similarly to the previous situation, it is also debatable which legal accountability forum should review a public procurement decision in Indonesia. This matter, however, will be discussed in Chapter 3. Although unclear situations exist, one thing, at least, can be asserted: administrative accountability and legal accountability are available in the Indonesian public procurement system.

²⁶⁴ Manipulation can infringe fair competition, for instance: a. a design specification leading to a particular product, except for spare parts; b. criteria to mark the evaluation are vague, and therefore this can lead to unfair and non-transparent marking; c. additional requirements which are beyond this regulation. See: the Explanation of Article 81 (1) (b) of PR No. 70/2012.

²⁶⁵ The explanation of the regulation clarifies the term abuse of power by stating: “an intentional action which is conducted beyond its power conducted by procurement authority holder, such as: budget user (and its representative), head of local government, commitment officers, supporting team and technical team.” See: the Explanation of Article 81 (1) (c) PR No 70/2012.

²⁶⁶ In this context, the time within which to submit the complaint is five days with five days to answer the objection. See: Article 81 (2) and (3) PR 70/2012.

²⁶⁷ Article 82 PR 70/2012.

²⁶⁸ “A written decision issued by the board or administrative officer contained legal action of the administration based on regulations, has characteristics as a concrete, individual, and final, and brings particular legal consequences for a person or private legal entities.”

²⁶⁹ Article 1365 Civil Code.

The focus will now shift to the administrative accountability forum in the EU. Stemming from recital 122 of Directive 2014/24/EC, there are two types of administrative accountability forums depending on the legal standing of the claimant. The first forum is regulated by the Remedies Directives, which provides for certain review procedures related to allegations of the infringement of Union Law in the field of public procurement or national rules transposing that law.²⁷⁰ The other explains that the ordinary citizen should also be given a possibility to indicate possible violations to a competent authority or structure. However, this forum should not be confused with the forum for the aggrieved bidders, i.e. by channelling the complaints of the citizen to the Ombudsman or to the Auditing Authorities.²⁷¹

This research focuses on the accountability forum for the bidders. Therefore, it is relevant to analyse the Remedies Directive 2007/66/EC. Concerning this Directive, Article 2(3) indicates that an independent administrative body or court can be the first instance accountability forum. It also explains that if the aggrieved bidders submit a complaint, the contracting authority cannot expeditiously conclude the contract.²⁷²

Before continuing with the discussion, it is beneficial to return to two previous paragraphs by focusing on the phrase “first instance accountability forum”. Indeed, the Directive does not clarify the character of review bodies: an independent administrative body or an instance with a judicial character. Nonetheless, according to Article 2(9), where bodies which are responsible for review procedures are not judicial in character, written reasons for their decisions shall always be provided. Also, where it is an independent administrative body, the review result should be reviewable by “another body, which is a court or tribunal within the meaning of Article 234 of the Treaty and independent from both the contracting authority and the review body”.

In addition, Article 2(1)(a), (b), and (c) Directive 2007/66 explain the availability of seeking the remedies whenever the Directives are violated. The remedies are interim measures with the aim of correcting the alleged infringement

²⁷⁰ In the context of this consideration see: the Directive 89/665/EEC.

²⁷¹ “(...) not duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities”. See: consideration no. 122 of Directive 2014/24/EC.

²⁷² Article 2 (3) Directive 2007/66/EC states that: “when a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a (2) and Article 2d (4) and (5).”

or preventing further damage; setting aside or ensuring that decisions taken unlawfully are set aside; awarding damages to persons harmed by an infringement. Besides, Article 2(d) explains the consequences of an infringement of the Directives. The Member States may ensure that a review body, which is independent from the contracting authority, shall decide whether the contract should be considered ineffective or whether alternative penalties should be imposed. The penalties are the imposition of fines on the contracting authority or the shortening of the duration of the contract.²⁷³

It can be seen that the EU Directives have recognised both an administrative review and a judicial review. Also, the Directives explain the availability of remedies. This amounts to robust evidence that the principle of accountability is embedded in the EU public procurement law regime.

The above discussion has demonstrated the existence of the principle of accountability in public procurement. Below, the discussion will focus on how this principle can be exercised in a narrower context based on the problem encountered in the following chapters. The following is a good public procurement approach regarding the principle of accountability.

For the sake of relevance of the problem discussed later, the discussion on administrative review will be embraced by the principle of equal treatment. This is also supported by a conceptual justification, which has been mentioned earlier; the principle of equal treatment is applied after the submission of the proposal and up until the contract is finally signed. The principle of equal treatment, therefore, also embraces the administrative review procedure.

Due to the deliberation in the above paragraph, the principle of accountability will focus on the discussion of judicial review. Having considered the above, the judicial review process should be effective as is discussed in the three points below.²⁷⁴ If this is exercised in a public procurement context, the aggrieved bidders must have effective access to the courts. The author's interpretation of this is that the aggrieved bidders (including those responsible for legal enforcement) must recognise which court has the competence to deal with a public procurement case, and the court itself must be consistent concerning its competence. In addition, the process before the court should be, amongst other things, within a reasonable period of time.²⁷⁵ The judicial review should weigh certain public procurement

²⁷³ Moreover, it is possible to request the award of damages, but this is not classified as a penalty.

²⁷⁴ Ortlep, R. and Widdershoven, R.J.G.M. "Judicial Protection", in Jans, J.H., Prechal, S., Widdershoven, R.J.G.M. (Eds.) 2015. *Europeanisation of Public Law*, Europa Law Publishing, Groningen, p. 333.

²⁷⁵ "The other criteria for effective judicial review are independence, impartiality, fair trial".

cases; if time is of the essence, the court should accelerate the judicial review process. Lastly, the court must have effective remedies with which breaches of the law may be rectified.

2.6. Good public procurement approach

This section aims to explain three matters. Firstly, it aims to clarify what is meant by a GPP approach. Secondly, it intends to emphasise why it is necessary to depart from the principles of GG (and it is unnecessary to directly exercise the principles of GPP). Lastly, it attempts to emphasise the author's own opinion as to why this should be considered a unique approach.

With reference to the first point, the GPP approach is regarded as the utilisation of the principled perspective for the following reasons, commencing with the three components of the concept of GG.²⁷⁶ These components have a legal character and, therefore, can be considered as three principles under the umbrella of the principle of GG. These three principles can be specified as five principles of GPP. Following this, the five principles are utilised as benchmarks from which to evaluate regulations related to public procurement and their implementations in three selected countries.

Turning to the second point, it is relevant to discuss the principle of GG due to the following considerations. The earlier discussion has explained that the principle of GG is a norm for the government and a right for the citizen. Stemming from this explanation, the principle of GG can be utilised to elucidate public procurement. Public procurement is financed by public funds, which may mainly emanate from taxes. Therefore, the government is obliged by reason of a certain norm to be responsible when it comes to government spending. Besides this, it is believed that behind public procurement there is always a public purpose and a public task.²⁷⁷

GPP principles are not directly utilised to analyse the fundamental problems because providing the discussion on good governance principles has certain usefulness. This can dispense whether the principles of equality, transparency and accountability embraced by the principle of GG have the same meaning and

²⁷⁶ In the literature it has been mentioned the necessity of the general principles to be utilised in the public procurement. Hordijk, E.H.P., van der Bend, G.W., van Nouhuys, J.F. 2009. *Aanbestedingsrecht: Handboek van het Europese en het Nederlandse Aanbestedingsrecht*, Sdu Uitgevers, Den Haag, p. 29.

²⁷⁷ Poulsen, S.T., Jakobsen, P.S., Kalsmose-Hjelmborg, S.E. 2012. *EU Public Procurement Law: the Public Sector Directive, the Utilities Directive*, DJØF Publishing, Copenhagen, p. 26.

function as the principles of GPP. As can be seen from the previous passage, these have the same meaning and function. However, in this research context, the principle of equality can be specified as equal opportunity and equal treatment. In addition, the principle of accountability can be specified as accountability related to the clarity of accountability forum and accountability related to the availability of remedies.

Addressing the third point, this GPP approach may differ between scholars. Scholars from economic fields for instance, have a strong inclination to concentrate on effectiveness and value for money,²⁷⁸ whereas the approach utilised in this research does not focus on this matter, but instead tends to emphasise the matter of preventing maladministration. This GPP approach is also more top-down oriented; using principles to elucidate the regulation and implementation. Therefore, this approach may differentiate from some legal academics that focus on the factual case law and subsequently include this in the principle discussion.²⁷⁹ By outlining these distinctions, it is not to suggest that one approach reigns over the others. Instead, each approach may provide certain beneficial insights, both academically and practically, to throw light on the field of public procurement.

2.7. Conclusion

This chapter has attempted to provide a normative framework for this research, namely explaining the GPP approach. In doing so, this chapter has employed the following arguments.

Firstly, it has been argued that GG, as a “concept,” can be traced far back in history. This can be found both in Eastern and Western civilizations. There are three components to the concept of GG that have been selected for further discussion, namely: equality, transparency and accountability. These have been selected because each component underpins the three cornerstones of the modern state, namely the rule of law, democracy and good governance. Moreover, these three are considered to be the most important components of GG. It has been argued that GG has a legal character; therefore, it can be called the ‘principle’ of GG. In addition, these three are the most relevant components to shed light on the problems. The

²⁷⁸ Nicola Dimitri, N., Piga, G., Spagnolo, G. 2006. *Handbook of Procurement*. Cambridge University Press, Cambridge, p 3, 14 and 15.

²⁷⁹ Professor Sue Arrowsmith for instance. Her publication which uses a bottom-up approach is the following: Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London.

same also applies to the principles of equality, the principle of transparency and the principle of accountability.

Before continuing the research with respect to each principle, it is noteworthy to underline the findings on the function of the legal principle. It has *prima facie* force; it provides an adequate argument to establish a fact or raise a presumption except in the situation when this can be disproved or rebutted. It may be true that the principle does not prescribe any legal outcomes. However, it may inspire the decision in a particular case. Many legal principles are written in the regulation. However, it is also possible that some legal principles have not (yet) been codified.

Stemming from the explanation on the paragraph above, both of these principle types (written or unwritten) have legally binding effect. The written principle directly binds the administration and the court. Therefore, the administration shall adhere the principle unless any exceptional positive law regulates otherwise. Whenever the administration violates the principle, one may seek legal redress to the court.

The unwritten principle is also binding but the nature of this is more indirect. In order to be operated, the administration should incorporate the unwritten legal principle into the motivation of the administrative decision. When the administration, for example, neglects to implement a certain unwritten principle, then one may also follow the above line of thinking - to seek legal redress to the judiciary. The fact that the relevant principle has not been codified may be seen as a loophole, which must be closed by the judiciary for the sake of protecting justice.

In reverting to the discussion relating to the principles of GG, and stemming from the explanations provided by other scholars, it has been considered that the principles of GG are norms for the government and rights for the citizen containing good values, which can drive the government to achieve better performance in carrying out its tasks. Related to this, as public procurement is a government activity, which also relates to the citizen, the principles of GG can, therefore, arguably be utilised to enshrine this activity.

This elucidation is important because (historically and) conceptually speaking, public procurement has long been suspected of being a gloomy area for government activities. It means that a top-down explanation (from the principles to the norms or factual situation) can be given. This elucidation can also be made because the principles of equality, transparency and accountability have also been embodied in the public procurement laws. This embodiment, arguably, is evidence of the principles of GPP. However, it should be admitted that the extent to which these principles have been embodied in one jurisdiction or another may vary. If the

principles of GPP are exercised in a certain context (leading to certain problems which will be seen in later chapters), then this approach can be called a GPP approach. The summary findings of the approach are as follows.

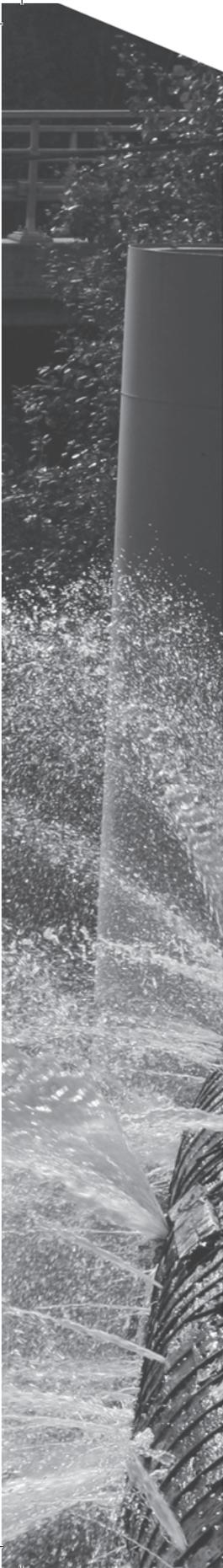
In the general legal context (such as human rights law and administrative law), the principle of equality stresses that everyone shall treat others equally and the administration shall perform its duties impartially. If the principle is violated, one shall be entitled to the equal protection of the law. In the context of public procurement, this principle can be specified further as the principle of equal opportunity and the principle of equal treatment. The principle of equal opportunity works more at the beginning - when the authority prepares the procurement document. The authority shall provide equal opportunity to bidders who can carry out the contract. The requirements set by the contracting authorities, therefore, shall be reasonable, proportional, justified, and shall not distort the competition. The procurement procedure shall also not distort the competition except it is justified legally. If the authorities conduct violation, then the bidders are entitled to equal protection and the protection may be provided either at the inside of the contracting authorities and (especially) at the court.

Slightly different from the above, the principle of equal treatment applies to the situation when the bidding proposals have been submitted by the bidders. The proposals shall be evaluated equally based on the same grounds. The principle of equal treatment also embraces the administrative review procedure. The contracting authority shall review impartially (shall not bias in reviewing) the objection and/or the administrative appeal lodged by the aggrieved bidders.

In the general legal context, the freedom of information has been considered as a human right. In a later development, the rights to access the documents have also been stipulated in various laws. In the most recent development, it has been discussed on the concept of openness, although it is still questioned whether openness has already been classified as a principle. In public procurement law context, openness can be seen more explicitly especially on the issue of the award notice. The notice shall be written in the simple and accessible language to ensure clarity. It shall also consider confidentiality to prevent bid rigging. For the sake of clarity, the notice should contain not only the symbol (numerical information (score)) but also the wording explanation about the meaning of the score, including the reason of the contracting authority giving the score. If the notice containing the decision is sent to a losing bidder, it should provide similar comparative information on the evaluation of the award winner. A procedure to have a fuller debrief shall also be provided, particularly in complex procurement.

The principle of accountability is useful to ensure that things are being done based on criteria that have been stipulated in advance. There are numerous fora, which may be utilised to protect this principle. This research, however, focuses on the legal accountability forum (provided by the judiciary). In general legal context, it is stressed that the access to the court shall be effective. The similar situation is also relevant for the public procurement context; the aggrieved bidders shall have effective access to the court which means, amongst other things, it has to be clear which court has the competence to deal with the dispute (the principle of accountability concerning on the clarity of accountability forum). Besides this, the remedies should also be available and the dispute must be resolved within a reasonable period (the principle of accountability concerning on the effective remedies).

All in all, it has been argued that there are five GPP principles determined by this research. These principles will be utilised to shed light on the fundamental problems stated in Chapter 1. It is essential to stress that this abovementioned argument does not necessarily mean that good public procurement principles are only contained five principles as such; the other principles such as effectiveness or respecting the environment may be counted as well. However, this research does not delve this matter. This chapter focuses on the formula to address the five fundamental problems mentioned in the earlier chapter.



Chapter 3

**Public procurement problems in Indonesia;
violations (of the principles) of good public
procurement**

3.1. Introduction

This chapter aims to demonstrate Indonesian public procurement problems dispersed in different public procurement phases, namely violations of the principles of good public procurement. The problems experienced here may refer to violations conducted by the administration, inadequacy of the regulations, or the undesired performance of the judiciary. These problems will be the point of departure from which to make legal comparisons, which will be explained in the following chapters.

This chapter consists of seven sections: an introduction, a conclusion, and between these five sections explaining the five violations found. The first discussion will be on the violation of the principle of equal opportunity (Section 3.2). Thereafter, a violation of the principle of equal treatment will be examined (Section 3.3), and a violation of the principle of transparency (Section 3.4). Finally, two sections are concerned with two different violations of the principle of accountability (Sections 3.5 and 3.6). In this regard, the first mentioned will focus on the inconsistency of the judiciary in deciding on the court's competence to deal with a dispute on public procurement. The latter will concern the unavailability of the remedies.

It may be questioned how these violations are to be detected. This question will be approached in the following means. A literature review was conducted before the field research in Indonesia was carried out. In doing so, problems in Indonesian public procurement law were detected. Following this, hypotheses regarding the problems during the stage of field research were tested. Some initial perceptions proved to be accurate, though it was necessary for other insights to be re-evaluated. During the field research, communication took place with public procurement practitioners (bidding participants, procurement officials, commitment officials, regulatory makers, etc.); interviews with anti-corruption activists and academics were conducted; and newspapers, journals, research reports, policy papers were studied, as well as many other relevant documents. In the early stages of the research process, it proved complex to assess whether situations would later prove to be problematic. Nevertheless, affirmation of such situations came in time, when a qualification of the situations was easier to determine. This became clear once a better understanding of the principles of good governance, the principles of good public procurement, administrative law and comparative public procurement laws had been gauged. In this chapter I will present the fundamental problems on Indonesian public procurement. In my view, the problems are related to the law and the implementation of the law.

The following structure will be applied in each section. At the beginning, information regarding the case studies will be provided. Following this, the good

public procurement approach stemming from the previous chapter will be described. By doing this, a finding relating to a violation of a certain principle can be provided in each section.

It is worth highlighting that the phrase 'case studies' in the previous paragraph should be interpreted broadly. It may not always refer to cases that have been decided by the courts. These also refer to the factual problems that were found during the field research. The factual problems are relevant if these have neither been addressed by the regulations nor by the judiciary.

The previous paragraph have made the reader aware of the fact that problems may be caused by the insufficiency of the regulations. In this introductory section, it is also relevant to note the fact that the Indonesian judiciary is still strengthening its capacity and aiming to reform its institutions. During the Soeharto dictatorship regime, the court decisions could not be accessed publicly. After the regime fell in 1998, the judiciary has been more willing to upload court decisions.²⁸⁰ However, some obstacles still occur regarding to the accessibility of the court decisions.²⁸¹ In order to deal with this lack of accessibility, on some occasions, reference has been made to a newspaper or to the official website of the legal enforcers. Besides this, it is also relevant to underline that the motivations of the court decisions are rarely addressed by the principle approach and the court decisions may be less coherent between one to another.²⁸²

Before addressing the main discussion, relevant information will be provided in this introductory section, which can offer a general description of public procurement law in Indonesia. After a brief history of Indonesian public procurement regulations, an explanation will be provided of the general content of the current public procurement regulations. Afterwards, information on the officials

²⁸⁰ See: Direktori Putusan Mahkamah Agung at <http://putusan.mahkamahagung.go.id/>, last visited 15 July 2016. Currently, the directory contains more than 1.8 million court decisions. This positive trend needs to be appreciated. However, it is also pivotal to underline the necessity of the judiciary to enhance the quality of search engine on this website; therefore, one may not face a situation like finding 'a needle in a haystack'.

²⁸¹ As it will be seen in the later discussion, there may be a delay on uploading a decision. Delay in here refers to 'years'. Thus, it may not always be possible to refer to the latest ruling.

²⁸² These may be caused by numerous possibilities. The capacity of the Indonesian judges to use multiple sources for legal reasoning has been undermined due to the past dictatorship effect on limited access on the relevant legal sources. In addition, the Indonesian jurists' belief to the idea that precedent is not binding because Indonesia is a civil law country. This idea is often sustained by the faulty allegation that common law countries are still characterised by the 'stare decisis' doctrine and Indonesia, as a civil law country, is not. See: Bedner, A. 2013. "Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions", *Hague Journal on the Rule of Law*, Vol. 05, Issue 2, p. 263-264. Presumably, the lack of coherence may also be triggered by the difficulty of the judges in accessing the court decisions.

involved in public procurement activities will be presented. The following discussion will centre on the procedure of public procurement. It will end with a brief summary highlighting the legal relationship between officials in public procurement procedures.

3.1.1. A brief history of the Indonesian public procurement regulations

The following is a brief explanation of the Indonesian public procurement regulations. As will be seen, there are two general remarks on public procurement regulations in Indonesia. First of all, these have never been regulated in any Act, but in presidential decrees or, more recently, in presidential regulations. The difference between these two will be discussed later. In addition, there is a general impression that decrees and regulations have been very dynamic; when the decrees and regulations were or are active, these have been amended on a couple of occasions.

The oldest public procurement regulation, which can be found is the Presidential Decree (PD) 18/1981 concerning the amendment of PD 14A/1980. The latter was a decree on the income and spending of the annual state budget. These regulations were repealed by PD No. 29/1984. The title of the decree remained unchanged: the implementation of the income and spending of the annual state budget. This regulation was in effect for a few years until it was repealed ten years later by PD 16/1994. This regulation also had the same title. This decree has subsequently been amended on a couple of occasions by PD 24/1995 and PD 08/1997.

PD 16/1994 and its amendments were repealed by PD 80/2003. The title of the decree has been changed in order to make it more specific, namely: guidance in implementing government procurement in goods/services. Unlike the previous decrees, this decree no longer dealt with the issue of the state's income; instead focusing on the mechanism for government spending. PD 80/2003 remained in effect for seven years and it was amended seven times in total during that period; once in 2004, twice in 2005, and four times in 2006. Concerning the second amendment, the type of regulation was changed from a 'Presidential Decree' to a 'Presidential Regulation' (PR). Since then, all amendments have been in the form of a PR. This changed due to Indonesia's Act 10/2004 on Creating Regulations.²⁸³ Article 56 and the explanatory memorandum to Article 54 of this Act explain the difference between a decree and a regulation. The former refers to a decision, which

²⁸³ The Act was repealed by Law No. 12/2011.

has a concrete and individual character, whereas the latter means that the regulation is of an abstract and general nature.

PD 80/2003 and its amendments were repealed by PR 54/2010. This regulation is still valid today, but four amendments have taken place almost on an annual basis. The first amendment took place in 2011 by means of PR 35/2011, and then PR 70/2012, PR 172/2014, and lastly PR 04/2015. The changes being implemented with every amendment may differ from one another regarding their substance. PR 35/2011, for instance, only provided for a minor change in regulating the more flexible procurement to acquire legal advisors for the government. PR 70/2012, however, introduced a significant change in many parts of PR 54/2010. Due to its relevance to the subject under discussion, the description in this chapter will mostly be based on PR 54/2010 and PR 70/2012.

To close the descriptive overview, it should be explained that the PR ranks fifth in the hierarchy of Indonesian regulations after²⁸⁴ (i) the Constitution, (ii) a Decision of the People's Consultative Assembly, (iii) an Act or what can be called a 'Government Regulation in Lieu of an Act',²⁸⁵ (iv) a Government Regulation. Legally speaking, the PR is created as a result of the authority of the President to clarify the promulgations determined by higher regulation(s) or to implement/regulate executive authority.²⁸⁶ This hierarchical information is relevant because by regulating public procurement in this form, the issue of judicial review cannot be included; the power of judiciary shall be regulated by an Act. This matter will be addressed later on in the section on accountability.

It is also relevant to underline that Indonesia has not ratified any international public procurement instrument. For instance, Indonesia and some other developing countries refused to ratify the World Trade Organisation's (WTO) General Procurement Agreement (GPA) because they considered that the GPA provides limited room for development measures.²⁸⁷ Moreover, Indonesia also gives

²⁸⁴ Article 7, Law No. 12/2011 on Creating Regulations. However, the PR ranks higher than the lowest ranking Indonesian regulation; the Local Regulation (at the Provincial, Municipality, or Regency levels).

²⁸⁵ A Government Regulation in Lieu of an Act (Perppu) refers to the authority of the executive to issue a regulation which has the same hierarchical ranking as an Act whenever the President considers that the country is faced with a compelling emergency. The Perppu must be approved by the DPR at its following session, failing which it will lapse.

²⁸⁶ Article 1 (6) Law No. 12/2011 on Creating Regulations.

²⁸⁷ Hsu, L. 2006. "Government Procurement: A View From Asia", Asian Journal of WTO and International Health Law and Policy, Vol. 1, p. 395.

preferential treatment to domestic suppliers or contractors.²⁸⁸ Indonesia is not bound by any multinational agreement. It is true that Indonesia is a member of the Association of Southeast Asian Nations (ASEAN), but, unlike the EU, the association does not have any agreement on public procurement.

3.1.2. A general overview of the current public procurement regulations

PR 54/2010 consists of 19 chapters. The first chapter concerns general regulations. In the following paragraphs, the terminology used will be explained. The scope of the implementation of this regulation is also explained for public procurement conducted by any public institution, which uses the annual state budget either at a central or local level. The public institution here refers to any public institution such as ministries, local governments in provinces, municipalities, regencies, secretaries general of the judiciary, Parliament, the state financial auditing body, or independent administrative bodies both at the central or local levels and even state-owned enterprises at the local or national level as long as they are financed wholly or partially by the state's annual budget.²⁸⁹ Following the normal usage in international terminology, a public institution will be referred to as a 'procuring entity.' This term is interchangeable with a 'contracting authority', which is recognised in EU public procurement terminology.

The following chapter concerns the values being implemented in public procurement. This embraces general principles of public procurement, such as being efficient, effective, transparent, open (open to any eligible interested economic operator which wishes to participate in the tender), competition, fair/non-discrimination, and accountability. This chapter also describes the ethics that must be adhered to, some of which include: avoiding and preventing conflict of interest, abuse of power, and ineffectiveness of government spending.²⁹⁰

The next chapter outlines the organisational structure of procurement. This chapter also describes the officials involved in public procurement procedures and their powers. These will not be explained here, as the matter will be discussed separately later.

²⁸⁸ Article 101 (1) PR 54/2010. Other developing countries which give preference to domestic suppliers or contractors are Malaysia, India, Thailand, the Philippines. See: Hsu, L. 2006. "Government Procurement: A View From Asia", *Asian Journal of WTO and International Health Law and Policy*, Vol. 1, p. 381-3.

²⁸⁹ Article 2 (1) and (2) PR 54/2010.

²⁹⁰ Article 6 PR 54/2010.

Chapter 4 explains the general plan for engaging in public procurement in one fiscal year.

In Chapter 5, a description of a special form of procurement (the so-called '*swakelola*') is included. It is planned, executed and/or oversighted by the procuring entity conducted the procurement or by another procuring entity.²⁹¹ It may also be planned, executed and/or oversighted by non-government organisation. If this occurs, in this author's view, the *swakelola* is to be considered more as a grant or subsidy to conduct community development.²⁹²

Chapter 6 explains the public procurement that is carried out by a supplier or contractor. Here the procurement procedure is elaborated upon. It starts with the preparation and ends with the handing over of goods or services from the party awarded the contract (a supplier or contractor) to the official who is responsible for attaining the procurement result at the procuring entity. A general description of the public procurement procedure will be given later.

Chapter 7 concerns instructions for the optimisation of national goods or services. The next chapter discusses the obligation to consider the possibility for small to medium-sized enterprises to participate in a public tender. Chapters 9 and 11 contain the issue of public procurement which is open to international economic operators (suppliers or contractors). In between those chapters, the rules on complying with public procurement which is financed by a grant or loan from a donor agency are explained.

Chapters 12, 13, and 14 contain the introduction to the concepts of green procurement, the electronic procurement, and the procurement in the defence sector. The following chapter concerns control, oversight, review mechanisms, as well as sanctions. The PR only deals with the administrative review mechanism within the procuring entity. It is silent on an administrative review outside a procuring entity and judicial review. These matters will be further discussed later in the section on the principle of accountability.

Chapter 16 deals with the strategy development of human resources within the procurement organisational structure. The three remaining chapters are

²⁹¹ LKPP. 2010. *Modul 8: Pelaksanaan Pengadaan Barang/Jasa Dengan Swakelola*, LKPP, Jakarta, pg. 8.

²⁹² *Swakelola* concerns a form of procurement, which, according to the efficiency and effectiveness criteria, shall be dealt with directly by the procuring entity which conducted the procurement, or another contracting authority, or by society. An example for the latest mentioned type is that *swakelola* on conducting reforestation operations in a remote area, for instance, it would not be efficient and effective if this were to be carried out by an economic operator; it is better if this is done by the local community who live close to the forest in question.

on miscellaneous issues. PR 54/2010 also contains an explanation and appendices, which provide additional detail and technical information. The PR comprises 660 pages.

3.1.3. The administration and the officials involved in public procurement

Realising that the aim of this chapter is to understand the underlying problems of Indonesian public procurement, and considering that these problems may be suitably described by explaining the administration of public procurement, this section will commence with an explanation of the officials involved in public procurement procedures. This information is essential in order to clarify 'who does what, when, and how' according to the law. The procurement administration will be the same in every public institution. According to PR54/2010, there are five officials involved in public procurement processes, namely:²⁹³ the budget user, the representative of the budget user, the commitment officer, the procurement committee, and the official responsible for achieving the results of the procurement. All of these officials have legal powers as discussed below.

According to Act 17/2003 concerning State Finance, the President as the head of government has the authority to manage the state's finances. This power is delegated: (i) to the Minister of Finance as the fiscal administrator; (ii) to other Ministers or any head of a public institution as the 'budget user' at his ministry or public institution;²⁹⁴ and, (iii) to the Governor, Mayor, or Regent as the head of local government. *The budget user* is defined more clearly in the PR as an official who bears the responsibility for using the allocated budget in a certain public body. This official has the power to:²⁹⁵ decide on the general procurement plan,²⁹⁶ appoint the 'commitment officer', appoint the 'procurement committee', appoint the 'official responsible for achieving the procurement results', decide on the award winner for a high-value procurement,²⁹⁷ decide on any dispute which may have arisen

²⁹³ Article 7 (1) PR 54/2010. In bahasa, it is called Pengguna Anggaran/Kuasa Pengguna Anggaran (PA/KPA), Pejabat Pembuat Komitmen (PPK), Unit Layanan Pengadaan (ULP)/Pejabat Pengadaan; and Pejabat Penerima Hasil Pekerjaan (PPHP), respectively.

²⁹⁴ Here, unlike the PR, the Act distinguishes between a public institution and a Ministry. In my view, a Ministry is one of the types of public institutions.

²⁹⁵ Article 8 (1) PR 54/2010.

²⁹⁶ In other jurisdictions, this is also known as a prior information notice ("PIN"): very general information on anticipated public procurement activities in a public body which is provided at an early stage of the government year.

²⁹⁷ High value here refers to above 100 billion rupiah (around € 6,475,000) for goods/services and above 10 billion rupiah (around € 647,610 euro) for consultancy activities.

between the commitment official and the procurement committee; and conduct general supervision.

The second official is called *the representative of the budget user*. According to the PR, this official may have the same powers as the budget user.²⁹⁸ Referring to Article 10(4), the extent of his powers depends on the extent to which the powers have been 'delegated' to him by the budget user. The PR does not clarify the meaning of delegation; however, according to the Government Administration Act, 'delegation' means "transferring the power and the responsibility from the higher institution/officer to the lower institution/officer".²⁹⁹ A scholar also explains that delegation means "the officer who has been granted the original power is authorised by the law to transfer (delegate) all or some of its power to another officer."³⁰⁰ After a transfer of power, the responsibility for exercising the power will be in the hands of the delegators.³⁰¹

The reason for delegating powers to the representative of the budget user is to ensure the effective supervision of the procurement processes. If the budget user considers that he will not be able to conduct effective supervision, he can appoint one or several representatives to do so.³⁰²

To provide illustration, in any ministerial structure the representative of the budget user may be appointed by a director general or a secretary general (a one-step structure below the minister). At the Ministry of Higher Education and Technology, for instance, the representative of the budget user is appointed by, *inter alia*, a secretary general, directorates general, and rectors at the head of public universities.

²⁹⁸ Articles 1 (6) and 9 PR 54/2010.

²⁹⁹ Article 1 number 23 Law Number 30/2014 concerning on Government Administration.

³⁰⁰ Nugraha, S. et al. 2007. *Hukum Administrasi Negara*, CLGS Universitas Indonesia, Jakarta, pg. 34-36. For a comparison with the Netherlands, see: Seerden, R and Stroink, F. 2007. "Administrative Law in the Netherlands" in Seerden, R.J.G.H. (ed), *Administrative Law of the European Union, its Member States and the United States*. Intersentia, Antwerp, p. 160.

³⁰¹ One may ask, why does not the PR accommodate the transfer of power by 'mandate'? According to the Indonesian law, 'mandate' is "transferring the power from the higher institution/officer to the lower institution/officer, but it does not include the transfer of the responsibility" (Article 1 number 24 Law Number 30/2014 concerning on Government Administration). Therefore, if the lower institution/officer makes wrong action(s) based on the transferred power, the higher institution/officer shall still bear the responsibility. Due to this consequence, the higher institution/officer may not opt 'mandate' to transfer its power in public procurement.

³⁰² Article 9 PR 54/2010.

The *commitment officer* is responsible for ensuring that the economic operator meets the objective of the aims of procurement.³⁰³ In practice, he is also called the project leader or *pimpinan proyek (pimpro)*. The PR states that the commitment officer has the power to prepare the plan for conducting public procurement. This refers to designing the specifications of goods/services, owner estimates, and a draft contract.³⁰⁴ The PR also stipulates that the commitment official has power to issue the award decision, to sign contracts, and to control the implementation of the contract.³⁰⁵

The next administrator involved in public procurement is the *procurement committee*. The committee is usually located in the procurement service unit. It is a permanent unit containing numerous procurement officials at each public body.³⁰⁶ The procurement committee has the power to prepare the procurement document.³⁰⁷ Also, it has powers to announce tender opportunities, to evaluate bidding proposals, and to answer bid protests (a review mechanism) at first instance.^{308 309}

The final official is *the officer responsible for achieving the procurement results*. It refers to an official who has the legal power to evaluate the procurement result by examining (checking) and receiving the goods or services as the output of the procurement.³¹⁰ In this respect, this official operates as a final check. If the results are what were intended in the contract, they will then be duly handed over.

³⁰³ Article 1 (7) PR 54/2010 in conjunction with PR 70/2012.

³⁰⁴ Article 11 (1) PR 54/2010.

³⁰⁵ Article 11 PR 54/2010. It is relevant to explain that in Bahasa Indonesia an award decision is called Surat Penunjukan Penyedia Barang Jasa (SPPBJ) or a letter for the appointment of the economic operator (supplier/contractor/consultant) as is promulgated in Article 85 (1) PR 54/2010.

³⁰⁶ Article 1 (8) PR 54/2010. However, small-scale procurement is conducted by a personal procurement officer. A personal procurement officer is in charge of conducting direct procurement, which is a simple procurement of small value (less than 200 million rupiah (approx. € 12,600 euro). Indeed, the latest revision of the regulation, PR 04/2015, determines that the personal procurement officer has three functions: to engage in direct procurement, direct appointment, and electronic purchasing. Article 1 (9) PR 54/2010.

³⁰⁷ Article 1 (21) PR 54/2010.

³⁰⁸ Article 80 (3) PR 54/2010.

³⁰⁹ Article 17 PR 70/2012.

³¹⁰ Articles 1 (10) and 18 (4) PR 54/2010.

3.1.4. The (legal) public procurement procedures

The above subsection has introduced the persons belonging to the administration of public procurement. Each official described above engages in certain tasks in the public procurement procedure. The procedure may differ between one procurement method and another. In essence, there are five procurement procedures: (i) an open tender, (ii) a restricted tender, (iii) a direct tender, (iv) a direct appointment, and (v) a contest.³¹¹

An *open tender* is a procedure in which any economic operator can participate as long as that operator meets the necessary qualifications.³¹² It can be implemented for many procurements from supplying computers to engaging in road maintenance, to give just two examples. In a *restricted tender*, only certain economic operators are invited to submit their bids. The invitation is based on their qualifications³¹³ for supplying 'sophisticated' goods/services or establishing sophisticated working constructions.³¹⁴ The procurement to build a new airport, for example, may only be dealt with by a high-grade economic operator. The procurement committee and the commitment officer may, therefore, call for applications from only certain economic operators listed on a so-called 'short list'. This list is based on an assessment carried out by the National Public Procurement Agency. A *direct tender* refers to the procurement process which does not make use of competition because the value of the procurement is below the thresholds which have been set.³¹⁵ An example of this would be the repainting of government offices or the purchasing of printers. A *direct appointment* means that the procuring entity invites one economic operator that is considered to be the most eligible operator to carry out a certain task.³¹⁶ It is required that negotiations take place between the procuring entity and the invited operator concerning the technical requirements and the price. A direct appointment will only apply in very restrictive circumstances, for instance: procurement in an emergency situation, procurement which can only be carried out by one economic operator (i.e. patents), procurement related to the

³¹¹ Article 35 PR 54/2010. This regulation uses the term 'methods' instead of 'procedures'. However, for the sake of consistency with the terminology used in other chapters, I will use 'procedures'. 'Methods' are used for the award criteria; the MEAT or the lowest bidder. See the discussion in section 2.4.

³¹² Article 1 (23) PR 54/2010.

³¹³ Article 74 (1) PR 54/2010.

³¹⁴ Article 1 (24) PR 54/2010.

³¹⁵ Article 1 (32) PR 70/2012. The thresholds are 200 million rupiah for the procurement of goods/construction work/other services (Article 17 (2) (h) 1) a)) and 50 million rupiah for consultation work.

³¹⁶ Article 38 (2) PR 70/2012.

issue of national security, etc.³¹⁷ Lastly, a *contest* refers to the procurement method for providing unique goods or carrying out unique services for which the price cannot be determined.³¹⁸ An example of this is a procurement to design a new logo for Pertamina, the Indonesian state owned enterprise in the oil sector.

The following discussion will focus on describing the open tender procedure. This has been chosen as it is the most used procurement procedure in Indonesia.³¹⁹ In essence, the procedures for the 'open tender' are *mutatis mutandis* for the 'contest'. The procedures in the 'restricted tender', however, are longer than in the 'open tender'. This may be the case due to the fact the procuring entity needs to engage in preliminary screening in order to determine which economic operators are eligible to participate in the tender. The procedures in a 'direct procurement' and a 'direct appointment' are shorter than the procedures in an open tender, because these two methods do not require a competition.

Returning to the discussion on the open tender, this procedure has six phases as described hereunder.

Phase 1: The budget user decides the annual (general) procurement plan for the institution (procuring entity).³²⁰ This refers to the plan for government spending in that institution. Thereafter, the commitment official follows up by creating a particular plan to explain detailed information on the desired output of the

³¹⁷ Article 38 (4) and (5) PR 70/2012.

³¹⁸ The PR explains the matter with two different terms, 'sayembara' and 'kontes'. The former refers to the procurement of services while the latter refers to the procurement of goods. See: Article 1 (29) and (30) PR 54/2010.

³¹⁹ Stemming from Articles 56 and 57 of PR 54/2010, an open tender is broken down into two technical procedures, namely: 'prequalification' and 'post-qualification'. Prequalification refers to the procedure which assesses the qualifications of economic operators before they submit their bidding proposals. With this, the procuring entity has a shortlist containing certain economic operators which are invited to submit their bids. The latter means that an assessment of the qualifications is conducted after the economic operators submit their bids. Any economic operators which comply with the necessary qualifications may submit their bid. This classification is indeed odd. If a tender is made by referring to the shortlist as in the prequalification, then it shall not be an 'open tender', but a 'restricted tender'. Realising this, the discussion on an open tender will here refer to post qualification, and not prequalification, and therefore the provided explanation is based on Article 36 (1) PR 54/2010 and Article 57 (1) (c) PR 54/2010.

³²⁰ Article 25 (1) and (1a) PR 04/2015.

goods/service(s).³²¹ ³²² The procurement committee then translates the plan by designing specifications for the goods/services, the qualifications of the economic operators, and other matters such as the timetable, owner estimates, the draft contract, and so forth. These are written in a procurement document.³²³

Phase 2: Announcing a contract opportunity. After the phase 1, the procurement committee announces the call for a tender and this call will be advertised for seven working days.³²⁴ The potential bidding participants shall register and obtain (download) the procurement document. This is possible commencing from the first day of the call for tender to one working day before the deadline for the submission of the bidding proposal.³²⁵ An explanation and a clarification of the procurement document (*'aanwijzing'*) can be made four working days at the earliest after the announcement of the call for tender.³²⁶ The bidding proposal can be submitted within one working day after the explanation while the time for submission shall close two working days after the explanation.³²⁷

Phase 3: Assessing the bidding proposals. After the submission of proposals, the procurement committee will evaluate these proposals and decide on the winner.³²⁸ The regulation is silent regarding the amount of time for the committee to make the assessment.³²⁹ However, logically speaking, the assessment should be made promptly. In deciding the successful bidder, the committee should be

³²¹ This phase occurs after the state annual budget has been agreed between the executive and legislature. See: Article 11 PR 54/2010. Indeed, in order to accelerate the absorption of the state annual budget, the revision of the regulation -PR 04/2015- enables the announcement of the tender opportunity to be conducted before the government budget obtains approval from the legislature. The procurement processes can be conducted, but the value of the contract can be modified whenever there is a difference between the initiation and the latest budget approved by the legislature. The procurement processes can also be set aside whenever the particular budget is not approved by the legislature. Article 86 (2) (a) PR 04/2015.

³²² Article 34 PR 54/2010.

³²³ It is relevant to explain briefly that the procurement regulation, the general administrative regulation, and even the literature in Indonesian administrative law are silent on clarifying the legal character of this kind of document. However, in the chapter on the Netherlands, this document can be challenged because it is an administrative decision which will influence the result of another administrative decision. I will discuss this further later on in this thesis.

³²⁴ Article 17 (2) PR 54/2010; Article 61 (1) (a) PR 54/2010.

³²⁵ Article 61 (1) (b) PR 54/2010.

³²⁶ Article 61 (1) (c) PR 54/2010.

³²⁷ Article 61 (1) (d) and (e) PR 54/2010.

³²⁸ Article 17 (2) (f) PR 54/2010.

³²⁹ Article 60 (1) PR 70/2012.

objective and its decision must be based on the award criteria in the procurement document as is explained in the first phase.

Phase 4: Announcing the awarding of the contract. The regulation states that “after the procurement committee has reached its conclusion concerning who shall be awarded the contract, the committee has to publish that decision on the website as well as on the official announcement board of the procuring entity.”³³⁰ The decision contains information on the operator awarded the contract and two economic operators that are eligible as alternatives to carry out the contract.³³¹ If the winner withdraws, an alternative operator may be granted the contract; priority will be given to the first alternative over the second. Additionally, although the law does not require this, the decision may also provide a list of the losing bidders. The issue of the awarding decision will be discussed further in the subsection on transparency.

Phase 5: A bid protest or the review mechanism.³³² The aggrieved bidder may lodge an objection to the procurement committee and carbon copies of the objection shall be sent to the commitment officer, budget user/its representative, and the inspectorate (the inspectorate will be explained separately at the end of the discussion on phase 5).³³³ Any objection must be submitted within five working days of the announcement of the award.³³⁴ The procurement committee shall reply to the objection within five days.³³⁵

If the aggrieved bidders are not satisfied with the answer they have received, they may request an appeal; the request shall be lodged with the head of the public

³³⁰ Article 80 (1), (2) (4) PR 70/2012. The announcement board is a board set up by a certain public institution and aims to provide information on the institution. It is usually located in a particular area which can be accessed publicly but is still housed at the offices of the institution.

³³¹ This is explained in the annex to the regulation. See for instance annex II-55 section ‘k’ on the procurement for goods.

³³² The PR uses the term ‘*sanggah*’ which can be translated into three legal terms as mentioned above. The first one is used more in the US while the others are used in Europe. There are actually two possible parties who may object against the committee decision: the aggrieved bidder(s) and the commitment officer. As the discussion will focus on the aggrieved bidder, I shall explain the objection made by the commitment officer in this footnote. The commitment officer may not be satisfied with the result of the evaluation of the proposal conducted by the procurement committee, so that the functioning of the committee may be in question. Whenever these two actors have a dispute, the budget user (or the representative of the budget user) will deal with this matter and give his decision on whether he agrees with the committee or with the officer (vide: Article 8 (1) PR 54/2010).

³³³ Article 81 (2) PR 54/2010.

³³⁴ Article 61 (1) (g) PR 54/2010.

³³⁵ Article 81 (3) PR 54/2010.

institution (i.e. the budget user) within five days from the time it receives the reply to the objection.³³⁶ The budget user shall reply to this request for an appeal within 15 working days after he has received the request.³³⁷ The reply may contain two possibilities. If the protest is justified, then the award decision shall be annulled, and the procurement process will recommence; however, if the protest is not justified, the procurement process will continue.³³⁸ The PR 70/2012 dictates that the request for an appeal can also be lodged with another official (for instance, the representative of the budget user), as long as he has been delegated to do so.³³⁹ If there is no objection, or if there is objection, but the procuring entity considers that it is not based on merit, the procuring entity (the commitment officer³⁴⁰) will issue a so-called 'letter appointing the supplier/contractor'.

According to the PR, "the appointing letter is issued within six days after the announcement of the award decision whenever no objection has been made, or after the objection has been replied to and the aggrieved bidder does not lodge an appeal."³⁴¹ If the aggrieved bidder lodges an appeal, the letter of appointment shall be issued within a maximum of two days after the appeal is replied to by the budget user.³⁴² The regulation is silent what must happen if the appeal is submitted to the court. According to a practitioner, in practice, although the aggrieved bidder lodges the complaint to the Court, the procurement process is continued, the appointing letter is issued and the contract will be concluded.³⁴³

The appointing letter is indeed different from the contract conclusion (which will be discussed in the next stage). Neither the regulation nor the literature explains why the regulation makes a distinction between 'the appointing letter' and 'the procurement contract'. It is, however, believed that the appointing letter may

³³⁶ Article 82 (1) PR 54/2010.

³³⁷ Article 82 (6) PR 54/2010.

³³⁸ Article 82 (7) and (8) PR 54/2010.

³³⁹ Article 82 (7a) PR 70/2012 states that the head of the institution can delegate this duty to an official at the first or second level whereas Article 82 (7c) PR 70/2012 states that this official must not be the commitment officer or the procurement committee.

³⁴⁰ Article 11 (1) (b) PR 54/2010.

³⁴¹ Article 61 (1) (h) PR 54/2010.

³⁴² Article 61 (1) (i) PR 54/2010.

³⁴³ A practitioner confirmed that the contract will be concluded if the procuring entity (procurement officials or budget user/representative of budget user) regard that the objection or appeal is not based on merit. This means that the contract will be concluded although the aggrieved bidder lodges the complaint to the court. Interview conducted with mr. AK by electronic means on 22 October 2016.

be used by the award winner to seek a letter of guarantee from the bank, as this is required for signing the contract.³⁴⁴

As will become evident in the section on accountability, there are numerous cases where aggrieved bidders have sought a judicial review whenever they still feel aggrieved. Nonetheless, PR 54/2010 indeed only explains the review mechanism within the procuring entity. The PR is silent on a review mechanism outside the procuring entity. This is believed to be so because the PR (Presidential Regulation) is not an Act; therefore, it cannot include the issue of judicial review due to the principle of the independence of the judiciary.³⁴⁵ This problem will be explained further in sections 3.5 and 3.6 concerning the principle of accountability: problems and violations.

Before moving on, it would be advantageous to return to the issue of the inspectorate as was mentioned earlier. After receiving the carbon copy of the objection, the inspectorate may conduct a further examination.³⁴⁶ Nonetheless, the result of the examination shall only be reported to the budget user; 'the report may be passed on to the legal enforcers only after obtaining approval from the head of the institution (the budget user).'³⁴⁷ Therefore, this can be interpreted to mean that the PR considers the inspectorate to be a unit, which gives advice to the budget user on the protest. This unit is not directly involved in the public procurement procedure, and will therefore be explained separately. It is worth highlighting the public perception of this unit. Due to its dependence on the budget user, the inspectorate is perceived as being 'a tiger without teeth.'³⁴⁸ Although this

³⁴⁴ See the draft example of the appointing letter at: Pengadaan, 17 September 2014, "Draft Surat Penunjukkan Penyedia Barang/Jasa" ("Appointment Letter Draft for Supplier or Contractor"), available from: <http://www.pengadaan.web.id/2014/09/draft-surat-penunjukkan-penyediajasa.html>, last visited 5 May 2016. See also: Appendix II of PR 54/2010, p. 58.

³⁴⁵ Wibowo, R.A. 2015. "Masukan Untuk RUU PBJ: Mendesain Peradilan yang Efektif Untuk Melayani Sengketa Pengadaan (Suggestions for a Public Procurement Bill: Designing an Effective Judicial Mechanism to Deal with a Procurement Dispute)", *Jurnal Pengadaan*, Vol. 4, No. 1, p. 82-95. Available from: <http://www.lkpp.go.id/v3/#/read/4132>, last visited 19 April 2016.

³⁴⁶ Article 117 (3) PR 54/2010.

³⁴⁷ Article 117 (4) PR 54/2010.

³⁴⁸ It is a common secret in Indonesia that the public are doubtful about the role of the inspectorate in conducting effective oversight. According to a director general at the Ministry of Homeland Affairs, this is because the chief inspector is elected by and responsible for the head of a public body; therefore, when the wrongdoers are named at the instruction of the head of a public body, the inspector will generally remain silent. See: Sindo, "Titik Tekan Korupsi di Daerah (Corruption sectors at the decentralised level)", at: <http://nasional.sindonews.com/read/892677/13/trik-tekan-korupsi-di-daerah-versi-kemendagri-1408392550>, last visited 14 September 2015. I met one of inspectors working at a Ministry of Farming Affairs during my field research in 2013. He admitted that on many occasions he is not allowed to be critical in evaluating public procurement

information is important, it is not necessary to expand the discussion on this subject any further as the focus of this research is not on the inspectorate. I would, however, encourage other researchers to examine the issue.

Phase 6: Contract is signed and implemented. The procurement contract shall be signed within 14 days of the appointing letter being issued.³⁴⁹ After this, the award winner will provide the goods or services as required. Then, the supplier/contractor is required to hand in the result of the work to the official responsible for ensuring the result of the procurement. This official will check and examine the quality of the work. Indeed, this phase will not be discussed any further, as the discussion is more concerned with private (contract) law. As has been explained in Section 1.2, this research concerns the phase starting from the stage of preparing the procurement document to the stage before the contract is concluded (signed). Therefore, this research encompasses the discussion on administrative review and judicial review, which take place after the award decision has been made (including the issue of remedies) as far as these reviews occur before the contract is concluded. It is also possible to embrace the discussion on the judicial review, which takes place after the contract is concluded; however the context of the dispute should be related to the administrative law, i.e. after the contract is concluded, an aggrieved bidder has realised that an infringement had happened at the pre-contractual phase.

After detailing the procurement procedure, the following explanation will elaborate on violations of the principles, which may occur during the different phases. There are two ways to provide an illustration of the problems. The first option is to provide the problems based on the sequence of the phases. Another option is to present the problems based on the sequence of the legal principles (equality, transparency and accountability). Realising that this research uses the perspective of the principle and considering the need to be coherent and consistent with the logic provided in chapter 2, the latter option will be employed.

3.2. The principle of equal opportunity: problem and violation

The following will provide some factual situations (i.e. the problems themselves). Afterwards, I will elucidate each problem based on the good public

complaints, because - according to his superior - the supplier or contractor who performs the contract is the desired winner determined by the Minister.

³⁴⁹ Article 61 (1) (j) PR 54/2010.

procurement approach utilised in this research. This elucidation leads to the finding that a violation of the principle has occurred.

The factual situation here refers to procurement documents, which contain unjustified qualifications and specifications. Stemming from the discussion in Chapter 2, 'unjustified' here refers to (i) the required qualifications of the economic operator, and (ii) the required specifications of the goods that obstruct competition and favour certain potential bidding participants. It will be highlighted that, although the interested bidding participant feels aggrieved with the procurement document, the participant has done nothing to protect his interest. This happens because the regulation does not enable him to challenge the procurement document. This may also be the reason why no court cases on the matter can be found. The unavailability of case law may be underpinned by the realisation that seemingly no one is aware that the bidding participants should have a right to ensure the prevalence of the principle of equal opportunity. Accordingly, the information gathered from the field interviews, and on rare occasions, the information obtained via news sources will be used.

3.2.1. Problem found and an analysis

The presentation of this section will be as follows. There are three cases ('situations') that will be discussed. Each situation will first be explained, before explaining the context and phase in which this occurs, as well as the actors who are involved. The section will then be concluded with a conceptualisation of the situations that violate the law and the principle of equal opportunity.

Case 1: Great Mosque in West Bandung Regency

This case concerns the procurement for constructing the Great Mosque in West Bandung Regency. It was a government project. Indonesia recognises six official religions and (some) of the places of belonging to those religions are owned and managed by the government. In its procurement document, the procurement committee set the required qualifications of the economic operators that were to participate in the tender. A scan of the procurement document can be found in the appendix A of this manuscript.

I obtained the procurement document from an aggrieved bidder. He informed me that the necessary qualifications for this procurement had been set

too high.³⁵⁰ In his view, the required qualifications should be the so-called certificate for general construction work. However, the qualifications required include other numerous certificates, such as certificate for constructing foundations, a certificate for roof construction, etc. He argued that the mosque should be categorised as an ordinary building; these high qualifications were irrelevant. He believed that the procuring authority had designed the procurement document so as to limit competition and to favour a particular bidding participant.³⁵¹

Having realised that this is a technical issue, which is beyond the expertise of a lawyer, I showed the procurement document to several procurement officials at a public body in East Java Province. After examining the document, they agreed that the requirements were overspecific. According to them, a mosque is not a sophisticated construction, so that the requirements stated in the procurement document were unnecessary.³⁵² They even claimed that if the procurement would have taken place at their institution, such detailed specifications would not have been appeared in the procurement document.

To provide greater insight in to the grievances of the unsuccessful bidder, I will further discuss my communications with him. He admitted that although he felt aggrieved, he had decided not to challenge the document. He thought it was better to find other tender opportunities at other public bodies. In my view, his decision may reflect various issues. He may have had a preference to compete in a fairer tender at other public bodies. This is a sound argument because citizens' trust in a public body tends to vary between one body and another. It is also possible that he might not have wanted to risk tainting his relationship with the procuring entity by challenging the document.

Nevertheless, I would like to emphasise another possibility, a legal argument that he and others may not have realised. To my mind, he could not have challenged the document, even if he would have wished to do so as the procurement regulation does not enable the interested bidder to challenge the procurement document. It is true that Article 24(3)(d) PR 54/2010 lays down that the procuring entity is not allowed to determine discriminatory criteria, requirements or procedures.³⁵³ As can be seen, the legislature uses different terms,

³⁵⁰ Interview with an aggrieved bidder, Yogyakarta, 13 April 2013.

³⁵¹ Interview with an aggrieved bidder, Yogyakarta, 13 April 2013.

³⁵² is based on an interview with a representative of the procurement service unit in one of the municipalities in East Java Province, Surabaya, 14 April 2013. Indeed, due to the sensitivity of the information, I will not clearly state and indicate which municipality I am referring to, because it would be an easy matter to discern who I was interviewing.

³⁵³ Article 24 (3) (d) PR 54/2010.

which had not previously specified. Arguably, this refers to the prohibition on setting discriminatory specifications and qualifications. However, the regulation does not grant the interested bidder a 'right to challenge' if the procuring entity infringes the regulation.

The PR does explain a mechanism that amounts to the possibility to request a further explanation (*penjelasan* or *aanwijzing*) concerning the procurement document.³⁵⁴ It is, therefore, possible for the interested bidder to ask for further or clearer information including the specifications or qualifications stated in the procurement document before he submits his proposal. However, the nature of the *aanwijzing* functions more as a request for clarification and not an objection against procurement document.

It is not possible for the interested bidder to challenge (or request a review of) the procurement document. The challenge mechanism is only possible for the award decision, and not for the procurement document. This may be so because Article of 81 (1) 70/2012 states:

"Tender participants who **have been handed** the document qualification or proposal (and) who feel aggrieved may, personally or together with other participants, request a review in writing, whenever they find: (a) a **violation of** the regulation or **procurement document** during the procurement process;³⁵⁵ (b) manipulation that affects unfair competition;³⁵⁶ (c) an abuse of authority by the procurement committee and/or other civil servants" (emphasis added).³⁵⁷

The first highlighted phrase "have been handed" has the consequence that a request for review is only possible for economic operators who (i) meet the qualifications, (ii) have submitted the proposals, and (iii) feel aggrieved with the proposal evaluation. In other words, a request for review does not favour the interested bidder. Moreover, if one looks at the second and third bold phrases

³⁵⁴ Article 57 (1) (c) PR 54/2010; this explains the open tender (post-qualification) procedure.

³⁵⁵ Violation here refers to two activities: a. it does not fulfil the requirement; and b. it does not follow the proper procedure. See: Explanation of Article 81 (1) (a) PR No. 70/2012.

³⁵⁶ A manipulation that can affect fair competition, for instance: a. making a specification which points to a particular product, except for spare parts; b. criteria to mark the evaluation are vague, and therefore this can lead to unfair and non-transparent marks; c. additional requirements which are beyond this regulation. See: Explanation of Article 81 (1) (b) of PR No. 70/2012.

³⁵⁷ The explanation of the regulation clarifies the term abuse of power by stating: "an intentional action which is conducted beyond its power conducted by a procurement authority holder, such as: the budget user (and its representative), the head of local government, commitment officers, and their supporting team and technical team." See: Explanation of Article 81 (1) (c) PR No. 70/2012.

above, 'a violation of... procurement document', it can be interpreted that the challenge mechanism should be argued by referring to the procurement regulations or procurement document. The procurement document is, therefore, understood as being more of a benchmark from which to conduct the review, and not as a decision that can be challenged.

The above illustration demonstrates a violation of the principle of equal opportunity. This principle refers to the widest possibility for economic operators to compete in public procurement, and whenever certain restrictions are laid down in the procurement document, then this should be justified legally and should not be intended to distort competition. This principle has been violated because whenever an infringement occurs, no legal mechanism can be used to ensure that this principle prevails.

Case 2: Procurement of goods at an independent administrative body

This information is based on an interview with a representative of an independent administrative body. He was an assistant of the commitment official; his duty was to design the specifications for the acquired goods. He warned me neither to disclose his institution nor the information on the goods.³⁵⁸ It would be possible to immediately recognise which institution is being discussed due to the nature of the goods as a particular item of machinery which is only utilised by his institution.

The representative informed me that his superior contacted him whenever he was drafting a procurement document. His superior informed him that "although all of us have to comply with the regulation, we should also follow the *kebijakan* of our superior". '*Kebijakan*' can be translated into English as 'policy'. However, 'policy' in this context refers to the polite terminology used to explain the circumstances. '*Kebijakan*' refers to the desire of the superior to favour a certain bidder. This means of communication is not unusual. On some occasions, Indonesian bureaucrats are likely to use polite terminology for illegal activities.³⁵⁹

³⁵⁸ This independent administrative body is situated in Jakarta; however, I met this officer in Utrecht, the Netherlands on 30 May 2013 and 24 April 2016. The name of the representative and his/her institution can be requested, and it will only be provided after the approval of the representative.

³⁵⁹ A researcher has noted that some judges at the administrative courts receive gifts from grateful parties after a favourable judgement. This is something that is prohibited according to the anti-corruption law. However, the judges refuse to consider this as a form of 'bribery' or 'gratification', but as a '*rezeki*', a Javanese term which means a sign of gratitude which cannot be refused. See: Bedner, A. 2001. *Administrative Courts in Indonesia: A Socio Legal Perspective*, Kluwer Law International, The Hague, p. 234-5.

The above statement from the superior was intended as an instruction that should be followed.³⁶⁰ The instruction was then interpreted as follows. The procurement document must be designed carefully in order to serve two objectives. First of all, the specifications or qualifications should be favourable towards the interested bidder who is the superior's preferred candidate. Secondly, the specifications or qualifications should comply with the regulation, so that they do not raise any suspicions from the other interested bidders or legal enforcers.

He explained that his colleagues were also given the same message. Each of them (the official responsible for commitment and his staff as well as the procurement committee) were contacted by their superior and each was briefed with the same instruction. The briefing took place one by one. Presumably, this occurred in order to emphasise the confidentiality of this activity.

In my view, the superior's above request is both irrational and illegal. It is irrational because it is not possible for the official to determine an objective procurement document if he has been previously asked to favour a certain bidder. It is illegal because substantively speaking the request contradicts Article 24(3)(d) PR 53/2010 which lays down that the procuring entity is not allowed to determine discriminatory criteria, requirements or procedures (discriminatory specifications or qualifications).

Regarding the above, it is worth underlining Article 81(b) PR 70/2012. This states that "a bid protest can be submitted whenever one finds specifications which point to a particular product, except for spare parts"; however, as has been argued in Case Study 1, the request for a review only concerns the award decision, and not the procurement document. Similar to the earlier case, I consider this illustration as a firm indication of a violation of the principle of equal opportunity.

Case 3: Scanner case at Jakarta Province

Unlike the above cases which are based on my personal interviews, the following case is based on an investigation by a highly reputable Indonesian

³⁶⁰ The representative confessed that he followed his superior's requests; however, he stressed that he is not like his other colleagues. He urged the bidder who would be declared the winner to submit his best proposal, so that the representative would not face any difficulty in finding a justification for awarding the contract to that particular bidder. He also claimed that he always refused a 'kickback': a certain amount of money from the economic operator who is awarded the contract. He was only willing to receive a legal payment from his institution for his role as the assistant of the commitment officer. I believe that his willingness to explain the above situation is a result of this particular attitude.

magazine. I consider this information to support my argument as was explained concerning my interviews in the two previous cases.

At the beginning of 2015, the police investigated the possibility of corruption in the procurement of an uninterrupted power supply (UPS) conducted by the Department of Education Affairs of Jakarta Province. The UPS case attracted the attention of Tempo Magazine so that it sent one of its journalists to conduct an investigation into the procurement processes at that Department. The findings are summarised as follows.

According to an interview with the supplier of computer equipment, he was warned by other suppliers not to participate in the tender at that Department due to its notorious reputation. According to the warning, the actual winner had already been predetermined even before the procurement process commenced. Nonetheless, the supplier insisted on participating in the tender to acquire scanners in 2014. He was then surprised to obtain a long list of qualifications stated as essential criteria to be eligible to compete in that tender. Some of the requirements were irrelevant. He explained that one of these was a certification of impact analysis on the environment (AMDAL).³⁶¹

Another supplier was interviewed to verify the above information. According to this supplier, making a long list of requirements is a strategy to obstruct tender participations from many bidders, so that it will be easier for the official to choose a winning bidding participant who has been connected with the officials at the procuring entity.³⁶²

I shall not repeat the regulation that prohibits the setting of irrelevant qualifications. Instead, I would like to underline that it is understandable if the interested supplier above felt aggrieved. Unlike in Europe, environmental considerations are less developed in the law of Indonesia. Therefore, this kind of certification is considered to be odd by these suppliers. In this respect, although the above information is based on a journalistic investigation, the information provided supports the two previous cases on the violation of the principle of equality. In addition, although the supplier felt aggrieved concerning the AMDAL qualification, he did not challenge the procurement document, and this may have been caused

³⁶¹ Majalah Tempo, "Arisan Perusahaan Seolah-olah" ("Bid rigging of the fake companies"), available from: <http://majalah.tempo.co/konten/2015/03/16/LU/147741/Arisan-Perusahaan-Seolaholah/03/44>, last visited 20 March 2015.

³⁶² Majalah Tempo, "Arisan Perusahaan Seolah-olah", available from: <http://majalah.tempo.co/konten/2015/03/16/LU/147741/Arisan-Perusahaan-Seolaholah/03/44>, last visited 20 March 2015.

by the unavailability of a mechanism to challenge (a right to request a review) the procurement document.

3.2.2. Normative framework and provisional finding

Three cases have been discussed above. It has been shown that the procurement document in each case was intended to hamper competition and/or to favour a certain bidding participant. In my view, the situation may not be suitable to be classified as the violation of the principle of carefulness or proportionality – the two relevant principles from the administrative law perspective. Rather, these should be regarded as violations of the principle of equal opportunity. The *modus operandi* which usually occurs in Indonesia is that the authorities set the (unnecessary) requirements to impose significant obstacles for the potential bidders. On the other hand, certain economic operators that are affiliated with the authorities may not face those difficulties because they obtain advance information from the authorities. The situation is exacerbated (and this is the concern of this point) because the procurement regulation does not provide for any legal mechanism that can be used by aggrieved interested bidders to challenge the procurement document. From a good public procurement perspective, this can be meant as a violation of the principle of equal opportunity.

3.3. The principle of equal treatment: problem and violation

In the following, information on the case described will first be provided. Thereafter the case will be elucidated with a good public procurement approach stemming from the previous chapter. With this, a finding in relation to a violation of a certain principle can be provided in each section.

The focus of the discussion will hereby centre on an (administrative) review within the procuring entity. It has been explained in Section 3.1 that the administrative review mechanism consists of two tiers: (i) an objection to the procurement committee, and (ii) an appeal to the budget user. Relating to the latter, the appeal may be dealt with by a representative of the budget user if the budget user has delegated this authority to him. An elaboration of the judicial review procedure will be provided in the section on accountability.

Below, cases will be highlighted which show that the budget user or the representative of the budget user is the person who orders his subordinates to engage in unequal treatment. Logically speaking, when the aggrieved bidder lodges the review mechanism (an appeal), the reviewer will not deal with this appeal objectively. These situations infringe the principle of equal treatment

because this principle not only embraces equal treatment when assessing and evaluating the bidding proposals, but also during the administrative review process.

3.3.1. Problem found and an analysis

Below are three cases concerning public procurement that have been dealt with by the so-called (special) court for handling corruption matters. However, I will illuminate the cases from the perspective of the principle of equal treatment. Not all of the cases are publicly available. If this has occurred, I will provide an additional explanation from the website of the legal enforcer or a reliable news item.

3

Case 1: Procurement of driving simulator

This procurement was conducted by the Directorate of Traffic Affairs under the National Police Department in 2010-2011. It aimed to acquire so-called 'driving simulators'. This equipment can help the police to evaluate the capability of applicants who apply for a driving licence.

To begin with, an explanation of the persons involved in the case will be provided.³⁶³ The Chief Department of Traffic Affairs as the representative of the budget user. The Vice Chief Department of Traffic Affairs as the commitment officer. Some of their subordinates at the Directorate were the procurement officers.

Long before the procurement took place, the representative of the budget user had communicated with a potential bidding participant, a director of PT CMMA. They discussed a strategy to ensure that the procurement contract for driving simulators would be awarded to PT CMMA, but without creating any suspicion.³⁶⁴ In order to do so, before the bid, the representative of the budget user

³⁶³ See: Sholih, M. 2013. "Becoming Head of Commitment Officer, Didik Never Obtained the Letter of Appointment" ("Jadi Pejabat Pembuat Komitmen, Didik Tak Pernah Lihat SK"). Metro TV. 11 June 2013. Available from: <<http://www.metrotvnews.com/metronews/read/2013/06/11/1/160510/Jadi-Pejabat-Pembuat-Komitmen-Didik-tak-Pernah-Lihat-SK>> last accessed 20 June 2012. See also: Sholih, M. 2013. "Driving Simulator Case, KPK re-examined Teddy Rusmawan" ("Kasus Simulator SIM, KPK Periksa Lagi AKBP Teddy Rusmawan"). Metro TV. 22 May 2013. Available from: <<http://microsite.metrotvnews.com/metronews/read/2013/05/22/1/155641/Kasus-Simulator-SIM-KPK-Periksa-Lagi-AKBP-Teddy-Rusmawan>>, last accessed 15 July 2014.

³⁶⁴ Ferdinan. 2013. "Teddy: Djoko Susilo instructed that the project has to be handled by Budi's company" ("AKBP Teddy: Djoko Susilo Perintahkan Proyek Dikerjakan Perusahaan Budi"). Detik. 28 May 2013. Available from: <<http://news.detik.com/read/2013/05/28/142501/2257997/10/akbp-teddy-djoko-susilo-perintahkan-proyek-dikerjakan-perusahaan-budi>> accessed 20 June 2013.

instructed the commitment officer to set the specifications for the machines, so that these specifications would be suitable for the equipment, which could be supplied by PT CMMA.³⁶⁵

The director of PT CMMA also convinced other companies to engage in bid rigging concerning the procurement. The other companies were asked to submit their bidding proposals, but their offers should be more disadvantageous than the proposal made by PT CMMA.³⁶⁶ In return, the other companies would be paid by PT CMMA. The purpose of this action was to create the impression that the tender was being conducted in a competitive manner. The court ruled on the case in 2013 and the officials involved were convicted.³⁶⁷

The above situation may be viewed from the perspective of anti-corruption law, but can also be seen from the perspective of a general principle. The order given by the representative of the budget user infringed the State Administration Act, which promulgates that the citizen has a right to obtain equal and fair service from state officials.³⁶⁸ Moreover, the explanatory memorandum to the PR explains two relevant principles, which must be implemented: (i) the principle of competition, and (ii) the principle of fairness/the prohibition of discrimination. The former principle is an instruction that “public procurement should be conducted in a fair competition (...) without any intervention which distorts the market mechanism.”³⁶⁹ The PR promulgates the latter principle as an instruction that “the procuring entity must provide equal treatment to the bidding participants”, and the

³⁶⁵ Mustholih. “Djoko marked up the price for simulator” (“Djoko Susilo Atur Harga Simulator”). 11 June 2013. Okezone. Available from: <<http://news.okezone.com/read/2013/06/11/339/820304/djoko-susilo-atur-harga-simulator-sim>>, last accessed: 20 June 2013.

³⁶⁶ Ferdinan. 2013. “Witness explained the manipulation in procurement of Driving Simulator” (“Saksi Ungkap Kong Kalikong Proses Lelang Simulator SIM”). Detik. 21 May 2013. Available at: <<http://news.detik.com/read/2013/05/21/174048/2252184/10/saksi-ungkap-kongkalikong-proses-lelang-simulator-sim>>, last accessed 20 June 2013.

³⁶⁷ Jakarta Appeal Court decision number 36/PID/TPK/2013/PT.DKI, dated 18 December 2013. This court sentenced the representative of the budget user, Djoko Susilo, to 18 years’ imprisonment and he had to pay a fine of one billion rupiah, he has also had to compensate the financial loss of 32 billion rupiah. See: “Jejak Kasus, Djoko Susilo” (“the Trace case, Djoko Susilo”), available from: <http://acch.kpk.go.id/djoko-susilo>, last visited 9 February 2015. In essence it upheld the district court decision which had first decided this case (48/PID.SUS/TPK/2013/PN.Jkt.Pst, dated 16 January 2014). This court had sentenced the person responsible for paying the bribe, Budi Susanto, to eight years’ imprisonment and to pay a fine of 500 million, as well as compensating the state for the financial loss of more than 17 billion rupiah. See: “Jejak Kasus Budi Susilo”, (“the Trace case, Budi Susilo”), available at: <http://acch.kpk.go.id/budi-susanto>, last visited 9 February 2015.

³⁶⁸ Article 9 (1) (b) Law No. 28/1999 concerning State Administration (which) Free from Corruption, Collusion and Nepotism.

³⁶⁹ Explanatory memorandum to Article 5 (e), PR 54/2010.

prohibition on “not providing favourable treatment to a certain bidding participant (...).”³⁷⁰ If, let us say, a similar situation occurred in a different case, but in this case the participants were not convicted, then the situation could be seen as a violation of the principle of equal treatment.

If the situation is viewed from a good public procurement approach, the order to favour a certain bidder (which then was followed up by the procurement committee with creating specifications that give advantages to that bidder) reflects a violation of the principle of equal treatment. It is indeed true that no request for a review (a bid protest) was made in this case. Nonetheless, logically speaking, if this would have occurred, the aggrieved bidders would not have been treated equally in the review mechanism.

Case 2: Procurement of Sewing Machines

The Ministry of Social Affairs conducted this procurement between 2005 - 2008. The aim of this procurement was to acquire sewing machines. The intention was that the machines would be distributed to the poor. Under the ministry’s programme to improve the economic conditions of the poor, the ministry encouraged them to be the makers of clothing and other apparel.

Before discussing the case itself, the persons involved in this case will first be discussed.³⁷¹ The Minister of Social Affairs was the budget user. The Director General for Social Security was the representative of the budget user. The commitment officer and the procurement committee were civil servants working under the Directorate General and were subordinates of the Director.

The position was as follows.³⁷² The budget user introduced the director of an economic participant (PT Lasindo) to the representative of the budget user. The representative of the budget user was then instructed by the budget user to ensure that PT Lasindo would be awarded the contract for the procurement of sewing machines. This was to be done by directly appointing PT Lasindo, without any tender competition, as the supplier of the sewing machines. The representative of the budget user then instructed the commitment officer and the procurement

³⁷⁰ Explanatory memorandum to Article 5 (f), PR 54/2010.

³⁷¹ The minister was Bachtiar Chamsyah, the director general was Amrun Daulay, the commitment officer was Amusdjaja Deswarta, and the head of the procurement committee was Wayan Wirawan. It is relevant to note that the procurement process was based on the previous regulation, Presidential Decree No. 80/2003 (“PD 80/2003”). The was the regulation before PR 54/2010.

³⁷² *KPK v. Bachtiar Chamsyah*, High Court Decision No. 22/Pid.B/TPK/2011/PT.DKI, p. 5, 7, 9-11).

committee to implement the order. Consequently, the committee granted the contract to PT Lasindo without any competition.

Under the Indonesian public procurement regulations this procedure is referred to as a 'direct appointment'. This enables the procuring entity to appoint an economic operator without conducting a tender; the procuring entity only needs to conduct negotiations regarding the technical quality and the price, so that the acquired goods/services meet the needs of a reasonable price.³⁷³ Nevertheless, this procedure is only allowed to take place in restricted situations, such as:³⁷⁴ in an emergency situation (like disaster management), in some defence procurements related to national security, in certain procurements which can only be carried out or supplied by the patent holder, etc. At the beginning, the procurement committee and commitment officer showed their hesitation to follow up the order. They knew that it is not permitted by law to apply this procedure. Nonetheless, the representative of budget user insisted to apply the procedure and instructed the committee and the officer to abide the order.

The court delivered its judgment in this case and the parties involved were all found guilty of having created losses for the state.³⁷⁵ However, from the perspective of a general principle in public procurement, the budget user's order was aimed at avoiding competition. It is true that no economic operator had ever submitted an objection and/or appeal in the above matter. Presumably, it was due to the fact that they did not realise that the situation was illegal, as there was no call for a tender and competition never took place. However, if an appeal had taken place, the appeal would not have been reviewed objectively by the budget user or by the representative of the budget user. This situation can be seen as a violation of the principle of equal treatment.³⁷⁶

³⁷³ Article 17 (5) Presidential Decree 80/2003.

³⁷⁴ Explanatory memorandum to Article 17 (5) Presidential Regulation 32/2005 concerning the revision of Presidential Decree 80/2003.

³⁷⁵ This case was heard by the Court of Appeal in Jakarta (see: Court Decision Number 22/Pid.B/TPK/2011/PT.DKI). This case was indeed reviewed by the Supreme Court and the original decision was upheld, with the punishment ordered by the Appeal Court even being increased (see: Supreme Court increased the sanction from 18 to 20 months' imprisonment. See: Tempo, "Bekas Menteri Sosial Bachtiar Chamsyah Bebas" ("Ex Minister of Social Affairs Released"), 25 November 2012. Available from: <<http://www.tempo.co/read/news/2012/05/25/063406066/Bekas-Menteri-Sosial-Bachtiar-Chamsyah-Bebas>>, last accessed: 10 July 2014). Nonetheless, as the Supreme Court decision has not been uploaded at the Supreme Court website, I shall therefore refer to the Appeal Court decision.

³⁷⁶ As the substance is about the wrong procedure, one may argue that it is the issue of the violation of the principle of carefulness. However, I qualify this case as the violation of the principle of equal treatment due to the intention systematic order to breach the law. The budget user and the representative of budget user had been aware with the limitation to apply direct procurement

Case 3: Procurement of the National Centre of Education, Training, and School for Sport

The Ministry of Youth and Sports Affairs conducted this procurement in 2011. It aimed to acquire a contractor to construct a national centre of education, training, and school for sport ('P3SON') in Hambalang, West Java.

The following officials were involved.³⁷⁷ The budget user was the Minister of Youth and Sports Affairs. The representative of the budget user was the Secretary General at that Ministry. The commitment maker was the Head of the Planning Bureau also at that Ministry. In addition, mention should be made of one economic operator (PT Adhi Karya); this company was subsequently awarded the contract.

The position was as follows. The Minister introduced his brother, Choel Mallarangeng ('Choel'), to his subordinates as the person who would assist him at the Ministry.³⁷⁸ It was a rather unclear statement; however, the intention may have been that the Minister appointed Choel as a 'middleman' to handle 'certain' matters.³⁷⁹ Later on, Choel was then involved in directing, or at least influencing, the public procurement process concerning P3SON.³⁸⁰ Together with the representative of the budget user, they met with a representative of PT Adhi Karya.³⁸¹ They agreed to support PT Adhi Karya in obtaining the contract for this procurement, and as a return this company had to give them a certain amount of

procedure, especially because the procurement committee and commitment officers have alerted them.

³⁷⁷ The Minister was Andi Mallarangeng, the Secretary General was Wafid Muharam, and the Commitment Maker was Deddy Kusdinar.

³⁷⁸ Supreme Court Decision 2427 K/Pid.Sus/2014, pg. 118.

³⁷⁹ There is a common perception in Indonesia that when a person holds a public position, he wants to be seen as an honest figure. He may not want to be directly involved in any illegal activities including receiving illegal funds. He therefore makes use of a middleman as his representative. If the illegal action is detected, he may easily deny his involvement. As his servant, his middleman will then usually take responsibility in order to protect his superior. In the context of a minister, the middleman is usually a personal secretary of the minister or a so-called 'asisten ahli' ('an expert assistant') of the minister. To strengthen this illustration of the middleman, one may consider a journalistic investigation which was recently conducted by Tempo Magazine. The investigation captured the role of middlemen in manipulating promotion at the Ministry of Villages, Development of Regions which are Lagging Behind, and Transmigration Affairs. See: Tempo Magazine, "Disposisi Sakti orang Dekat Menteri" ("Sacred Disposition from the Minister's Inner Circle), see: <https://majalah.tempo.co/konten/2016/03/21/NAS/150315/Disposisi-Sakti-Orang-Dekat-Menteri/04/45>, last visited 21 March 2016.

³⁸⁰ Supreme Court Decision 2427 K/Pid.Sus/2014, p. 58.

³⁸¹ The representative was the Head of the Division of Construction I of PT Adhi Karya, Teuku Bagus Mohammad.

money equivalent to 18% of the contract value.³⁸² The representative of the budget user appointed the commitment maker and instructed him to favour PT Adhi Karya. The commitment maker together with the procurement committee met with the workers of PT Adhi Karya to prepare the procurement document.³⁸³ Unsurprisingly, PT Adhi Karya was later awarded the contract.³⁸⁴

It is relevant to underline that the budget user, the representative of the budget user, the commitment officer, Choel, and the representative of PT Adhi Karya were found guilty by the court. However, for the sake of consistency with the discussion in this section, focus will be on the budget user. The budget user was found guilty because PT Adhi Karya had given him money via Choel, to the amount of 2 Billion rupiah and 5,500 USD.³⁸⁵

As has been discussed in earlier examples, this situation may not only be viewed from the perspective of anti-corruption law or from the perspective of competition law. This violation can also be seen as an infringement of the principle of equal treatment, because the contracting authority did not treat each bidding participant equally (but favoured a certain company). It is indeed true that the bidding participants had not objected or appealed in this case. Nevertheless, if they had requested an appeal, the budget user would not have reviewed the appeal objectively.

3.3.2. Normative framework and provisional finding

Three cases have been described in the above discussion which underline that the head of a public institution (the budget user or the representative of the budget user) had instructed his subordinates to favour a certain bidding participant. These cases illustrate that subordinates tend to follow orders. It may be true that, in the above cases, the bidding participants did not submit request for administrative review (object or appeal). Nonetheless, if they had done so, the objection and appeal would not have been assessed objectively. Therefore, the whole picture shows a violation of the principle of equal treatment, because this principle includes not only the phase of the assessment of the bidding proposals, but also the phase of the review mechanism. The distrust towards the review

³⁸² Supreme Court Decision 2427 K/Pid.Sus/2014, p.11, 35, and 58.

³⁸³ Supreme Court Decision 2427 K/Pid.Sus/2014, p. 12.

³⁸⁴ There was close assistance by workers from PT Adhi Karya in the procurement process; the procurement process only needed to declare that PT Adhi Karya was the winner. See: Supreme Court Decision 2427 K/Pid.Sus/2014, p. 14.

³⁸⁵ Supreme Court Decision 2427 K/Pid.Sus/2014, p. 118.

mechanism within the procuring entity may not be a major problem if the review mechanism outside the procuring entity functions effectively. However, the latter mechanism has its own problems as will be discussed in Section 3.6.

3.4. The principle of transparency: problem and violation

The structure of this section will be as follows. The factual situation that demonstrates the underlying problem will be analysed first. Thereafter, the problem based on the good public procurement approach will be elucidated. Then, it will be concluded that a violation of the principle has occurred. The factual problem here refers to the information explaining the award decision.

The procuring entity should explain why the contract has been awarded to a certain bidding participant. This is required in order to prevent a grievance by the bidding participant, and to promote trust towards the procuring entity. Providing this explanation may not be difficult in procurement on the 'lowest price method'; the procuring entity only needs to explain that the winner meets the requirements and offers the lowest price. However, if the evaluations are based on other methods (or in EU procurement terminology: 'award criteria'), such as 'quality' or 'on quality and price',³⁸⁶ then providing the information may be more challenging. The procuring entity should provide insight in to the assessment of the quality of the bidding participant.

In the following, three procuring entity explanations will be provided for procurement decisions to acquire a consultant which exercised award criteria based on 'quality and price'. No example of an award could be found that was based solely on quality. According to a head of a procurement committee, to the best of his knowledge he had never heard of any procuring entity that had ever applied an award criteria that was only based on quality.³⁸⁷ This information will not be dwelled upon, as it is more beneficial to clarify what is meant by an 'explanation'.

The PR lays down that the procuring entity utilises two documents in explaining the assessment result of the procurement.³⁸⁸ The first one is the 'award decision' and the other is the 'procurement evaluation report'. As is indicated by this terminology, the element of 'information' in the decision is less pronounced

³⁸⁶ Article 49 PR 54/2010.

³⁸⁷ A statement from a representative of the Ministry of the National Development Plan on 12 October 2015.

³⁸⁸ The information is located in the appendix to the regulation. According to Article 133 of PR 54/2010, the appendix should be seen as a unit which cannot be separated from the regulation. Consequently, it is legally binding just like the PR.

than in the report.³⁸⁹ The award decision should automatically be announced publicly without request. Slightly differently, the procurement evaluation report can only be requested after the award decision has been announced. The regulation does not specify who may request the report.³⁹⁰ Presumably, it can only be requested by the bidding participants. However, some procurement evaluation reports are published online. It seems that the regulation does not distinguish between transparency for citizens, for economic actors, or for individuals.

Realising that the report contains more information than the decision and considering that some reports can be accessed publicly, the good public procurement approach outlined in this research will be used to elucidate transparency for the report. This will afford insight in to whether the report can be considered transparent. Pertaining to this, it will be argued that although (i) the content information in the report is more extensive than in the decision, and (ii) the content of the report may comply with the regulation, the report is still not understandable. Whilst the evaluation of the price may be understandable, it is, in all examples, the case that the evaluation of quality is not provided in a sufficiently understandable manner.

3.4.1. Problem found and an analysis

The presentation of this section will be as follows. Two procurement evaluation reports will first be explained. A scan of these reports will be available in the appendix B of this manuscript. In each report, it will be argued that the information provided is not sufficient. In addition, it will be argued that from a good public procurement approach to transparency, it reflects a violation of the principle of transparency.

*The first example of a procurement evaluation report*³⁹¹

³⁸⁹ According to appendix IV A to the PR 54/2010 concerning the mechanism for selecting consultants, p. 102, the award decision must be published as soon as the assessment is completed and this shall contain at least contain: (i) the names and addresses of the bidding participants; (ii) their tax identification numbers; (iv) their final offers after corrections; (iv) a combination of the score between the technical score and the offer score. I will explain the content of the report later.

³⁹⁰ Appendix IV A of PR 54/2010, p. 106.

³⁹¹ Procurement Evaluation Report No. 116/ULP/Pokja/III/2015. Available at: <http://www.lpse.depkes.go.id/eproc/publicberitadetail.filedownload:download/313830323935353034373b31?t:ac=5624047>, last visited 16 Sept 2015.

This procurement was conducted by the Directorate General of Health Affairs under the Ministry of Health in 2015. The procurement aimed to acquire an economic operator who could be a consultant in a construction project to build a national neurology hospital in the eastern part of Jakarta. The ceiling budget ('the owner estimate') for this procurement was 1.8 billion rupiahs. The award criteria were based on quality and price, with the weight of each criterion being 80% and 20%, respectively. The 80% weight attributed to quality was composed of three sub-criteria, namely the company experience (10% (out of 80%)), an explanation of the approach and methodology for carrying out the task (40%), and human resources qualifications (50%).

Some 16 economic operators submitted their proposals. Before the competition was conducted, the operators had to pass two screenings: administrative requirements and qualification. The minimum mark for the qualification was set as 70. Pertaining to the first screening, only eight proposals satisfied the administrative requirements. Related to the second screening, only five out of the eight passed the minimum score for qualifications, and therefore these five economic operators were eligible to compete for the contract.

The information on the competition result was provided in the form of a table. The table showed the evaluation result of the operators. In each row, there was an explanation of the technical (qualification) score, the price score, and the calculation of these two scores based on the agreed formula: 80% for the qualifications and 20% for the price. At the end of the row, there was information on the final score attained by each company and the company's ranking in this tender competition. A company that obtains the highest score will always be ranked first. The second highest will be second in rank, and so on.

Let us take as an example the information on PT Arkonin, which was eventually awarded this contract. The table explains that PT Arkonin's technical (qualification) mark was 84.551 while the price mark was 98. If these two marks were multiplied by the formula of 80% and 20%, respectively, then this company had obtained the score of 67.6 for the qualification and 19.6 for the price. If these two are added together, then the final score for PT Arkonin was 87.24. As this was the highest score among other bidders, PT Arkonin was ranked in the first position. Information regarding the other bidding participants (PT Indah Karya, PT Pandu Persada, PT Artefak, and PT Griksa Cipta) was also provided in the table in the same manner. As a result of the assessment, the procurement committee then awarded the contract to PT Arkonin, mentioning its address, phone, tax identification number and the price proposed, which was 1.44 billion rupiahs. It was also explained that, after negotiations, the price agreed was reduced to 1.402 billion rupiahs.

It is relevant to check whether the information provided above meets the requirements determined by the regulation. The PR lays down 11 items of information which should be made available in the report, as follows:³⁹² (i) a list of the economic operators which passed the first screening, (ii) a list of the economic operators which passed the second screening, (iii) the evaluation result relating to the administration and qualification criteria, (iv) the price offered, (v) combination scores on qualification and price, (vi) the result of negotiations, (vii) the budget ceiling, (viii) elements which were evaluated, (ix) formula which were applied, (x) additional relevant information, and (xi) the date of the report.

The report fulfilled almost all of the above requirements, but it was less clear with respect to one requirement: point (viii). The PR is rather unclear as to the meaning of the phrase 'elements which were evaluated'. I have tried to seek further information based on the minutes of PR 54/2010 to the National Public Procurement Agency (LKPP) and obtained a reply that this was not documented. In my view, this phrase may refer to two possibilities. It may simply refer to the weighting criteria. However, it may also refer to not only the weighting criteria, but also the assessment result of the procurement officials based on the benchmark of the criteria. The above report has provided information on the weighting criteria, i.e. the company experience (10%), an explanation of the approach and methodology for carrying out the task (40%), and the human resources qualifications (50%). However, the report remains silent on the assessment result.

With regard to this, by referring to the Public Information Act two representatives explained that the assessment result of the weighting criteria will not be published in order to protect business data protection and the quality of the competition.³⁹³ This is understandable if the information provided is too excessive, or that it may infringe on intellectual property rights, or that it may allow for future coordination in order to engage in bid rigging.³⁹⁴

Although this argument does have some merits, the protection should, nevertheless, be balanced by the availability of the reasons for awarding the contract. It is certainly not sufficient to provide a technical score of '67.6' as provided above; it is not coherent how the score is composed by which sub-weights, how much it is in fact weighted, and the reasoning behind why it is weighted in this

³⁹² Appendix IV A to the PR 54/2010, p. 106.

³⁹³ A representative in Surabaya in 2013 and a representative at the Ministry of National Development Plan in 2015. Article 17 (b) Act 14/2008 on Public Information.

³⁹⁴ OECD, Policy Roundtables on Public Procurement, available from: <http://www.oecd.org/competition/cartels/39891049.pdf>, last accessed 27 March 2015.

manner.³⁹⁵ Moreover, it is not sufficient to only provide '19.6' as the price score. It is true that the regulation explains how the price score is calculated: the proposed price of a certain bidder is divided by the lowest price, and afterwards this result is multiplied by 20 (namely, the weight attached to the price). However, since the information on the lowest bidder has not been published, it is not possible to investigate the validity of this score.

It should be explained that no legal procedure exists allowing the bidding participants to seek a further explanation in order to understand the procurement evaluation results. When I explained the lack of transparency in the award decision to a representative, he disagreed. He said, "if the bidding participant wants to obtain a further explanation, he can submit a request for a review."³⁹⁶ Nonetheless, I am doubtful whether this is a desirable option due to the following reasons.

The nature of a request for a review takes the form of an 'objection'. It contains an allegation that the procuring entity has made an error; therefore, it may be perceived as a hostile mechanism. Due to insufficient information in the report, the allegation will not be based on the merits. In practice, officials at the procuring entity tend to have a cynical response towards such a request by retorting that the person making the request is simply envious because he is a losing party in the competition. On some occasions, the person responsible for submitting the request is accused of trying to disrupt the whole procurement process. On the other hand, some bidding participants may not always be interested in tainting their relationship with the procuring entity by submitting an objection; this could be considered a case of 'do not bite the hand that feeds you'. Thus, realising that the information provided in the report is still insufficient, and there is no mechanism to seek additional information without escalating the communication into an objection, the whole situation amounts to a violation of the principle of transparency.

³⁹⁵ I have communicated with three officials concerning their position on the procurement committee in three different public bodies, and also with the owner of a supplying company which usually participated in public procurement activities. I gave them the procurement process reports that I have provided in this thesis, and asked them whether they understood the report. They admitted that they were not able to do so. Communication with three representatives: from the Ministry of Religious Affairs; from the procurement service unit of a 'central' government institution situated in East Java Province; and from the Ministry of National Board Planning, 16, 18, and 21 September 2015, respectively. Also, an interview with a representative from a company supplying health equipment, 12 October 2015.

³⁹⁶ Representative from the Ministry of Religious Affairs, conducted on 16-18 September 2015.

*The second example of a procurement evaluation report*³⁹⁷

This procurement was conducted by the National Conservation Board under the directorate general for the sea, coastal areas, and small islands at the Ministry of the Seas and Fisheries in 2015. The procurement intended to acquire a consultant to prepare a feasibility study, a business plan, and a detailed engineering design for developing tourism on Padaido Island, Biak regency. The budget ceiling (the owner's estimate) was 1.68 billion rupiahs. The award criteria were based on the quality and the price, with the weight attached to each criterion being 80% and 20%, respectively. Unlike the above example, there was no explanation of the weight given to the sub-criteria for quality.

Before the competition took place, the operators had to pass through two screenings: administrative requirements and qualifications. The minimum score for the qualifications was set at 70. Five economic operators passed the first screening and three of these then passed the second screening and obtained a score higher or equivalent to 70. Therefore, these three operators (PT Transima, PT Padmaduta, and PT Aulia Sakti) competed for the contract.

Similar to the earlier example, the evaluation took the form of a table. Let us take as an example the evaluation result for PT Transima. It was explained that its technical score was 70.24. After this was multiplied by 80% (the weighting formula for a technical score), the result was 56.19. PT Transima offered the lowest price which was 1.59 billion rupiahs. As this was the lowest price, this company obtained a full score, 20, for the pricing criteria. If these scores were added, PT Transima's score was 76.19; it was the highest score among the three operators.

Relying on the assessment provided in the table, the procurement committee then awarded the contract to PT Transima and mentioned its address, tax identification number and the price proposed, which was 1.59 billion rupiahs. The report also explained that after negotiations were conducted, the agreed price remained the same.

For the sake of relevance, I shall not explain the 11 items of information that had to be made available in the report according to PR 54/2010. Instead, I will focus on the same point as discussed above: point (viii) related to the 'elements which were evaluated.' This report does not provide any information on the sub-weights attached to the technical score. Moreover, the report does not explain the assessment result of each sub-weight. The other bidding participants may logically

³⁹⁷ Available from: <http://lpse.kkp.go.id/eproc/publicberitadetail.filedownload:download/313434373237383231383b33?t:ac=3251218>, last visited 22 September 2015.

enquire how PT Transima could be given 70.24 as its technical score. What was this score composed of, and why did PT Transima deserve to obtain that score?

Similar to what was previously explained, the other bidding participants do not have a right to seek a further explanation in order to understand the procurement evaluation result. The only way of doing this is by submitting an objection, which, as considered earlier, may not be a desirable option. Hence, realising that the information provided in the report is still insufficient, and there is no mechanism to seek additional information without escalating the communication into an objection, the principle of transparency is violated.

*The third example of a procurement evaluation report*³⁹⁸

This was a procurement to acquire a consultant to propose the economic enhancement of villagers in Riau Province. It was conducted by the Administration and Economic Affairs Bureau, Riau Province, in 2013. The award criteria were based on quality (80%) and price (20%). The passing grade required the quality score to be above 60. However, there was no information about the weighting criteria with regard to quality, nor was there information about the ceiling budget (owner's estimate).

The report described four economic operators listed in tables. In a table explaining the quality assessment, the operators were listed according to their ranking as follows: PT Kreasi (91.53), PT Aulia (86.92), PT Azevedopratama (84.31), PT Shiddiq (83.04), respectively. In a table explaining the price assessment, the operators were listed exactly the opposite of the above. PT Shiddiq offered the lowest price (524.370 million rupiah) whereas PT Kreasi offered the highest price (560.120 million).

I will expand upon the case of the award winner, PT Kreasi. It was reported that its original quality score was 91.53; therefore, if this is multiplied by 80%, then the quality score was 73.22. It was explained that the price score for PT Kreasi was 18.72.³⁹⁹ Thus, the overall score for PT Kreasi was 91.95, which was the highest score among all the participants.

Focusing on the same point listed in a previous example (i.e. point (viii)) related to the 'elements that are evaluated', this report does not provide any

³⁹⁸ Available from: <http://lpse.riau.go.id/eproc/publicberitadetail/3459039;jsessionid=E26F7E295A0CDCDA823266DC99FC20E0>, last visited 22 September 2015.

³⁹⁹ It was obtained with the following formula: its proposed price is divided by the lowest price and then multiplied by the weight of the price (20).

information on the weight given to the sub-elements attached to the technical score. Moreover, the report does not explain the assessment result concerning each of the sub-weights. The other bidding participants may logically enquire how PT Kreasi could be given 91.53 for its technical score. What made up this score, and why did PT Kreasi deserve to obtain that score?

3.4.2. Normative framework and provisional finding

The above discussion has looked at some procurement process reports. The report can be requested by the bidding participants, and this contains more extensive information than the award decision. Although the report provides additional information, it is doubtful whether the bidding participants understand the reasons as to why the procurement committee has awarded the contract to a certain bidder. The committee does not always comply with the minimum amount of information, which must be published in the procurement process report. However, even if the report has indeed provided this minimum amount of information, it is likely that the bidding participants will remain unable to comprehend the report, as it does not fulfil the information which has been concluded in section 2.7. This may be so because the report provides an overall score without explanation of how it was constructed by its sub-components. In addition, the score is compiled based on numerical information without providing a wording description. Moreover, by law, the bidding participants are not entitled to ask for further information relating to the score. Hence, these situations violate the principle of transparency.

3.5. The principle of accountability (clarity on the legal accountability forum): problem and violation

The problems concerning the review mechanism within the procuring entity have been described in the section on the principle of equal treatment. In the following, the problems concerning the review mechanism will be illustrated, but this time reference will be made to situations outside the procuring entity. The 'outside' here refers to an independent administrative body and the judiciary.

At this stage, it is relevant to provide information on the organisation of the Supreme Court. The Indonesian Supreme Court has five chambers:⁴⁰⁰ criminal law,

⁴⁰⁰ Kepaniteraan Mahkamah Agung. 2015. *Road Map Reformasi Birokrasi Mahkamah Agung Republik Indonesia 2015-2019 (Road Map for Bureaucratic Reform at the Indonesian Supreme Court 2015-2019)*, Mahkamah Agung, Jakarta, p. 33.

private law, administrative law, religious law and military law. The criminal law chamber is divided into two sub chambers: ordinary criminal law and special criminal law. The same situation also occurs in the private law chamber; there are two sub chambers: ordinary private law and special private law.⁴⁰¹ The sub-chamber of special private law handles specific private law cases including fair competition. In the later explanation, it will be shown that there are different interpretations made by the ordinary private law chamber, special private law chamber, and administrative law chamber with regard to which legal accountability forum shall be applied in the procurement case. The judiciary fails to provide consistent decisions regarding the courts' competence, and this may also be caused by silence or by a lack of clarity in the regulations. Arguably, this situation reflects a violation of the principle of accountability.

3.5.1. Problem found and an analysis

The following will highlight some court decisions. The decisions are not consistent in clarifying which court has competence to deal with a procurement review. These indicate that the judiciary is confused when it comes to determining the competence of the legal accountability forum.

Situation type 1: cases submitted to an administrative court, where judges ruled that these must be instead reviewed by the civil courts

There are two cases that demonstrate this situation. The first one is a procurement case where health equipment had to be provided in Lebong Regency, Bengkulu. The case involved the following.⁴⁰² An aggrieved bidder lodged an objection with the procurement committee against an award decision. He received an answer, but was still not satisfied. He then submitted an administrative appeal to the budget user. Not being satisfied with the administrative appeal, he lodged an appeal with an administrative court in Bengkulu.

He argued that the object of the case was an administrative decision. According to Article 1(3) of the Indonesian Administrative Court Law an administrative decision is "a written decision issued by a board or administrative officer containing a legal action by the administration based on regulations, having

⁴⁰¹ Kepaniteraan Mahkamah Agung. 2015. *Road Map Reformasi Birokrasi Mahkamah Agung Republik Indonesia 2015-2019 (Road Map for Bureaucratic Reform at the Indonesian Supreme Court 2015-2019)*, Mahkamah Agung, Jakarta, p. 33.

⁴⁰² Administrative Court Decision No. 15/G.PLW/2011/PTUN-BKL.

the characteristic of being concrete, individual, and final, and resulting in particular legal consequences for a person or private legal entity". He requested the court to annul the award decision. The judges dealing with the case refused to accept this. According to these judges, this case should have been within the competence of the general courts because an administrative decision (the decision to award the contract) amounts to a series of government activities with regard to a contract; therefore, the decision should be categorised as a private law action. Additionally, the judges argued by referring to Article 2 of the Indonesian Administrative Court Act as follows. "All government decisions made in a private law action cannot be classified as an administrative decision." Stemming from this, the judges argued that the administrative court did not have the competence to deal with the case.

A similar example is a case determined by the Indonesian Supreme Court. There was a procurement process to find a contractor to construct the offices of the House of Representatives of Central Sulawesi Province. The plaintiff was a construction company, PT LGP, and the defendant was the Governor of Central Sulawesi Province and the Secretary of the Local House of Representatives. After passing the procurement mechanism, PT LGP was awarded the contract. However, at a later date, the decision was annulled because the procurement committee had calculated incorrectly.⁴⁰³ Then, the committee decided to recommence the procurement processes. With regard to this, PT LGP lodged an objection to the committee. As this company was not satisfied with the answer it received, an administrative appeal was submitted. PT LGP was then also not satisfied with the answers it received, and so the case was brought to the Administrative Appeal Court in Makassar. The court concluded that the claim by PT LGP was indeed valid. Nonetheless, after the defendant had lodged an appeal in cassation at the Supreme Court, the decision was overturned. The appeal court decision was therefore annulled. In addition, the Supreme Court ruled as follows; "Although the reason for submitting an appeal in cassation was valid, the appeal court was wrong in implementing the law. The object of the case is the decision which leads to a private contract under private law; hence, the administrative court does not have the competence to deal with this matter."⁴⁰⁴

⁴⁰³ First, the duration of the work exceeded the logic of the state annual budget. The project would be started in August 2007 and would be finished in April 2008, whereas due to financial accountability, the government should hand in the financial report at the end of December. It resulted in the project not being feasible. In addition, the committee made mistakes in the duration of the announcement. Instead of providing 14 days for obtaining the document and submitting the proposal, the committee merely provided 7 days. Lastly, the committee did not have a procurement certificate in order to carry out its duties. See: Administrative Court Decision No. 111 K/TUN/2008, see particularly p. 11-12.

⁴⁰⁴ Administrative Court Decision No. 111 K/TUN/2008, see particularly p. 25.

Situation type 2: case submitted to a civil court, where the judges ruled that such cases must instead be reviewed by the administrative courts

The following case demonstrates an opposite ruling to the two previous cases. The case was submitted to a civil court, but the judges determined that such cases must be reviewed by the administrative courts. The case concerned the procurement of lamps in Sampang regency with the following results.⁴⁰⁵ An unsuccessful bidder who felt aggrieved objected against the award decision with the procurement committee. Not being satisfied with the answer, he consequently submitted an administrative appeal to the budget user/its representative. Indeed, the regulation mandates that the appeal should be answered, and the procurement process should be halted.⁴⁰⁶ However, he did not obtain any response, and the procurement process continued. Faced with this situation, he decided to lodge a protest at the civil court in Sampang District. He submitted the case on the basis of Article 1365 of the Indonesian Civil Code. This article states that every unlawful act that causes damage to another person obliges the wrongdoer to compensate such damage. He requested that the court annul the decision of the award winner. Related to this, the judges considered that this case should have been dealt with by the administrative courts, instead of the civil court. The judges considered the award decision to fall within the category of an administrative decision. A suit for the annulment of an administrative decision should be within the competence of the administrative courts. Additionally, the court argued that the bid protest procedure and its appeal refer to a particular mechanism that is only recognised by administrative law.

Situation type 3: a review should first be conducted by the business competition and supervisory commission, and then it will be reviewable by the civil courts

While the above situation remains unclear, the commissioners of the Business Competition and Supervisory Commission (KPPU) interpret that the Commission has the authority to review a procurement dispute. It is relevant to explain the authority of the KPPU and then subsequently explain the above-mentioned interpretation.

⁴⁰⁵ District Court Decision No. 12/Pdt.G/2012/PN.SPG.

⁴⁰⁶ Article 82 (6) PR 54/2010.

According to the law,⁴⁰⁷ the KPPU is a commission established to oversee entrepreneurs in conducting their business activities; and to ensure that they do not conduct monopolistic practices and unfair business competition. It is laid down that the Commission is an independent institution, free from government or other party influence or power. This agency is independent and has various degrees of authority, i.e. receiving reports, conducting investigations, summoning entrepreneurs, deciding and determining the losses suffered by other entrepreneurs or the public; and imposing and administering sanctions on entrepreneurs who violate the provisions. It is relevant to explain that a decision by the KPPU can be appealed to the district court where the business enterprise is located.⁴⁰⁸ Whenever this occurs, the KPPU becomes a party against that enterprise. In addition, the district court decision can be appealed to the Indonesian Supreme Court,⁴⁰⁹ where the case will be examined by judges in the special private law chamber.

In later developments, the commissioners of the KPPU considered that their institution has the competence to deal with procurement cases by referring to Article 22 of the Indonesian Law on Banning Monopolistic Practices and Unfair Business Competition. This article concerns the prohibition on entrepreneurs conspiring with other parties to arrange and determine the winner of the tender, and causing unfair business competition. Based on this provision, the KPPU has interpreted that public procurement processes are business activities and an entrepreneur refers not only to bidders; but also to civil servants.⁴¹⁰ By this, the KPPU has expanded its jurisdiction from only supervising the private sector to also supervising public bodies. The KPPU's interpretation can be seen in the following two cases.

The first case concerned two contracting opportunities to increase the quality of roads in two different places in South Sumatra Province, from 2006 to 2008.⁴¹¹ The unsuccessful bidding participant, PT AM, believed that the committee

⁴⁰⁷ Article 36 Law No. 05/1999 on Banning Monopolistic Practices and Unfair Business Competition.

⁴⁰⁸ Article 1 (19) Law No. 5/1999; Article 2 (1) Supreme Court Regulation No. 3/2005.

⁴⁰⁹ Article 45 (3) Law No. 5/1999.

⁴¹⁰ Information on public procurement in Indonesia was gathered by the OECD in 2010. *Collusion and Corruption in Public Procurement*, Paris, p. 209. Although the document was issued by the OECD, it is believed that the chapter on Indonesia was prepared officially by the KPPU itself. This may be so because the OECD documents were gathered from roundtable meetings. Moreover, within that document there is also a power point delivered by Mr. Benny Passaribu, one of the commissioners of the KPPU (at that time), p. 435. An example of this argument can be seen in Supreme Court decision no. 796 K/Pdt.Sus/2010.

⁴¹¹ the KPPU's decision on this case: No. 24/KPPU-L/2007.

was extending unequal treatment in order to favour two companies, PT AAAN and PT CIA. The first mentioned company was awarded the first contract whereas the second company was awarded the second contract. PT AM submitted a bid protest, but it was not successful. This company then reported bid rigging by these companies and unequal treatment by the committee to the KPPU. The KPPU found that PT AM's claim was justified and therefore punished these companies and the committee. This decision was challenged before the Ordinary Civil Court in Central Jakarta. The court annulled KPPU's decision. The KPPU then requested an appeal in cassation before the Supreme Court as the final instance, and substantively speaking, in 2012, the Supreme Court agreed with the KPPU decision.⁴¹²

The second case is similar to above, but it occurred in Senggau Regency, West Kalimantan.⁴¹³ The case concerned an allegation that unfair business competition had taken place between the procurement committee (the first party) and the joint operation by PT CBGA and PT BPB (the second party), PT TM, PT GMP, and PT SK (the third, fourth and fifth party). After investigations and reviews, the Commission (KPPU) decided that there was a horizontal conspiracy between the second party and the third, fourth and fifth party to implement the fictitious competition. Also, there was also a vertical conspiracy between the second party and the first party. The first party had intentionally determined particular procurement requirements to ensure that the second party could easily be declared the winner. This requirement hence reduced the quality of the competition. The Commission settled this case by making three concluding decisions: *first*, all the parties were guilty; *second*, a fine of 651 million IDR (approx. 54,000 USD) would be imposed on the third party; *third*, the second, third, fourth and fifth party were prohibited from participating in a public tender for two years. This decision was final and binding as in 2012 the Indonesian Supreme Court ruled in favour of the KPPU.⁴¹⁴

From the above cases, it can be argued that the Indonesian Supreme Court, via the special private law chamber, has acknowledged the KPPU as an independent administrative body for procurement disputes. This means that aggrieved bidders must first submit their administrative appeal to the KPPU. If they still feel aggrieved, then they may then submit the case to the civil courts.

Nevertheless, other chambers of the Supreme Court have voiced their opinions in this respect. In a case decided in 2013, *CV Mumtaz v BNPB*, the Supreme Court Judges at the Administrative Law Chamber indicated that the administrative

⁴¹² Supreme Court Decision No. 247 K/Pdt.Sus/2012.

⁴¹³ KPPU decision No. 03/KPPU-L/2011.

⁴¹⁴ Supreme Court decision no. 390 K/PDT.SUS/2012.

courts have the competence to deal with public procurement case.⁴¹⁵ In contrast, in a case decided in 2012, *Ibrahim v Sabang Major*, the Supreme Court's General Private Law chamber dealt with an award decision.⁴¹⁶ Hence, it is safe to say that the Supreme Court has been inconsistent in deciding on competence in public procurement cases.

3.5.2. Normative framework and provisional finding

The above discussion has demonstrated the inconsistency in numerous court decisions (including the Indonesian Supreme Court) with regard to the competence to hear a procurement dispute. At times the courts have considered that the case must be heard by the civil courts, sometimes by the administrative courts, and sometimes that it must first be dealt with by the KPPU whose decision is then reviewable by the civil courts. Interpretations vary between chambers. In other words, the Indonesian judiciary has failed to decide which forum has the competence to deal with a procurement review outside the procuring entity. This failure may also be underpinned by the silence of the procurement regulations and the lack of clarity in the general regulations. It is a concern that this situation will trigger an undesired domino effect; the aggrieved bidders may submit the case to all of the forums outside the procuring entity: the Administrative Courts, the Civil Courts, and the KPPU. In this occurrence a number of difficulties could arise. All accountability forums may reject the case, inferring that the other forums should take responsibility. Alternatively, it could be the case that all forums decide to accept the responsibility for the case, and it will be confusing for the bidder to decide which decision should be followed. The overall situations amount to a violation of the principle of accountability.

⁴¹⁵ Supreme Court Decision No. 542 K/TUN/2013. Briefly speaking, this case concerned CV Mumtaz which challenged an award decision made by the National Board of Disaster Countermeasures ("BNPB"). CV Mumtaz claimed that, inter alia, the Administrative Court had competence to deal with this matter (p. 8-9). On this, BNPB replied that this case should be dealt with by the KPPU (p. 14-15). In its ruling, the Supreme Court delivered a decision in favour of the BNPB. However, the pertinent point is the fact that the Court dealt with the case; this implies that the Court acknowledges that the Administrative Court is the forum to settle this issue.

⁴¹⁶ See: Supreme Court Decision No. 3102 K/PDT/2012. In short, this case concerned Ibrahim who challenged an award decision by the procurement committee in the city of Sabang. He first submits the case before the administrative court, but it refused to hear the case as this belonged to the civil courts (p. 8). Ibrahim then lodged a case with the civil court where that court delivered a ruling in favour of the city of Sabang. After submitting an appeal and losing the case, Ibrahim lodged an appeal in cassation. The Supreme Court (general private law chamber) decided to deal with the case, although it delivered a decision in favour of the city of Sabang.

3.6. The principle of accountability (effective remedies): problem and violation

Similar to the previous elaboration, this section aims at highlighting the violation of the principle of accountability in the Indonesian public procurement system. However, the emphasis will be different as compared to the previous elaboration. Here, the focus will be on the unavailability of remedies. Remedies here may refer to: (i) interim relief (suspension), (ii) an effective procedure to obtain relief, and (iii) damages.

The discussion on the first and second point will elucidate the review mechanism outside the procuring entity, which only requests an annulment of the award decision. None of those requesting asked for a suspension.⁴¹⁷ This means that the procurement procedures continue during the judicial review (which may involve an examination by the court at the first, second or third instance). Consequently, when the court delivers its ruling, the procurement contracts may already have been carried out. This situation may provide a disincentive for aggrieved bidders to seek remedies. They may not be interested in any oversight of the procuring entity. For the third point, it will be shown that none of the cases discussed previously have ever requested compensation ('damages') because of the wrongdoing by the procuring entity. These reflect that the Indonesian public procurement system is not accustomed to the issue of (effective) remedies. This may be considered a violation of the principle of accountability.

3.6.1. Problem found and an analysis

To illustrate the problems, a well-known case on the procurement of electronic national identity cards ('e-KTP') will be discussed. An analysis of the regulation and the court decision will be provided. It will be concluded that the principle of accountability has been violated due to the unavailability of remedies.

⁴¹⁷ One should be careful in distinguishing between a standstill and a suspension. The Indonesian regulation actually does not recognise these two terminologies. I have borrowed them from the EU Directive on which I will elaborate further in the following chapters. A 'standstill' refers to some days off after the announcement of the award decision. It aims to give time to the bidding participants to allow them to understand the decision and/or to decide whether or not to challenge it. A standstill aims at facilitating the aggrieved bidder to conduct a merit objection or appeal within the public body as well as to prevent further losses if the procurement procedure is continued. Whenever the review mechanism takes place, the standstill mechanism is usually automatically extended. Similar to that, the 'suspension' mechanism is also about postponing the procurement procedure; however, it occurs in a review mechanism outside the public body (in the courts, for instance). This is to ensure that the public body does not continue the process while the legality of the decision is being examined. The elaboration will here focus on suspension.

The conclusion will also be supported by underlining the cases discussed in the previous section.

In 2011, the Ministry of Home Affairs aimed to modernise the Indonesian database system for identity cards. Any previous cards would be replaced by an electronic identity card. In order to do so, there was a procurement to acquire the necessary machinery and an adequate system. The machines would be distributed throughout the government sub-districts or villages (the lowest governmental structure in Indonesia). The machines were to record the biometric identity (a finger and retina scan) of citizens and to store the digital information in a national database system. Other machines located in certain areas would print the identity cards attached to an electronic chip on the inside of the card.

The procurement processes can be summarised as follows.⁴¹⁸ After conducting the call for tender, the submission of the proposals, and the evaluation of these proposals, the procurement committee announced the award decision. The period for objecting was from 22nd - 28th June 2011. Two aggrieved bidders submitted objections to the procurement committee; one lodged their objection on the 22nd while the other was submitted on the 28th. Therefore, these objections were submitted on time. Both of these objections were also answered on 28th June. As an answer was given, the next stages would then be the period for the appeal, which was from 29th June to 5th July 2011. These two aggrieved bidders lodged their appeals to the budget user on 5th July. The replies were provided separately, one bidder received a reply on 6th July while the other was on 11th July. However, later on, it surprisingly became known that the procuring entity had issued an appointment letter to select the supplier on 1st July.

Due to the latter aspect, the procuring entity was accused of infringing the procurement regulation.⁴¹⁹ The basis of this accusation was Article 82(4) PR 54/2010, "if the aggrieved bidder lodges an appeal, the procurement process should be suspended." However, the budget user replied to that accusation by referring to Article 85(1)(b) which states: "the procurement committee and the award winner can sign the contract if the objection or appeal has been found to be incorrect." As has been discussed in Section 3.1.2 with particular reference to phase five, an appointment letter can only be issued after the procuring entity has answered the

⁴¹⁸ Majalah Tempo, 26 September 2011, "Megaprojek Kartu Baru" ("Megaproject of the New Card"), available from: <https://majalah.tempo.co/konten/2011/09/26/LU/137834/Megaprojek-Kartu-Baru/30/40>, last accessed 4 May 2016.

⁴¹⁹ Majalah Tempo, 26 September 2011, "Proyek Besar, Ribut Besar" ("Big Project, Big Commotion"), available at: <https://majalah.tempo.co/konten/2011/09/26/LU/137832/Proyek-Besar-Ribut-Besar/30/40>, last accessed 4 May 2016.

request for an appeal.⁴²⁰ As this was not the case, it is conceivable to suggest that the procuring entity was hurried into issuing the appointment letter as a step towards the signing of the contract. Presumably, this was to discourage the aggrieved bidders from continuing with the review. This matter will not be dwelled upon as it is evident that the procuring entity breached the procedure, which has been laid down in the regulation. Instead, the following section will focus on the issue of the 'suspension mechanism'.

Unsatisfied with the answer to the appeal, the aggrieved bidders then reported the matter to the KPPU. While the examination process was taking place, the procurement procedure also continued. The award winner received a certain amount of money in return, millions of citizens have now been recorded in the system,⁴²¹ and many electronic identity cards have been produced and distributed to citizens. The KPPU determined, among other things, that the procurement committee and the commitment officers at the Ministry had colluded (or, to use the terms in this research, conducted unequal treatment) by supporting a particular bidder (i.e. the award winner) in obtaining the contract.⁴²² This was conducted by holding numerous informal meetings with that bidder without the knowledge of the other bidders.⁴²³ Furthermore, the committee allowed the bidder to refine the proposal despite the fact the time for submission ('post-bidding') had already expired.⁴²⁴ The commission was seemingly more concerned about the issue of fair competition, thus the commitment officer rushing to sign the contract was only mentioned briefly. One of the commissioners briefly stated: "it is a violation of PR 54/2010 because signing of the contract before a reply to the appeal had been provided; however, it does not necessarily mean that this is a violation of fair competition as laid down in the Law on Banning Monopolistic Practices and Unfair Business Competition".⁴²⁵

⁴²⁰ See my previous explanation in 3.1.2 on the law of the procurement procedure particularly in phase five.

⁴²¹ On 25 September 2012 the Ministry claimed that 85% of citizens had been recorded in the system. See: <http://www.jpnn.com/read/2012/09/25/140852/Perekaman-Data-E-KTP-Mencapai-85-Persen>, last visited 24 September 2015.

⁴²² The KPPU concluded that the contracting authority had manipulated the law (Decision No. 03/KPPU-L/2012. Available from: <<http://www.kppu.go.id/id/wp-content/uploads/2012/11/SALINAN-PUTUSAN-EKTP.pdf>>, p. 198 and 206, last visited 22 July 2014).

⁴²³ Decision No. 03/KPPU-L/2012. Available from: <<http://www.kppu.go.id/id/wp-content/uploads/2012/11/SALINAN-PUTUSAN-EKTP.pdf>>, p. 171.

⁴²⁴ Decision No. 03/KPPU-L/2012. Available from: <<http://www.kppu.go.id/id/wp-content/uploads/2012/11/SALINAN-PUTUSAN-EKTP.pdf>>, p. 170.

⁴²⁵ Decision No. 03/KPPU-L/2012. Available from: <<http://www.kppu.go.id/id/wp-content/uploads/2012/11/SALINAN-PUTUSAN-EKTP.pdf>>, p. 205.

Responding to the KPPU decision, the Ministry of Home Affairs appealed against the decision to the district court. The court ruled and delivered a decision overruling the decision of the KPPU. According to the court, the KPPU ruling was based on a lack of evidence.⁴²⁶ The KPPU responded to this by submitting an appeal in cassation to the Supreme Court (as this was considered to be an anti-competition case, it was heard by the special private court chamber).⁴²⁷ During the Supreme Court's examination, the Commission on the Eradication of Corruption (KPK) announced that it would start investigating the case due to indications of corruption.⁴²⁸ Months later, the Supreme Court delivered its ruling by endorsing the previous ruling made by the district court.⁴²⁹ Up until recently, there has been no further news on the investigation result conducted by the KPK.

Considering the above, there are three interrelated problems which have been identified. Seemingly, these problems have not been realised by the judiciary or the public in general.

To begin with, it can be seen that whenever the KPPU and the courts reviewed the case, the procurement procedure was not suspended. As a consequence, the procurement contract was carried out by the award winner based on the award decision which was questioned as to its legality. This situation may discourage aggrieved bidders as they then tend to lose interest in subjecting the procuring entity to an oversight mechanism (by reviewing the legality of the procuring entity's action or decision). Numerous court decisions which have been scrutinised in the previous section also exemplify this. Both the plaintiffs and the courts have been silent on requesting and discussing the suspension mechanism. It seems that the remedies have not been explained in public procurement regulation in Indonesia. It may be questioned whether non-public procurement regulations

⁴²⁶ I cannot find the decision by the district court, so that I must refer to the following news. See: Liputan6, 07 March 2013, "Kasus Tender E-KTP, Pengadilan Negeri Batalkan Putusan KPPU" (Procurement Case on E-KTP, Court Annulled the KPPU's Ruling"), available at <http://bisnis.liputan6.com/read/530050/kasus-tender-e-ktp-pengadilan-negeri-batalkan-putusan-kppu>, last visited 4 May 2016.

⁴²⁷ In the previous discussion, it has been explained that when the KPPU's ruling is reviewed by the judicial body, the KPPU will be a party.

⁴²⁸ KPK, 22 April 2014, "KPK tetapkan pejabat Kemendagri Tersangka E-KTP (KPK considers an official at the Ministry of home Affairs to be a Suspect in Electronic ID Card)", available from: <http://www.kpk.go.id/id/berita/siaran-pers/1816-kpk-tetapkan-pejabat-kemendagri-tersangka-e-ktp>, last visited 24 September 2015.

⁴²⁹ Supreme Court decision No. 55 K/Pdt.Sus-KPPU/2014, p. 169. This decision merely explains that the Supreme Court judges were satisfied with the argumentation provided by the judges of the district court. This statement is given without providing sufficient reasoning. The information on the district court was also not discussed.

could work to elucidate the matter. In my view, it is doubtful that the other regulations can shed light on the remedies issue. The following are my arguments.

Realising the unclear situation concerning the accountability forums outside the procuring entity, the discussion will focus on three fora: the administrative courts, the KPPU, and the civil courts. The suspension mechanism is recognised in the Indonesian Administrative Court Act.⁴³⁰ Nonetheless, this mechanism is not available if a request for a review is submitted to the KPPU. Also, it is doubtful whether this mechanism is recognised by the ordinary (civil) courts.

Indonesia is still using the heritage of the Dutch colonial regulations, namely: the revision of Indonesian Regulation; *Het Herziene Indonesisch Reglement* (HIR) which applies to people living on the Java and Madura Islands and the regulations for judicial system in the regions outside Java and Madura; *Reglement tot regeling van het rechtswezen in de gewesten buiten Java en Madura* (Rbg) which applies to people living on any other islands.⁴³¹ There is an article in the HIR and Rbg, which state: “A court decision which is not a final rule must be announced at the trial and this should only be written in the minutes.”⁴³² This provision has been consistently interpreted in practice as the availability of the interlocutory decision. This means that it is arguable that the suspension mechanism can be requested by means of an interlocutory decision.

Nevertheless, referring to the literature and considering communications with practitioners, the interlocutory decision is used to block the transfer of ownership of tangible goods, such as land, homes, cars, etc.⁴³³ Moreover, the

⁴³⁰ According to Article 67 (1) Act No. 5/1985 concerning the Administrative Court, “the suit does not delay or obstruct the administrative decision”. However, Article 67 (2) and (4) explain that the applicant may request the court to order the administration to suspend the process/implementation of the decision if the applicant can show very urgent consequence in the applicant’s interest whenever the decision is implemented.

⁴³¹ Indonesia has been preparing a bill on a civil procedure act. Direktorat Jenderal Peraturan Perundang-undangan, “Rancangan Undang-undang Hukum Acara Perdata (Bill on Civil Procedure)”, available from: <http://ditjenpp.kemenkumham.go.id/files/RUU/2005/RUUAcaraPerdata.pdf>, last visited 25 September 2015.

⁴³² Article 185 (1) HIR and Article 196 (1) Rbg.

⁴³³ It is explained in a literature that Indonesian civil procedure law recognises seizure/foreclosure (*sita jaminan*); an action of officer(s) under court of order to take into custody the property of a person whom a court has provided judgement to pay certain money to another. The existence of this judgement indicates the existence of the interlocutory decision. According to Article 227 HIR and 720 Rv, seizure can be requested to ensure that the ownership of the property is not transferred to anyone else. See: Harahap, M.Y. 2015. *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan (Civil Procedure Law: Lawsuit, Trial, Seizure, Evidence, and Court Decision)*, Sinar Grafika, Jakarta, p. 288-289, 292. This opinion is strengthened by my personal

interlocutory decision is usually requested in a purely private law case, where both the plaintiff and the defendant are private bodies;⁴³⁴ it does not occur between private persons versus a public body. This perhaps explains why no cases in which the suspension mechanism has been implemented in a procurement case have been encountered.

The second problem will now be considered. The E-KTP case and the previous cases illustrate that the court examination may take several years.⁴³⁵ Indeed, this is not restricted to the above case as, generally speaking, the justice seekers are keen to submit an appeal and an appeal in cassation.⁴³⁶ This situation gives rise to a dilemma. If the suspension mechanism is applied during the whole judicial review process, it will only protect the interest of the aggrieved bidders. However, it may ruin the government's spending plan and hamper the delivery of the goods and services needed by the government and society at large. This quandary may be dealt with by providing an effective judicial mechanism to implement the suspension mechanism and to deliver the ruling. Nonetheless, the Indonesian procurement regulations are silent on the matter. The general regulations may not provide any clarification, as is discussed in what follows.

communications with two advocates, the last communications were conducted on 13 November 2015.

⁴³⁴ It is indicated from the literatures which explain on various types of seizure. See: Harahap, M.Y. 2015. *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan (Civil Procedure Law: Lawsuit, Trial, Seizure, Evidence, and Court Decision)*, Sinar Grafika, Jakarta, p. 326-375. See also: Rasito. 2015. *Panduan Belajar Hukum Acara Perdata (Guidance to Study Civil Procedure Law)*, Pustaka Pelajar, Yogyakarta, p. 89-100. This indication is also strengthened by my personal communication with an advocate. In addition, based on the information provided in a prominent website on legal issue, Hukumonline, the term of interlocutory decision is recognised for patents, industrial designs, and so forth. It does not mention anything about the possibility to have an interlocutory decision in a dispute between a member of the public and a private body. See: Hukumonline, "Penjelasan Soal Putusan Provisi, Putusan Sela, dan Putusan Sementara" ("Explanation of provisional, interlocutory, and interim decisions"), available from: <http://www.hukumonline.com/klinik/detail/cl6260/penjelasan-soal-putusan-provisi-putusan-sela-dan-penetapan-sementara>, last accessed 13 November 2015.

⁴³⁵ Regarding this aspect, it is relevant to highlight a satirical comment in Indonesia in that waiting for a Supreme Court decision is like 'Waiting for Godot'. It refers to Samuel Beckett's play in which the character Godot never arrives; parties sometimes wait for up to ten years for official confirmation after a case has been decided. See: Pompe, S. 2005. *The Indonesian Supreme Court: A Study of Institutional Collapse*, Cornell Southeast Asia Program, p. 337. Pompe admitted that it is not his own opinion; he was inspired by a reputable magazine in Indonesia, Tempo, edition of 9 July 1983 and 25 May 1991. Nonetheless, his research confirmed this criticism. Regarding this, from my personal communications with legal practitioners, it is known that the current situation is likely to remain the same, although perhaps not for as long as ten years as was mentioned above.

⁴³⁶ Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP). 2010. *Pembatasan Perkara: Strategi Mendorong Peradilan Cepat, Murah, Efisien dan Berkualitas (Limiting the Case: Strategy to Accelerate Quick, Efficient Judicial Review on the Merits)*, LeIP: Jakarta, p. 9.

Similar to the previous structure, this section will deal with the situation at three accountability forums: the administrative courts, the KPPU, and the civil courts, respectively. The Indonesian Administrative Court Act acknowledges the accelerated procedure. According to the Act, “whenever the plaintiff has an urgent interest which may be concluded from its petition, the plaintiff can request the head of the court so that his case will be reviewed under the accelerated procedure”.⁴³⁷ This kind of procedure, however, is not recognised in the Indonesian Law on Banning Monopolistic Practices and Unfair Business Competition, the law which empowers the KPPU. In the case of the civil courts, the *HIR/Rbg* does not explain this matter; perhaps due to the fact that both Acts are out of date. It may be true that the Indonesian Supreme Court tries to prioritise cases which draw public attention;⁴³⁸ however, the possibility to prioritise a case does not necessarily mean that the accelerated procedure will be used.

The third problem is as follows; it is questioned whether the plaintiffs have a right to obtain damages in the situation in which the court subsequently rules in a final and binding manner that the award decision was illegal, but the contract has already been partially or fully performed by the award winner. The procurement regulation is silent on the matter. The general regulations are not always clear on providing clarification, as can be seen in the following.

Explaining the last issue of damages (compensation), the previous structure will once again be utilised by dealing with information based on the three accountability forums, the administrative courts, the KPPU, and the civil courts. According to the Indonesian Administrative Court Act, “a person who feels aggrieved by an administrative decision can lodge a written suit to request the annulment of the decision with or without compensation and rehabilitation”.⁴³⁹

⁴³⁷ Article 98 (1) Administrative Court Act No. 5/1985. In the following section, it also lays down that the court must rule on the case within 14 days. In the following article, it is also promulgated that an answer to this request should also be given within 14 days after the submission of the request.

⁴³⁸ Nevertheless, it is relevant to state that the Supreme Court tries to prioritize cases which draw public attention. See: Decision of the Head of the Supreme Court Chief No. 214/KMA/SK/XII/2014.

⁴³⁹ Article 53 (1) Administrative Court Act No. 5/1985. According to Article 53 (2) Law No. 5/1985 concerning the Administrative Courts, there are three reasons to lodge the suit: (a) the administrative decision infringes/contradicts the regulation(s); (b) in issuing the decision, the administration has used its power to serve a different purpose than the original purpose; (c) whenever the administration has carefully weighed all the interests, it will not reach a suitable decision. In the literature, however, it is explained that there are four reasons to lodge a case. The first three points are the same (although in the literature the explanation refers to the original references, such as *detournement de pouvoir* for point (b); the principle of reasonableness (*willekeur*) for point (c). The additional reason (unwritten law) if the decision infringes the principle of good governance. See: Indroharto. 1996. *Usaha Memahami Undang-undang Peradilan Tata Usaha Negara: Buku ke II (An Effort to Understand Administrative Court Act: Book II)*, Pustaka Sinar Harapan, p.172-179.

Thus, compensation is recognised at the administrative courts, although the amount of compensation may not be satisfactory.⁴⁴⁰ Turning to the KPPU, compensation is not recognised in its rulings, because the Indonesian Law on Banning Monopolistic Practices and Unfair Business Competition only acknowledges fines which have to be paid to the state, and not to the aggrieved bidder. Is compensation available under the Indonesian Civil Courts Act? Unlike the two previous issues, a remedy (“compensation”) is regulated by civil law: “every unlawful act that causes damage to another person obliges the wrongdoer to compensate such damage”.⁴⁴¹ Therefore, conceptually speaking, an unlawful action is seen as an action which infringes the regulation and causes a loss to (an-)other party, so that it enables him to seek compensation.⁴⁴²

3.6.2. Normative framework and provisional finding

It is doubtful that the Indonesian judiciary succeeds to provide effective remedies for public procurement disputes. Therefore, there is no mechanism for (i) suspension, (ii) an effective procedure to obtain a final ruling in a procurement dispute, and (iii) damages (compensation). This failure is supported by the silence of the procurement regulations and the lack of clarity in the general regulations. All these situations indicate a violation of the principle of accountability.

3.7. Conclusion

This chapter has discussed five problems in Indonesian public procurement that occur at the pre-contractual phase. It may be true the above discussion has embraced the award decision and even the review procedure towards the decision. Nonetheless, these are still classified as the pre-contractual phase because the contract has still not been concluded. Conceptually speaking, the contract shall be concluded if the award decision is not annulled by (i) the contracting authority itself due to the objection or administrative appeal, or (ii) the review body (either the administrative review body or the court).

⁴⁴⁰ Article 3 (1) of the Government Regulation 43/1991 concerning Compensation and its Implementation in the Administrative Courts explains that the minimum amount of compensation is 250,000 rupiahs (approx. 16.4 euro) and the maximum amount is 5 million (approx. 327 euro).

⁴⁴¹ Article 1365 Civil Code.

⁴⁴² Agustina, R. “Perbuatan Melawan Hukum (Unlawful Act)” in Agustina, R. et al, *Hukum Perikatan (Law of Obligations)*, Universitas Indonesia, Universitas Leiden, Universitas Groningen, Pustaka Larasan, Denpasar, 2012, p. 4-6.

Before highlighting the finding of the five problems, it is relevant to provide the general overview. The principle of equal opportunity has been violated because the interested aggrieved bidders do not have a procedure to access legal protection, which may be provided by the principle of accountability. The principle of equal treatment has been infringed whenever the contracting authority conducts impartial actions/decisions. It may be true that an action/decision may be corrected by giving the legal protection stemming from the principle of accountability. However, as may have been realised, this principle has not worked properly either in the administration (contracting authority) or in the judiciary. Besides this, the principle of transparency does not perform sufficiently due to the inadequacy of the regulation. As a consequence, any violation of the principle of equal treatment may be difficult to detect. In addition, logically speaking, the aggrieved bidders may have a low chance of success in seeking the protection of the principle of accountability; the claim of the bidder may not be based on merit due to the lack of information. The following explanations contain more detailed findings. In essence, when the problem discussed in each sub-section is elucidated by the good public procurement approach, it then can be concluded that each problem refers to a violation of a certain principle, either written or unwritten.

In Section 3.2, some examples have been provided in which the procurement document has been set up to hamper the competition or to favour a certain bidding participant. These may violate the procurement regulation, which determines the widest possibility for economic operators to compete in public procurement except if a restriction is legally justified. Nevertheless, the procurement regulation does not provide for any legal mechanism that can be used by the aggrieved interested bidders to challenge the procurement document. From a good public procurement perspective, this context can also be meant as a violation of the (unwritten) principle of equal opportunity.

In Section 3.3, three cases have been provided where the head of a procuring entity (i.e. the budget users or the representatives of the budget user) had instructed his subordinates to favour a certain bidding participant. These cases also demonstrate that the subordinates followed their orders.

Legally speaking, the bidding participants may pose a request for the administrative review namely objection (reviewed by the procurement committee) and administrative appeal (handled by the head of public body (the budget user/its representative)). Arguably, if the participants had requested review, it would not have been impartially handled. This is because the official who evaluates the administrative appeal is the same person who instructed the procurement committee to favour one bidding participant. As the principle of equal treatment embraces not only the phase of the assessment of the bidding proposals, but also

the phase of the review mechanism; therefore, in this setting, this situation can be considered a violation of the (written) principle of equal treatment. It may be true that this could be resolved if the judicial review performs well. However, as will be concluded below, the judicial review has its problems.

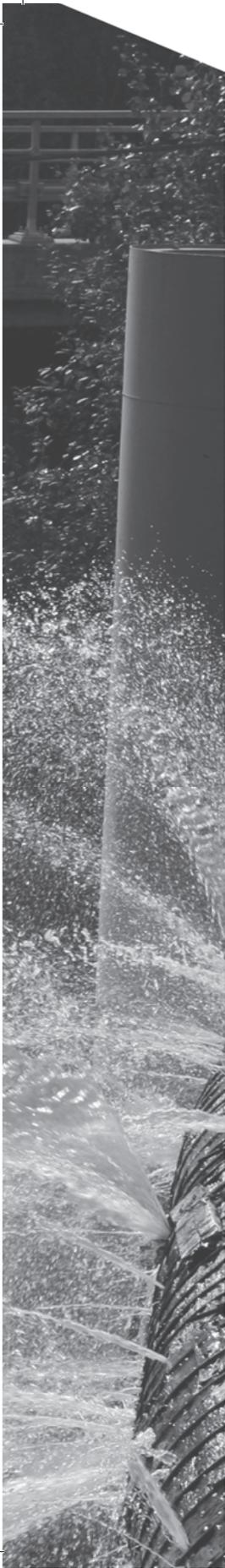
Section 3.4 offers explanation of information derived from documents so-called 'procurement process reports'. These reports contain more information than the award decision, which can be requested by the bidding participants. It has been questioned whether the bidding participants are able to understand the reasons as to why the procurement committee has awarded the contract to a certain bidder. This happens because the committee does not always comply with the minimum information that has to be published in the procurement process report. The 'minimum information' refers to eleven items of information, as explained in Section 3.4.1. Legally speaking, if this situation happens, the aggrieved bidders are entitled to seek legal redress via an administrative or a judicial review by arguing that the (written) principle of transparency has been violated. Nonetheless, although the aggrieved bidders obtained a favourable decision from the review which order the procuring entity to comply with the minimum information, it remains doubtful whether the bidding participants can understand the report. This occurs because the regulation on the minimum information does not require the procuring entity to provide an overall score with explaining how the score has been constructed from its sub-components. The regulation also does not require the entity to provide a (comparative) wording description for the numerical information (score) given. Furthermore, the regulations also do not provide a mechanism for debriefing (to request further information about the score). Hence, it can be said that a violation of the (unwritten) principle of transparency occurs under the circumstances.

Section 3.5 has highlighted the problem of the Indonesian judiciary to determine which forum has the competence to deal with a procurement review outside the procuring entity. Sometimes, the Supreme Court is of the opinion that the case must be dealt with by the civil courts while at other times it has determined that the administrative courts are competent in this respect. On other occasions, the Supreme Court has been satisfied with the KPPU dealing with a procurement review at first instance in which case the KPPU decision is reviewable by the civil courts. The failure to decide on the forum may also be caused by the silence of the procurement regulations and the lack of clarity in the general regulations. Therefore, that condition amounts to a violation of the (unwritten) principle of accountability.

The last section has underlined the problem, which occurs in the Indonesian judiciary to provide effective judicial protection in public procurement disputes.

The protection especially refers to the availability of remedies, such as: (i) a suspension mechanism, (ii) an effective procedure to obtain a ruling on the procurement dispute and (iii) damages (compensation). Just as in the previous section, this problem may also be underpinned by the silence of the procurement regulations. Unfortunately, the general regulations are not always clear to elucidate the matter. It is questioned whether the Indonesian Civil Procedure Code recognises the first and second types of remedies. However, the Indonesian Civil Code does acknowledge the third type of remedies. On the contrary, the Indonesian Administrative Court Act may give light on all the matters, as this Act embraces three types of remedies mentioned above. Nevertheless, as the situation remains unclear which court has the competence (and therefore which law shall be applied), it can be argued that these contextual situations reflect the violation of the (written and unwritten) principle of accountability.

The elaboration in Chapter is hereby brought to a close. In Chapters four and five, an examination of whether the above problems also occur in the compared countries will be undertaken, encompassing an analysis of how these countries attempt to curb such problems. In the Chapter six, a number of comparative remarks will be made before elucidating upon the lessons learned which can be acquired.



Chapter 4

**Public Procurement in the Netherlands;
protection (of the principles) of good
public procurement**

4.1. Introduction

This chapter aims to examine whether the five fundamental problems in Indonesia also occur in the Netherlands. It can be analysed by examining whether the law, the administration, or the judiciary in the Netherlands is in line with the normative framework as concluded in Section 2.7. As it has been restricted at the Chapter 1, the elaboration will concentrate on the pre-contractual phase, starting from the preparation before the contract is signed and then looking at the phases, which exist under administrative law.

This chapter will consist of seven sections: an introduction, a conclusion, plus five sections explaining how the selected principles are dealt with. The first discussion will be on the protection of the principle of equal opportunity (Section 4.2); thereafter, the protection of the principle of equal treatment (Section 4.3); and then the protection of the principle of transparency (Section 4.4). The remaining two sections will discuss the protection of the principle of accountability; Section 4.5 will explain the clarity of the legal accountability forum, whilst Section 4.6 will elaborate on the availability of effective remedies.

The following structure will be applied to each section. To start with, the reasons for discussing the matter will be provided. Thereafter, an explanation will be provided as to how the Netherlands implements the legal principle in question by discussing the procurement regulations, general regulations and the case studies. Subsequently, an analysis will be provided as to what is actually meant by a good public procurement approach. The case studies will not only refer to decisions issued by the judiciary, but may also refer to advice issued by an independent administrative body.

Before entering into the main discussion, in this introductory section relevant information giving a general description of public procurement law in the Netherlands will be provided. The sequence of this explanation will be as follows. Firstly, a brief history of Dutch public procurement regulations will be provided. Then, the general content of the current public procurement regulations will be explained. Afterwards, information on the administration of public procurement activities will be presented. The following discussion will be on the procedure of public procurement.

4.1.1. A brief history of the Dutch public procurement regulations

The first public procurement regulation in the Netherlands can be found in the form of a Royal Decree from 1815 stipulating that works and supplies contracts

above 500 guilders in value had to have been procured publicly.⁴⁴³ Therefore, arguably, procurement took place in an open and competitive manner.⁴⁴⁴ In 1927, there was the so-called *Comptabiliteitswet* (public expenditure 'Government Accounts Act'). In essence, it reiterated the royal decree, but increased the threshold to 2500 guilders.⁴⁴⁵ After World War II, government attention to the needs of public procurement regulation increased.⁴⁴⁶

Since 1971 EU Directives have influenced the Dutch procurement regulations. The regulation of procurement for the central government and for lower levels of government was recognised. The regulations on the former were the *Besluit aanbesteding van werken* (BAW) 1973 and *Uniform aanbestedingsreglement* (UAR) 1972 whereas the regulation for the latter was the *Wet aanbesteding van werken lagere publieksrechtelijke lichamen* (Walapuli) 1977.⁴⁴⁷

Realising that the above discussion entailed EU Directives and recalling that the discussion on Directives will appear again later, it is worth explaining what a Directive entails. This may be particularly useful for readers who are not familiar with the EU legal system. A Directive is a measure with general application, which requires the Member States of the EU to achieve certain results, but provides each Member State with the precise form and method of implementation.⁴⁴⁸ Besides this, it is also relevant to highlight a doctrine, which has so-called national procedural autonomy. Stemming from a ruling issued by the European Court of Justice, this doctrine allows the Member States to regulate the legal procedure for engaging in

⁴⁴³ de Mars, S. 2011. The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France, Ph.D. thesis at the University of Nottingham, Nottingham, p. 123. KB (Royal decree) 11 November 1815, nr 94 (national archive).

⁴⁴⁴ de Mars, S. 2011. The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France, Ph.D. thesis at the University of Nottingham, Nottingham, p. 123.

⁴⁴⁵ de Mars, S. 2011. The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France, Ph.D. thesis at the University of Nottingham, Nottingham, p. 123; Stb. 1927, 259.

⁴⁴⁶ Chao-Duivis, M.A.B and van Wijngaarden, M.A. 2010, *Serie Bouw- en aanbestedingsrecht Deel: 16*, Uitgeverij Paris, p. 18-21.

⁴⁴⁷ de Mars, S. 2011. The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France, Ph.D. thesis at the University of Nottingham, Nottingham, p. 125-6.

⁴⁴⁸ Article 288 Treaty on the Functioning of the European Union (TFEU), "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

legal protection in certain areas.⁴⁴⁹ Regarding this, it is relevant to mention Article 4 of the Treaty on European Union which requires Member States to have measures which are in line with the Treaty of the European Union - including the interpretation provided by the ECJ.⁴⁵⁰

Returning to the history of Dutch public procurement, there was a call for a reform of Dutch public procurement regulations in 1993. The proposal suggested the adoption of a General Framework Act (known as the *Raamwet*) and two adopted General Orders in Council which were to be based on this law, namely the *Besluit overheidsaanbestedingen* (BOA) which focused on implementing public sector directives and the *Besluit aanbestedingen nutssector* (BAN) which concerned the Utilities Directive.

In 2004, the Dutch Government issued the *Besluit aanbestedingsregels overheidsopdrachten* (BAO) which contains a provision on public procurement, while the regulation of utilities procurement is contained in the *Besluit aanbestedingsregels special sectoren* (BASS).⁴⁵¹ In 2007, an Act providing remedies was issued, called the *Wet Implementatie Rechtsbeschermingrichtlijn Aanbesteden* (WIRA). The BAO, BASS and WIRA reproduced EU Directives 2004/18, 2004/17, and 2007/66, respectively.⁴⁵²

In 2012, the Dutch Government adopted the Bill on a Dutch Public Procurement Act (DPPA) 2012 which was the first integral procurement law in the Netherlands, and this came into force on 1st April 2013. As a consequence, all

⁴⁴⁹ It takes as its point of departure the European Court of Justice's (ECJ's) judgement on the refusal of an import licence, known as the *Salgoil* case. The ECJ here provided the first clear ruling on a Member State's competence in the field of judicial organisation, but then the Italian Court requested a further explanation. The ECJ then replied that [...] it is for the national legal system to determine which court or tribunal to give protection. See: Wouters, K. "Public Procurement Review Bodies (including Anti-Fraud Measures)", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law: Public Procurement and Beyond*, Bruylant, Brussels, p. 352.

⁴⁵⁰ Article 4 on second and third paragraph of the Treaty on European Union states that "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

⁴⁵¹ Boekhorst, R., Goudsmit, M., van 't Klooster, K. "Netherlands", in: Chamberland, D. and Ling, T. (Eds.) 2012. Baker & McKenzie's Global Public Procurement Handbook 2012 Edition, available from: <http://www.bakermckenzie.com/files/Uploads/Documents/Germany/RealEstate/GlobalPublicProcurementHandbook2012.pdf>, last visited 16 March 2015

⁴⁵² de Mars, S. 2011. The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France, Ph.D. thesis at the University of Nottingham, Nottingham, p. 134-5.

procurement regulations (BAO, BASS and WIRA) were repealed.⁴⁵³ On 1st July 2016, the Dutch Parliament has approved the revision of the DPPA to accommodate Directive 2014/24/EC. However, this research is conducted from September 2016 to 1st June 2016. Therefore, it will refer to the DPPA 2012. Besides the DPPA, it is relevant to mention two other supplementary procurement decrees (*Aanbestedingsbesluit*), namely the Procurement Rules for Work Contracts (*Aanbestedingsreglement voor Werken* (ARW) and the proportionality guide (*Gids Proportionaliteit*).⁴⁵⁴ The former contains guidelines for the procurement of construction. The latter is intended to guide all phases in public procurement procedure in order to ensure that procurement processes are proportionate to the nature, scope and complexity of the contract.⁴⁵⁵

4.1.2. A general overview of the current public procurement regulations

There are four parts of the DPPA 2012, as is discussed in the following paragraphs.⁴⁵⁶ Part one contains the general provisions. The following part contains public procurement contracts, contest designs for public procurement contracts, and public works concession contracts. Next, the third part relates to special sector contracts and contest designs for special sector contracts. The final part contains other provisions.

Part one is divided into five chapters. The first chapter concerns definitions. The following chapter contains principles and rules on procurement. The next chapter provides administrative rules for procurement. The chapter thereafter looks at the issue of the procurement of works by contracting authorities. The fifth chapter contains conditions associated with the framework of World Trade Organisation agreements.

⁴⁵³ Van de Meent, G.W.A. and Damsma, R.S. 2013. "A New Procurement Act in the Netherlands", *The International Construction Law Review*, Vol. 30, issue (4), p 417.

⁴⁵⁴ Van de Meent, G.W.A. and Damsma, R.S. 2013. "A New Procurement Act in the Netherlands", *The International Construction Law Review*, Vol. 30, issue (4), p. 419 - 420.

⁴⁵⁵ Hebly, J.M. and Meesters, J. 2014. "The Proportionality Principle in the Dutch Public Procurement Act", *European Procurement and Public Private Partnership Law Review*, 4, p. 267. The ARW can be found at: <https://www.rijksoverheid.nl/documenten/richtlijnen/2013/02/20/aanbestedingsreglement-werken-2012> whereas the "Gids Proportionaliteit" is available at: <https://www.rijksoverheid.nl/documenten/rapporten/2013/02/20/gids-proportionaliteit>, last visited 24 May 2016.

⁴⁵⁶ Van de Meent, G.W.A. and Damsma, R.S. 2013. "A New Procurement Act in the Netherlands", *The International Construction Law Review*, Vol.30, issue (4), p. 418.

Part two comprises of four chapters. The first one deals with the scope of the subject-matter. Afterwards, it discusses the procedures for contracting entities to award contracts. The following chapter explains the rules of notification, exclusion, selection, and awards. The final chapter explains the rules on special procedures.

Part three contains six chapters. The opening chapter deals with the scope. The next chapter is on the procedures for awarding the special sector contracts (utilities procurement). The following chapter is about the open procedure, restricted procedure and negotiated procedure with publication. Then the subsequent chapter deals with the rules on special sector contract-related announcement, exclusion, selection, and awards. The penultimate chapter is on eligibility qualifications, and the last chapter contains other requirements for procedures relating to framework agreements, dynamic purchasing systems and competition.

The last part is divided into the six following chapters. The first deals with the statement of procurement activity. Afterwards, the next chapter contains information pertaining to further implementing rules. Then, non-feasibility and fines are looked at. The fourth chapter concerns arbitration and complaints. Two final chapters are on evaluation terms and transitional as well as final provisions.

4.1.3. The administration involved in public procurement

Unlike in Indonesian Public Procurement, the Public Procurement Regulation in the Netherlands is not accustomed to provide information on the officials involved in public procurement activities. Presumably, this is because the regulation significantly refers to EU Directives, which also do not provide information on the matter.

Another possible explanation for not providing this information is that the procurement regulation takes the form of an Act of Parliament. Therefore, it is less likely to contain such detailed information on the technical officials involved in public procurement – unlike the Indonesian Presidential Regulations on Public Procurement.

The term used in the DPPA is that of tendering authority ("*aanbestedende dienst*"). It refers to: "*de staat, een provincie, een gemeente, een waterschap of een publiekrechtelijke instelling dan wel een samenwerkingsverband van deze overheden of publiekrechtelijke instellingen*".⁴⁵⁷ This reflects the definition of 'contracting authorities' in the Directives; the State, regional or local authorities, bodies

⁴⁵⁷ Article 1.1. of the DPPA 2012.

governed by public law, associations established by one or several of such authorities or one or several of such bodies governed by public law.⁴⁵⁸

Nevertheless, although the DPPA is silent on the matter, logically speaking there are officials within a contracting authority who carry out certain tasks within a certain time based on a particular form of authority regarding the procurement procedure, because it is impossible for one person to deal with public procurement procedures in their entirety. Different job descriptions apply among different officials and these job descriptions must be based on legal authority; therefore, it is here relevant to briefly discuss the General Administrative Law Act. The GALA – the abbreviation of this Act - explains three possibilities for how an official obtains his legal authority, namely: through a mandate, delegation, and a conferral. I shall briefly discuss these three forms.

According to the GALA, a *mandate* means the power to make decisions in the name of an administrative authority.⁴⁵⁹ Any decision by a mandated organ (mandatary) must be within the scope of its authority and such a decision is then deemed to be a decision by the organ mandating such a decision (mandator).⁴⁶⁰ An administrative authority may grant a mandate, unless it is stated otherwise by law.⁴⁶¹ A mandate can be divided into a general mandate and a special mandate, the former is granted in writing and the latter shall “in any event be granted in writing if the mandatary does not work under the responsibility of the mandator”.⁴⁶² It is relevant to underline that a mandator⁴⁶³ may give the mandated organ instructions regarding the exercise of the mandate either generally or on a case-by-case basis.⁴⁶⁴

⁴⁵⁸ See: Article 2 (1) and (4) of Directive 2014/24 (formerly Article 1 (9) of Directive 2004/18). It also adds an explanation that a ‘body governed by public law’ means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law’.

⁴⁵⁹ Article 10:1 of the GALA.

⁴⁶⁰ Article 10:2. of the GALA.

⁴⁶¹ “(...) or unless the nature of the power is incompatible with the mandate”. See: Article 10.3 of the GALA.

⁴⁶² Article 10:5. of the GALA.

⁴⁶³ Mandator is the person employing another to perform a mandate.

⁴⁶⁴ Article 10:6.1 of the GALA.

Also the mandated organ may permit the granting of a submandate.⁴⁶⁵ A mandator retains authority to exercise the mandated power, and therefore a mandator may revoke a mandate at any time and this must be made in writing.⁴⁶⁶ Different to a mandate, a *delegation* is a transfer of power from an administrative authority of its power to take decisions to another person who will exercise the power under his own responsibility.⁴⁶⁷ A delegation to subordinates cannot be made.⁴⁶⁸ The delegation itself may only occur if this is possible under the law.⁴⁶⁹ The final method is the so-called *conferral of powers*. It occurs when “a power to take decisions is conferred by law on a person or collegial body working under the responsibility of an administrative authority”.⁴⁷⁰ In addition, it is explained that: “the administrative authority may issue instructions regarding the exercise of the conferred power either generally or on a case-by-case basis”.⁴⁷¹

Besides clarifying the power of the official at the administrative body, it is also important to provide information about the two following terms relating to an economic operator: the tenderer and the candidate. This classification is based on which form of public procurement applies. An explanation of the various procedures will be given after this elaboration. The term ‘tenderer’ refers to an economic operator that has submitted a tender. The term ‘candidate’ refers to an economic operator who has submitted a ‘request to participate’ or has been invited to participate in the restricted procedure, competitive dialogue, and negotiated procedure.⁴⁷² An economic operator means a contractor, or a supplier of goods or services.⁴⁷³

⁴⁶⁵ Article 10:9. of the GALA.

⁴⁶⁶ Article 10:7 and 10:8 of the GALA.

⁴⁶⁷ Article 10: 13 of the GALA.

⁴⁶⁸ Article 10:14 of the GALA.

⁴⁶⁹ Article 10:15 of the GALA. It is also relevant to note that a decision taken by virtue of a delegated power shall cite the delegation decision and its source. See: Article 10:19 of the GALA.

⁴⁷⁰ Article 10:22 of the GALA.

⁴⁷¹ Article 10:22 of the GALA.

⁴⁷² Article 1.1 of the DPPA 2012; a similar content can be seen in Article 2 (11) and (12) of the Directive 2014/24.

⁴⁷³ Article 1.1 of the DPPA 2012.

4.1.4. The (legal) public procurement procedures

There are five different procedures acknowledged in the DPPA 2012, namely: an open procedure, a restricted procedure, competitive dialogue, a negotiated procedure with notice, and finally, a negotiated procedure without notice. In *open procedures*, any interested economic operator may submit a tender in response to a call for competition.⁴⁷⁴ The contracting authority, however, will obviously not be interested in receiving proposals which do not meet the minimum requirements.

In the *restricted procedure*, any economic operator may submit a “request to participate” in response to a call for competition; however, only those economic operators that have been invited to do so by the contracting authority following its assessment of the information provided may submit a tender.⁴⁷⁵ The main reason for choosing this procedure is to avoid wasting the resources of tenderers when submitting the bids. This procedure also prevents the authority from having to evaluate large numbers of bids, particularly when this will not lead to better value for money.⁴⁷⁶ However, in order to ensure the competition, the minimum number of candidates in this procedure must be five.⁴⁷⁷

The *competitive dialogue* is a procedure in which any interested economic operator may participate, and the contracting authority may conduct a dialogue with the operators based on certain procedures to seek one or more alternatives to fulfil the desired goods/services; based on this, the selected operators are invited to register.⁴⁷⁸ This procedure was introduced as a means to provide more flexibility for complex procurement contracts. Open and restricted procedures are unsuitable for

⁴⁷⁴ Article 1.1 of the DPPA 2012.

⁴⁷⁵ Article 1.1 of the DPPA 2012.

⁴⁷⁶ Arrowsmith, S. 2010. *EU Public Procurement Law: An Introduction*, University of Nottingham, Nottingham, p. 156. According to Article 65 (2) of the EU Directive 2014/24, in the restricted procedure the minimum number of candidates shall be five. See also the *Gids Proportionaliteit* 3.4. A

⁴⁷⁷ Article 65 (2) of the EU Directive 2014/24.

⁴⁷⁸ Article 1.1 of the DPPA 2012. In addition, Article 2.28 of the DPPA 2012 stipulates that (1) a contracting authority, in their opinion, may implement the competitive dialogue procedure in a complex procurement which cannot be conducted via an open or restricted procedure; (2) it is called complex if the contracting authority cannot: (a) determine the technical means/methods to fulfil the needs or aims, or (b) determine the legal and financial conditions of the projects.

such projects, particularly for major privately-financed infrastructure projects and public-private partnerships.⁴⁷⁹

Referring to Article 2.30(1) of the DPPA, the *negotiated procedure with notice* can take place whenever it meets one of the four following reasons. First of all, it can occur where (i) no tenders, (ii) no suitable tenders, (iii) no requests to participate, or (iv) no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered. In addition, this procedure occurs in exceptional cases of procurement for works, supplies or services when it is not possible to determine in advance the total budget due to the nature of the work or the risks involved. Moreover, "this procedure is exercised in the case of a public service contract as referred to in Annex II, part A, category 6 of Directive no. 2004/18/EC or intellectual services concerned, which, due to the nature of the services to be provided, the specifications cannot be established with sufficient precision to allow the award of the contract by the selection of the best tender referring to the rules governing open or the restricted procedure."⁴⁸⁰

Lastly, this procedure is applied in the case of public works; works carried out for purposes of research, testing or development, and which does not intend to have commercial purposes, or to cover the costs of research and development. To ensure competition, the minimum number of candidates in this procedure shall be three.⁴⁸¹

According to Article 2.32 of the DPPA, the *negotiated procedure without notice* is conducted whenever one of the following reasons is satisfied. Firstly, no suitable tenders or no applications have been submitted to participate in the open, restricted, or competitive dialogue procedure if the requirements are not substantially altered. Secondly, procurement for technical or artistic reasons or for reasons concerning the protection of exclusive rights may be awarded only to a certain economic operator. Thirdly, as far as is strictly necessary where, due to extreme urgency caused by events which are unforeseeable for the contracting

⁴⁷⁹ Complex contracts are not clearly defined; however, it arguably refers to the situation where the authority is unable to find the best solution itself. See: Arrowsmith, S. 2010. *EU Public Procurement Law: An Introduction*, University of Nottingham, Nottingham, p. 185-6.

⁴⁸⁰ Article 2.30 (1) (c) of the DPPA.

⁴⁸¹ The number of invited candidates in a restricted procedure must be a minimum of five while in the competitive dialogue and negotiated procedure with notice there must be at least three. See: Article 2.99 (6) of the DPPA.

authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.⁴⁸²

According to Article 2.25 and stemming from the implicit information from the previous elaboration, there are two main procedures that are acknowledged by the DPPA: the open and the restricted procedure. Therefore, the following explanation illustrates these two, respectively.

Stemming from Article 2.26 of the DPPA, there are nine stages of the open procedure. To begin with, the contracting authority will first announce the contract opportunity. After receiving the bidding proposals, the authority assesses whether the tenderers meet any grounds to be excluded from the tender procedure.⁴⁸³ If not, the authority shall assess the eligibility of the tenderers based on the requirements. Then, the authority examines the technical specifications, qualifications, and standards (which have been previously set by the authority in the procurement document). Afterwards, the contracting authority shall evaluate all eligible tender proposals according to the award criteria and the additional criteria.⁴⁸⁴ The contract is awarded in accordance with two evaluation methods: the lowest bidder and the most advantageous tender (“MEAT”); the latter mechanism being preferred by the legislators.⁴⁸⁵ In the following stage, the authority prepares a so-called ‘process verbal’ from the commissioning record. The subsequent step is to announce the

⁴⁸² According to the EU Directive paragraph 50, this exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. Moreover, in paragraph 81, the following situation is provided: where a natural catastrophe occurs and this requires immediate action.

⁴⁸³ According to Article 2.86 section 1 to 4 of the DPPA, the grounds for an exclusion are: the company has an affiliation with a criminal organisation, has engaged in bribery; has breached the protection of citizens’ financial interests. Any exclusion has to be based on the *res judicata*, or a final and binding court decision which has been delivered no longer than four years before the tender is conducted.

⁴⁸⁴ As has been embodied in Article 2.114 and 2.115, respectively.

⁴⁸⁵ This is explicitly mentioned in Article 2.114 (1) and (2) Dutch Procurement Act. In addition, whenever the authority decides to choose the lowest bidder mechanism, then it must provide its reasoning for doing so. See: Van de Meent, G.W.A. and Damsma, R.S. 2013. “A New Procurement Act in the Netherlands”, the International Construction Law Review, p. 420. It is estimated that MEAT is implemented in more than 80% of procurements for supplies and services, and 70% for the procurement of construction (Interview with a representative from “PIANOo”, the Dutch Public Procurement Expertise Centre, the Hague 30 April 2015). From the *memorie van toelichting* (explanatory memorandum) of this Article, the reason for doing so is to encourage the contracting authority to consider other factors besides the price, such as: quality, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, customer service and technical assistance, and the date and time for delivery or performance.

award decision. After applying the standstill period,⁴⁸⁶ two final stages remain: concluding the contract and announcing the contract award.

Referring to Article 2.27 of the DPPA, the following stages apply to the restricted procedure. Firstly, the contracting authority will make an announcement of the contract opportunity. After receiving the proposals, the authority assesses whether 'the candidate' meets any of the grounds to be excluded from the tender procedure. If not, then the assessment is continued to check whether the candidate meets the eligibility requirements. A further stage is carried out to evaluate the remaining candidates based on the contracting authority's selection criteria. The selected candidates are subsequently invited to submit their bidding proposals. Afterwards, the tender proposals are assessed to ensure that they meet the technical specifications determined by the contracting authority, the requirements, and the standards. The next stage is carried out to evaluate the valid proposals based on the objective and additional criteria.⁴⁸⁷ Then the authority prepares a 'written record' (*process verbaal*). The remaining stages are the same as in the open procedure, namely announcing the award decision; applying the standstill period before concluding the contract, and, lastly, announcing the contract award.

Besides the stages mentioned above, there are additional procedures that may apply. These may occur when the aggrieved 'candidate' challenges the contracting authority if his request to participate in the tender has been turned down. Similarly, the 'tenderer' may challenge the authority if the tenderer feels aggrieved with the authority decision to award the contract to another contractor/supplier.⁴⁸⁸ If these situations occur, then the aggrieved candidate or tenderer may seek legal redress as follows.⁴⁸⁹ First of all, the aggrieved candidate or tenderer may pose a question to the contracting authority. If the issue escalates, he may lodge a complaint (objection) with the contracting authority. If he still feels aggrieved, he may file a complaint to the so-called Committee of Tendering Experts. Alternatively, he may lodge the complaint to the Courts. This is stated as an

⁴⁸⁶ The standstill period is 20 days both for cross-border procurement and national procurement. The aim is to provide time for the tenderer to understand the decision and to prepare any legal redress (so that it may submit a complaint based on the merits). See: van Eck, W.R., 2015. "Netherlands: Public Procurement 2016", available at: <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/netherlands>, last visited 26 May 2016.

⁴⁸⁷ As embodied in Article 2.114 and 2.115, respectively.

⁴⁸⁸ de Jong, K.I. "Remedies in the Netherlands" in Tyrell, A and Bedford, B. 1997. *Public Procurement in Europe: Enforcement and Remedies*, Butterworth, Edinburgh, p. 197-198.

⁴⁸⁹ Beside the above mentioned, another legal redress which can be used is that complaint to the European Commission. However, as this research focuses on the national level, it will not be discussed further. See: Manunza, E., Lohmann, W.A., and Bouwman, G. 2013. "Juridisch Leaflet Maatschappelijk Aanbesteden", Public Procurement Research Centre (PPRC), Utrecht/Twente, p. 22.

'alternative', because it is possible to go directly to the court without lodging the complaint to the Committee; however, it is not allowed to submit the complaint both to the Court and to the Committee at the same time. Also, the Committee will not accept the complaint, which is being or has been reviewed by the Court.

The Court here refers to civil court and the procedural law to review the procurement decision is regulated via private law. The legal basis of this is that Article 8:3 of the General Administrative Law Act (GALA); "no appeal lies against decisions taken in preparation of a private-law juridical act." Therefore, unlike the procedure to review a decision - which usually applies in administrative law - the aggrieved candidate/tenderer can directly lodge the complaint through the court without passing the administrative review procedure such as objection or administrative appeal.⁴⁹⁰ However, referring to the supplementary note of the DPPA, in practice it is common for the contracting authority to facilitate the objection procedure.⁴⁹¹ The discussion of this matter will be referred to later in more detail.

4.2. The principle of equal opportunity: situation and legal protection

This section will examine how the Netherlands deals with the principle of equal opportunity, with particular focus on setting the requirements in the procurement document. The explanation will start by looking at the relevance of discussing the matter. Then, the availability of certain regulations both in public

⁴⁹⁰ In administrative law, a decision is usually reviewable by the Administrative Court only after passing the phases objection and administrative appeal. According to Article 1:5 of the GALA: 1. 'Lodging an objection' means exercising the right conferred by law to request the administrative authority that took a decision to reconsider it; 2. 'Lodging an administrative appeal' means exercising the right conferred by law to ask an administrative authority other than the one that took a decision to review it; 3. 'Lodging an appeal' means lodging an administrative appeal or lodging an appeal with an administrative court.

⁴⁹¹ See: *Memorie van toelichting Nieuwe regels omtrent aanbestedingen*, Kamerstuk 32440 nr. 3, para. 3.6. Available at: <https://zoek.officielebekendmakingen.nl/kst-32440-3.html>, last visited 02 November 2016. There are two reasons why it is common for the contracting authority to facilitate the objection. First of all, the contracting authorities are trying to accommodate the future law which will be applied. Referring to the supplementary note of the DPPA, the Ministry of Economic Affairs together with its stakeholders are trying to design a uniform complaints procedure (complaint handled by the contracting authorities) which can contribute to a quick and careful handling of complaints (para 5.2). In addition, the regulation of the Committee of Tendering Experts may also influence the contracting authority to provide the objection procedure. According to the regulation, the aggrieved bidder is only allowed to lodge the complaint to the Committee if he has firstly submitted his objection (in writing) to the contracting authority in questioned and the authority has replied the objection. See: Article 9 (a) and (b) of the Regulation of the Committee of Tendering Experts. Available at: <https://www.commissievanaanbestedingsexperts.nl/indienenklacht/reglement-commissie-van-aanbestedingsexperts>, last visited 1 November 2016.

procurement laws and in general laws will be considered (including the EU Directives as they are implemented in the Dutch context). Afterwards, relevant cases dealing with this issue will be provided. These will be examined from a good public procurement approach.

4.2.1. Situation found and an analysis

It is possible that the contracting authorities make mistakes unwittingly or even abuse their authority so that the formulation of the procurement document violates the principle of equal opportunity.⁴⁹² As a consequence, the interested bidding participants may feel aggrieved. It is interesting to examine how the Netherlands make use of legal redress pertaining to this matter.

Procurement regulation(s)

To open the discussion, it is relevant to underline that the EU Directives have long recognised a certain mechanism referred to as ‘interim relief’. This is a form of legal redress, which should be taken before the contract has been concluded. It enables candidates to quickly obtain legal protection whenever they feel aggrieved. This issue will be further discussed in the section on the principle of accountability; however, what is relevant to be highlighted here is that interim relief can provide two forms of legal redress related to the principle of equal opportunity. The first one is an injunction requiring the authority to allow a potential bidder to take part in a tender procedure and another is an injunction requiring the authority to apply the correct procurement rules.⁴⁹³ The legal consequence of these forms of redress is that an unfair procurement document can be challenged in every EU member state, including in the Netherlands.

⁴⁹² As happened in Indonesia (section 3.2.) where the violation occurred in the procurement of a great mosque in west Bandung regency and in the procurement of scanning machinery in Jakarta Province. The interested bidding participants (candidates) felt aggrieved; they believed that the contracting authorities required unfair specifications and qualifications in the procurement documents which could distort the competition. In the other illustration, this has been shown in a confession made by an official at a different procuring entity; he had to follow the instructions of his superior to favour a certain bidding participant by unjustifiably designing the procurement document. While distrust towards the contracting authority exists, the procurement regulation does not provide for any legal mechanism which can be used by aggrieved interested bidders to challenge the procurement document.

⁴⁹³ Van de Meent, G.W.A. “Enforcing the Public Procurement Rules in the Netherlands”, in Arrowsmith, S (Ed.). 1993. *Remedies for Enforcing the Public Procurement Rules*, Earlsgate, South Humberside, p. 223.

Switching the discussion to the national Dutch procurement laws, the principle of equality is strongly emphasised in the specification requirements. Regarding this, it is relevant to mention the *memorie van toelichting* (the explanatory memorandum) of the DPPA, particularly in the second paragraph of Article 2.75. It states that the technical specifications should create equal access by tenderers and do not create unnecessary obstacles.⁴⁹⁴ This logic follows the EU Directive stating that the award criteria, the procurement method, and the technical specification drawings in the procurement document should not distort and unjustifiably limit the competition.⁴⁹⁵

In addition to that, according to Article 1.10 DPPA 2012, the contracting authority must create balanced requirements and criteria based on the objective contracts. Taking a mechanism to design technical specifications as an example, the statute mandates that the specification designs have to be reasonable and logical (Article 2.76(1)). When referring to a particular technical specification, the following phrase must be added: “or which has similar value” (Article 2.76(2)).

The discussion regarding the balancing of requirements is strengthened by both the principle of equality and the principle of proportionality. The following is a practical illustration. When contracting authorities conduct disproportionate qualifications or specifications in the procurement document, these requirements can be considered as unjustified demands, which distort competition, and therefore the requirements may also be considered as an infringement of the principle of equal opportunity. In examining the conceptual perspectives, these two principles interlock with one another, due to three reasons below. First, the current discussion at the EU level and at the level of Dutch public procurement law has been widened from the principle of equality to the principle of proportionality.⁴⁹⁶ Also, one of the developments of the principle of properness is based on the principle of equality.⁴⁹⁷ Moreover, the principle of proportionality has an instrumental function for the

⁴⁹⁴ Regarding this, in order to achieve this purpose, whenever the contracting authority refers to certain technical specifications, the provision should always be accompanied by the words “or equivalent”. See: explanatory memorandum to Article 2.75 to 2.78.

⁴⁹⁵ See points (74), (92), and (96) of the EU Directive 2014/24/EU. See also the principles of European procurement in Article 18, “contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner”.

⁴⁹⁶ See: consideration 57 of EU Directive of the 2014/24/EU. Also the existence of the *Gids Proportionaliteit* (Guide of Proportionality) issued by the Dutch Government.

⁴⁹⁷ The lines of development of the principles of properness were [the mechanism against] illegality, irrationality, and then impropriety. [... and then] irrationality [...]. The third step in this development was the specification of other principles like equality, legal certainty, carefulness and motivation (emphasis added). See: Addink, G.H. Forthcoming. *Good Governance: Concept and Context*, OUP, p. 77.

principle of equality,⁴⁹⁸ it can evaluate whether or not the principle of equality has been adhered to by the contracting authority during the various stages of public procurement.⁴⁹⁹

The principle of proportionality came under the spotlight when the Dutch Government issued a Proportionality Guide (*"Gids Proportionaliteit"*). Practically speaking, this statutory guideline is considered to be even more important than the Dutch Procurement Law itself.⁵⁰⁰ It is also interesting to highlight that the Guide creates a norm, which is referred to as "comply or explain". This means that a contracting authority that has not acted based on the guide has to explain its reasons for not doing so in the tender documents.⁵⁰¹ In addition, according to the statute and the guide, the contracting authority must take into account, for instance:⁵⁰² (i) whether the contracts have been combined, (ii) the grounds for exclusion, (iii) the substance of the suitability requirements, (iv) the number of

⁴⁹⁸ The principle of proportionality has the function of managing disputes involving an alleged conflict between two rights claims, or between a rights provision or private interest and a state/public interest. See: Herbo, T. 2010. "The function of the Proportionality Principle in EU Law". *European Law Journal*, Vol. 16, No. 2, p. 158.

⁴⁹⁹ Regarding the last point, there are three tests which can be conducted. The first two tests are widely accepted by scholars whereas the last test has received criticism, as it cannot be easily implemented. The tests are the following. *The suitability test*, or appropriateness test, refers to the relationship between the means and the end. The question asked is whether the measure chosen is suitable or appropriate in order to achieve the given aim proposed to be achieved by using the chosen measure. *The necessity test* implies that the court assesses whether the chosen measure is necessary to achieve the proposed goal, meaning that the measure which should be chosen is the least restrictive for the given norm. *The stricto sensu test*, meaning that a measure is disproportionate, although suitable and necessary, nevertheless imposes an excessive burden on the individual. See: Herbo, T. 2010. "The Function of the Proportionality Principle in EU Law". *European Law Journal*, Vol. 16, No. 2, p. 158 and 165.

⁵⁰⁰ Van de Meent, G.W.A. and Damsma, R.S. 2013. "A New Procurement Act in the Netherlands". *The International Construction Law Review*, p. 419, 431. Actually, the legal nature of the proportionality guide is a Procurement Decree (Aanbestedingsbesluit). See: Van de Meent, G.W. and Manunza, E.R. et al. 2014. "The Netherlands", in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 618-619.

⁵⁰¹ This is explicitly stated in Article 1.10 (4) of the Dutch Public Procurement Law: "A non-compliance is not permitted except there is a good reason to do so." Also see: Hebly, J.M. and Meesters, J. 2014. "The Proportionality Principle in the Dutch Public Procurement Act". *European Procurement and Public Private Partnership Law Review*, p. 268.

⁵⁰² Actually, the principle of proportionality is a relatively new principle which is explicitly laid down in the New European Directive 2014/24/EU adopted on 26 February 2014. The directive has to be implemented by EU member states by no later than 18th April 2016. However, as the Dutch legislator has introduced this principle in a legal instrument called the Proportionality Guide, it means that the Netherlands anticipated the implementation of the new Directive. Hebly, J.M. and Meesters, J. 2014. "The Proportionality Principle in the Dutch Public Procurement Act". *European Procurement and Public Private Partnership Law Review*, p. 267-269.

suitability requirements to be imposed, (v) the deadlines to be set, (vi) the contract award criteria, and (vii) the conditions of the agreement.

Having demonstrated the previous explanation, the principle of proportionality is interwoven with the principle of equal opportunity - as long as the requirements of the procurement document are determined. The Proportionality Guide dictates that contracting authorities have to give careful consideration to identifying the experience and competencies of the proper performance of the contract.⁵⁰³ Otherwise, the requirements will be seen as an obstacle for certain bidders to participate in a public tender, and thus infringes the principle of equal opportunity.

General regulation(s)

To complement the elaboration of public procurement regulations, it is relevant to discuss general regulations, for instance, the General Administrative Law Act (GALA). Included in this Act are general principles of good administration. These have been designed to cope with unavoidable legal uncertainties⁵⁰⁴ caused by a lack of clarity in the law that may lead to unpredictable rulings or the discretionary powers.⁵⁰⁵ In other words, GALA may be used to clarify public procurement laws.

According to Article 3:4 (2) of the GALA, the principle of equality can implicitly be seen when it instructs the administration to engage in proportionally. It states: “the adverse consequences of a decision for one or more interested parties may not be disproportionate to the objects to be served by the decision.”

The substantial message in this Article is that of *egalite devant les charges* (equality before public burden) which means that “the administration may not lead

⁵⁰³ Hebly, J.M. and Meesters, J. 2014. “The Proportionality Principle in the Dutch Public Procurement Act”. *European Procurement and Public Private Partnership Law Review*, p. 268.

⁵⁰⁴ GALA was first developed in the Netherlands after World War II. The Dutch chose a “state-led” concept which means the state plays a significant role in leading the economic development of society. Therefore, the government was empowered by such authorities to interfere in every area of policy, economics, and individual freedom. As the regulation did not have a detail mechanism and thus provided wide discretion for the administration, the legitimacy of the administrative action was tested by the judiciary. The Court filled in the legal gap by creating judicial standards against the power of government. These standards have been the foundation of the GALA. See: Widdershoven, R and Remac, M. 2012. “General Principles of Law in Administrative Law under European Influence”, *European Review of Private Law*, Vol. 2, p. 384-5. Also, see: Langbroek, P.M., 2003. “General Principles of Proper Administration and the General Administrative Law Act in the Netherlands”, paper for the World Bank Workshop, Washington, p. 2.

⁵⁰⁵ Langbroek, P.M., 2003. “General Principles of Proper Administration and the General Administrative Law Act in the Netherlands”, paper for the World Bank Workshop, Washington, p. 2.

to a disproportionate burden of certain individuals in comparison to all others which are affected by the measure.⁵⁰⁶ This balancing of interests will guide the administration towards making reasonable decisions and prevent it from making arbitrary decisions.⁵⁰⁷ As will be evident in the later discussion, this is closely related to the public tender procedure; the contracting authority has to implement equal treatment and/or equal opportunities for every bidder, and must not create an unnecessary and unjustified burden to hamper the participation of particular (interested) bidding participants.

Case law

Besides the availability of legal redress to challenge the procurement document in question, it is also relevant to provide information on the following case law. It may be true that the legal issues arise in the following cases may not be identical to those in Indonesia. The emphasis will be on underlining that the aggrieved candidates may challenge the contracting authority at the very beginning. The reason to do so may not only be caused by the specification/qualification determined in the procurement document but may also be caused by the rejection of the request to participate or not alerting a potential candidate. The practice of challenging the contracting authority has taken place for many years.⁵⁰⁸

The first example occurred in early 2016. Zeeland BV was interested in participating in a tender for construction work (refurbishment). However, this company was considered to be ineligible by the contracting authority (the Municipality of Rotterdam) because the company did not meet the competence requirements. Regarding this, this company challenged the authority; however, the court was not satisfied with the plaintiff's argument, as the requirement determined by the authority (so-called "competence 3") was based on good grounds.⁵⁰⁹ The

⁵⁰⁶ Maastricht Academy. No year of publication. "Administrative Law in the Netherlands", available from: <http://maastrichtacademy.com/administrative-law-in-the-netherlands/>, last visited 18 March 2015.

⁵⁰⁷ Langbroek, P.M., 2003. "General Principles of Proper Administration and the General Administrative Law Act in the Netherlands", paper for the World Bank Workshop, Washington, p. 11.

⁵⁰⁸ See the following old publication which explains that (potential) aggrieved bidders can request an injunction whenever something is presumably wrong in the document call for tenders. See: de Jong, K.I. "Remedies in the Netherlands" in Tyrell, A. and Bedford, B., 1997. *Public Procurement in Europe: Enforcement and Remedies*, Butterworth, Edinburgh, p.197.

⁵⁰⁹ Court decision ECLI:NL:RBROT:2016:1205, para. 4.5.

court considered that if the contracting authority were to adopt a technical reference offered by the plaintiff, it would then lead to a different result.⁵¹⁰

Another example can be seen in the following case. The Dutch Land Registry (*Kadaster*) organised a procurement to develop a desktop application that could provide information to examine graphic, plot and printing data related to land registration activities. The *Kadaster* sent the invitation to participate in the tender to the companies on a list drawn up by a unit under the *Kadaster*, namely the BAO - *Bronhouders- en Afnemers Overleg*. There were 27 economic operators on the list; however, the name of the plaintiff (HLA) was not listed.⁵¹¹ The plaintiff therefore challenged the contracting authority based on the ground that the authority would have known that the plaintiff had developed the program and had been recognised as a leading authority in this field.⁵¹² The lower court was satisfied with this argument and the contracting authority was considered as having acted unlawfully,⁵¹³ but this was overturned by the Dutch Supreme Court, because the defendant had sent the request to participate to all potentially interested IT companies. The fact that the plaintiff had developed the geographic automation in the past did not mean that the claim was based on the merits.⁵¹⁴ The court seemed to be satisfied with the argument provided by the defendant that the plaintiff should have known from the market about this contract opportunity, and therefore should have reacted accordingly by submitting a request to participate.⁵¹⁵

4.2.2. Provisional finding

It has been shown that the principle of equal opportunity is interwoven with the principle of proportionality and the principle of carefulness especially when it comes to the context of determining the requirements in the procurement document. The contracting authority, consequently, must ensure that the procurement document is prepared carefully. By so doing, the requirements are not disproportionate, and the interested bidding participants will not be aggrieved (the principle of equal opportunity will therefore not be violated).

⁵¹⁰ Court decision ECLI:NL:RBROT:2016:1205, para. 4.1.1.

⁵¹¹ Court decision ECLI: NL: HR: 2016: 503, para. 3.1. (vii).

⁵¹² Court decision ECLI: NL: HR: 2016: 503, para. 3.2.1.

⁵¹³ Court decision ECLI: NL: HR: 2016: 503, para. 3.2.3.

⁵¹⁴ Court decision ECLI: NL: HR: 2016: 503, para. 4.3.3; 4.4; 5.1.

⁵¹⁵ Court decision ECLI: NL: HR: 2016: 503, para. 3.2.3.

Also, the above elaboration has shown the availability of legal redress embodied in the Dutch legal system. The DPPA has prohibited the contracting authority from distorting the competition unjustifiably via determining certain requirements in the procurement document. Also, by referring to the EU Directives, the GALA, and the practice conducted by the (civil) courts, the interested bidders who feel aggrieved have a right to challenge the procurement document. Also, the case law has shown that if the request to participate in the tender has been turned down by the contracting authority; the aggrieved candidate can make use of this legal redress. Considering above, it can be concluded that the principle of equal opportunity is protected in the Netherlands since legal redress has been made available by the regulations and the case law.

4.3. The principle of equal treatment: regulation and legal protection

This section will examine how the Netherlands implements the principle of equal treatment particularly in the process of administrative review. To examine this, the following structure will be employed. The relevance of discussing the matter based on the logical line of this research will be firstly stressed. Then, both the public procurement laws and general laws applied to public procurement procedures will be described. Next, relevant cases on the matter will be provided. It will then be argued what these mean if they are examined from a good public procurement approach.

4.3.1. Situation found and an analysis

It is possible that, due to certain situations,⁵¹⁶ the aggrieved bidders do not trust that the contracting authorities have objectively assessed their objections. As a consequence, it is questioned whether the principle of equal treatment, particularly concerning the administrative review phase, can be adhered to. It may be true that aggrieved bidders can seek legal redress from the courts; however, if the government aims to diminish the amount of cases lodged with the courts, it is necessary to establish an effective and respected administrative review system. Thus, it is interesting to examine how the Netherlands organises legal redress on this matter.

⁵¹⁶ Section 3.3 has demonstrated three cases in which the impartiality of the administrative review mechanism within the contracting authority came under question. The official who assesses the administrative review (the administrative appeal) was the head of the procuring entity who had instructed his subordinate to favour a certain bidding participant.

Procurement regulation(s)

The general instruction for the contracting authority will firstly be acknowledged. According to Article 1.8 and 1.12 of the DPPA 2012, the contracting authority must treat economic operators in the same manner.⁵¹⁷ Logically speaking, this instruction also embraces the administrative review phase (in this context: objection). However, this Act contains Article 4.27, which indicates a legal foundation for establishing an independent review to hear the complaints related to public procurement. This Article states that “the Minister (in this context Minister of Economic Affairs) establishes a Committee for providing an independent recommendation for the complaint related to the procurement procedure”.⁵¹⁸ Not long after this, the Minister established the Committee of Tendering Experts,⁵¹⁹ which can be considered as an independent administrative body. It can be called so, as the committee has a certain independence from the administration; however, it is still classified as part of the administration (executive).⁵²⁰

This ministerial decision provides numerous explanations regarding the character and authority of the Committee, as follows.⁵²¹ The establishment of this body was not designed to be an additional procedure to deal with the procurement dispute. Yet, it aims to provide for an expeditious, accurate and accessible handling of complaints. As the matter has been touched upon earlier, the parties are free to decide whether or not to submit their complaint to the Committee, or rather to immediately resort to the Courts. The Committee has only two powers:⁵²² (i) to mediate between the parties in response to complaints, and (ii) to provide non-

⁵¹⁷ Article 1.8 and 1.12 of Dutch Public Procurement Law 2012.

⁵¹⁸ It is stated that “Onze Minister bevordert de instelling van een commissie die tot doel heeft onafhankelijk advies te geven over klachten met betrekking tot aanbestedingsprocedures”.

⁵¹⁹ Besluit van de Minister van Economische Zaken van 4 maart 2013, nr. WJZ / 3008668, tot instelling van de Commissie van Aanbestedingsexperts (Instellingsbesluit Commissie van Aanbestedingsexperts), available from: <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/besluiten/2013/03/04/besluit-van-de-minister-van-economische-zaken-van-4-maart-2013/besluit-van-de-minister-van-economische-zaken-van-4-maart-2013.pdf>, last visited 01 December 2015.

⁵²⁰ There are various definitions of independent administrative bodies. According to Braibant and Stirn, this term refers to bodies “created by the legislator, placed outside traditional administrative structures and given strong guarantees of independence (...)”. See: Bell, J. 1997 “Independent Administrative Authorities in France”, *European Public Law*, Volume 3, Issue 4, p. 474-5.

⁵²¹ Besluit van de Minister van Economische Zaken van 4 maart 2013, nr. WJZ / 3008668, p. 3.

⁵²² Article 2 of de Besluit van de Minister van Economische Zaken van 4 maart 2013, nr. WJZ / 3008668.

binding opinions in response to complaints. It is also important to stress that submitting a complaint to the Committee does not suspend the procurement procedure.⁵²³

The Committee obtains a positive response from the public despite its limited power. Referring to the final evaluation report published by an independent reviewer appointed by the Dutch Ministry of Economic Affairs highlights the accessibility of the committee to be approached by the aggrieved bidders.⁵²⁴ Many aggrieved bidders, particularly small and medium-sized enterprises (abbreviated to SMEs), submit their complaints to the Committee. There are two possible reasons for this; they thereby avoid the high costs of conducting a lawsuit and they are reluctant “to bite the hand that feeds them”.⁵²⁵ The report also concluded the following positive findings.⁵²⁶ The complaints are handled carefully, and the committee produces advice to a high quality. Moreover, it is deemed that the advice has an influential power; it leads to changes in subsequent tendering procedures and in the general procurement policy of contracting authorities. Also, the advice of the Committee contributes to the professionalisation of the procurement practitioners.

General regulation(s)

The principle of equal treatment can be seen in the Dutch Constitution. Referring to Article 1 of the constitution, “all persons in the Netherlands shall be treated equally in equal circumstances (...)”. In Article 5 of the Constitution, it is promulgated that “everyone shall have the right to submit petitions in writing to the competent authorities”. According to literature, the latter mentioned Article

⁵²³ According to Article 9.3 of the Rules of the Public Procurement Experts Committee. See: [http://www.commissievanaanbestedingsexperts.nl/sites/default/files/bijlage/Reglement%20Commissie%20van%20Aanbestedingsexperts%20d%20d%20%2001%2004%202013%20def_herzien_%20\(2\)_0.pdf](http://www.commissievanaanbestedingsexperts.nl/sites/default/files/bijlage/Reglement%20Commissie%20van%20Aanbestedingsexperts%20d%20d%20%2001%2004%202013%20def_herzien_%20(2)_0.pdf), last visited 2 March 2015. See also: Jansen, C., Janssen, J., Muntz-Beekhuis, J. 2014. “Extra Judicial Complaints Review: First Experiences of the Dutch Public Procurement Experts Committee”. This paper was presented at the 6th International Public Procurement Conference at Dublin City University on 14-16 August 2014, p. 8.

⁵²⁴ Kwink Group. 2015. “Eindrapport Evaluatie Commissie van Aanbestedingsexpert”, p.3. available from: <http://www.kwinkgroep.nl/publicatie/eindrapport-evaluatie-commissie-van-aanbestedingsexperts/>, last visited 28 October 2016.

⁵²⁵ Jansen, C., Janssen, J., Muntz-Beekhuis, J. 2014. “Extra Judicial Complaints Review: First Experiences of the Dutch Public Procurement Experts Committee”. This paper was presented at the 6th International Public Procurement Conference at Dublin City University on 14-16 August 2014, p. 2.

⁵²⁶ Kwink Group. 2015. “Eindrapport Evaluatie Commissie van Aanbestedingsexpert”, p.3 available from: <http://www.kwinkgroep.nl/publicatie/eindrapport-evaluatie-commissie-van-aanbestedingsexperts/>, last visited 28 October 2016.

enables the citizen to submit a request to the competent authority asking it to abandon, undo, or amend a decision in which he or she feels disadvantaged.⁵²⁷

In addition, it is relevant to mention Article 112 Dutch Constitution. It provides the justification to submit the dispute to the judiciary.⁵²⁸ Moreover, this provision explains the possibility to submit the dispute to the certain forum(s) that do not form part of the judiciary; when this occurs, an act of parliament shall clarify the matter.⁵²⁹ Arguably, this provision provides constitutional justification to, and coherent with, the establishment of the Committee of Expert Tenders as a forum, which can ensure the protection of any relevant principles - including the principle of equal treatment.

Case law

The following is some relevant legal advice issued by the Dutch Committee of Tendering Experts. The focus of the discussion in this section is on the advice issued by the Committee as an independent administrative body; the discussion regarding the court decision will be covered in the section of the principle of accountability. As has been explained earlier, although this advice cannot have similar legal status as court decisions, the advice, nonetheless, has the influential power.⁵³⁰ The advice may highlight how the principle of equal treatment has been

⁵²⁷ Bovend'Eert, P.P.T. and Kortmann, C.A.J.M. 2012. *Constitutional Law in the Netherlands*, Kluwer Law International, Alphen aan den Rijn, p. 158.

⁵²⁸ "The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary."

⁵²⁹ "Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament."

⁵³⁰ According to a representative of the Committee of Tendering Expert, there are no exact data showing how frequently the contracting authority follows the advice prepared the Committee. However, there are good examples of the influential power of the Committee. Two of these are the advice number 351 and 362. The advice number 351 was issued on 23rd May 2016. When the contracting authority (Municipality of Amsterdam) received the advice, the authority stopped the tendering procedure on the 1st June 2016. The advice number 362 was issued on 26th July 2016. Shortly after the contracting authority (Municipality of Den Bosch) received the advice, the municipality stopped the tender procedure. Advice 351 was about the European public procurement procedure to supply materials relate to the granite bands, tile and seating. The contracting authority prepared the document in a way which is perceived as favouring certain economic operator. An aggrieved bidder submitted a complaint to the Committee of Tendering Expert. The Committee handled this by saying, among other things, the contracting authority should clarify the standard on the requirements (i.e. by following certain handbook for nature stone pavement). The Committee stressed that the specification material shall not limit the solution in advance. See: Advies 351, especially para. 7.2.1. Available from:

protected in the Netherlands. This may, of course, intertwine with other relevant principles, but the emphasis on the principle examined in the current discussion will be provided.

A contracting authority - no detailed information provided - organised procurement to acquire media placements in November 2014. An aggrieved tenderer submitted a complaint to the Committee based on the following two points.⁵³¹ The defendant (the contracting authority) had breached the principle of equal treatment by communicating substantive aspects to another tenderer. The other reason was that the defendant had wrongly provided a negative review of the complainant. Regarding the former matter, the Committee considered that this was pointless and that the complaint was, therefore, unfounded. Regarding the second complaint, the Committee provided an interesting explanation. The Committee considered that part of the assessment mechanism had clearly been designed by the defendant; however, something was less clear (in this context, "a 'click' as a good basis for partnership").⁵³² A lack of clarity leads to unclear reasoning in the award decision, such as: "much expertise available"; "very good impression"; or, "the click as the basis for the partnership."⁵³³ Having realised this, the Committee concluded that the second complaint was indeed well founded.

Looking at another advice, which proved to be relevant, a contracting authority (its identity was not made known) had engaged in procurement in order to acquire temporary information and technology staff. An aggrieved bidder submitted a complaint to the Committee based on, among other things, the contention that the reason for the award decision lacked transparency, and the award decision was based on a subjective assessment and was, furthermore,

[https://www.commissievanaanbestedingsexperts.nl/advies/advies-351-mag-de-mate-waarin-
een-monster-voldoet-aan-een-referentiemonster-als](https://www.commissievanaanbestedingsexperts.nl/advies/advies-351-mag-de-mate-waarin-een-monster-voldoet-aan-een-referentiemonster-als), last visited 28 October 2016. Advice 362 was about the European tendering on a framework agreement with six firms for graphic and design services. In essence, it was questioned whether the invitation to tender has met the criteria which so-called "reasonably well-informed and normally diligent tenderers". The criteria set by the contracting authority might be interpreted differently by the tenderers, and therefore it might lead to favouritism and arbitrariness (para 5.2.3). This allegation was also supported by the subjective criteria such as 'in touch with the culture of the defendant' (para 5.2.12); 'speak the language of the defendant' (para 5.2.13). The Committee considered that the complaint was well-founded (para 6). See: Advies 362, available from: [https://www.commissievanaanbestedingsexperts.nl/advies/advies-362-heeft-de-aanbesteder-
gehandeld-strijd-met-de-transparantieverplichting-van-art-19](https://www.commissievanaanbestedingsexperts.nl/advies/advies-362-heeft-de-aanbesteder-gehandeld-strijd-met-de-transparantieverplichting-van-art-19), last visited 28 October 2016.

⁵³¹ Advies 202, para. 2.1 and 2.2. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/935>, last accessed 27 May 2016.

⁵³² Advies 202, paras 5.3.7 and 5.3.8. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/935>, last accessed 27 May 2016.

⁵³³ Advies 202, para. 5.3.8. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/935>, last accessed 27 May 2016.

inaccurate.⁵³⁴ In examining this case, the Committee considered that the principle of transparency underpins the implementation of the principle of equal treatment. With regard to this, the Committee alleged that it was unclear how the principle of equal treatment could be ensured where the contracting authority had not disclosed, in advance, the matrix assessment (how the proposal will be evaluated).⁵³⁵ The Committee also mentioned that the contracting authority should have clarified the proposed measurement concerning certain aspects (in this context in reducing CO2 emissions); by doing so, the bidding participants would not be led to think that the authority had assessed the proposal in an assumptive (or subjective) manner.⁵³⁶

The other relevant advice is as follows. It concerned the construction and operation of an energy source, namely a procurement to install a new system for air in a swimming pool. There was an aggrieved bidder that complained about the very high demand (namely twelve times) for turnover requested by the contracting authority. According to the bidder, the law prohibits this requirement. In its assessment, the Committee considered that the defendant (i.e. the contracting authority) had not sufficiently explained the reason why it required such a high demand.⁵³⁷ In addition, stemming from the Proportionality Guide, in the highly complex and risky project a turnover requirement of up to 300% can be requested.⁵³⁸ According to the Committee, anything above that is not only disproportionate, but is also not permitted.⁵³⁹

⁵³⁴ Advies 161, para. 2.1. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/934>, last accessed 27 May 2016.

⁵³⁵ Advies 161, para. 5.2.2. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/934>, last accessed 27 May 2016.

⁵³⁶ Advies 161, paras 5.4.5. and 5.4.6. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/934>, last accessed 27 May 2016.

⁵³⁷ Advies 237, para 6.5. Available at: <https://www.commissievanaanbestedingsexperts.nl/advies/advies-237-disproportionele-omzeteis>, 27 May 2015.

⁵³⁸ Advies 237, para. 6.6.1. Available at: <https://www.commissievanaanbestedingsexperts.nl/advies/advies-237-disproportionele-omzeteis>, 27 May 2015.

⁵³⁹ Advies 237, para 6.6.1. Available at: <https://www.commissievanaanbestedingsexperts.nl/advies/advies-237-disproportionele-omzeteis>, 27 May 2015.

4.3.2. Normative framework and provisional finding

The above elaboration has shown that there is a prohibition on the contracting authority dealing with bidding participants unequally. Obviously, this prohibition also applies during the administrative review phase. In this regard, the regulation lays down that there must be a review mechanism not only internally but also outside the contracting authority. The administrative accountability forum outside the contracting authority is called the Dutch Public Procurement Experts Committee. It may be true that the legal advice given by the committee is not legally binding. However, as a body outside the contracting authority provides the advice, it is considered to be more impartial. Moreover, as the parties usually adhere to the advice, it does have a significant influence. In the above, some of the advice issued by the Committee has also been discussed. The complaints submitted to the Committee were based on accusations by aggrieved bidders that the contracting authorities had dealt with them unequally or subjectively. The reasoning of the Committee regarding these matters has also been explained. Having said the above, arguably the principle of equal treatment in the Dutch public procurement system is protected.

4.4. The principle of transparency: regulation and legal protection

This section will examine how the Netherlands implements the principle of transparency particularly in explaining the award decision. The following structure will be employed. To start with, the relevance of discussing the matter will be underlined. This is followed by an elaboration on the availability of certain regulations both in public procurement law and in general law. Afterwards, relevant case law on the matter will be provided. It will then be argued what these means from a good public procurement approach.

4.4.1. Situation found and an analysis

It is possible that bidding participants may not understand the contracting authority's reasoning in the award decision.⁵⁴⁰ Obviously, this situation violates the

⁵⁴⁰ In section 3.4 it is doubted whether the bidding participants in Indonesia can understand this report; it is a report which can be requested by the bidding participants which contains more detailed information on the bidding proposal assessment than on the award decision. Based on three examples of a procurement process report in different procuring entities, it has been argued that these reports are not self-explanatory. In addition, the regulations do not entail the possibility for bidders to request further clarification.

principle of transparency. With regard to this, it is relevant to understand how the Netherlands deals with the matter.

The procurement regulations (focusing on the clarity of the award decision)

To begin with, it is relevant to underline that the DPPA explicitly lays down the obligation for contracting authorities or special sector companies to act transparently.⁵⁴¹ However, it has a certain limitation; the contracting authority may not publish certain information whenever such information may:⁵⁴² contradict the regulations; contradict the public interest; cause harm to the legitimate commercial interests of the bidders; and reduce fair competition among economic operators. With regard to the issue of the transparency of the award decision, the Act lays down that the award decision should be announced in three procedures, each of which contains different information.⁵⁴³ The first is sent to each bidding participant and it contains substantive information which I shall discuss separately in the following paragraph. The second is a notice sent to TenderNed which tends to be fairly general and is publicly available.⁵⁴⁴ The third is a notice, which is so called the *proces-verbaal* report. It is sent to the European Commission if this is requested.⁵⁴⁵

⁵⁴¹ Article 1.9 Dutch Public Procurement Law 2012. See also: *Gids Proportionaliteit* (Proportionality Guide) section 1.1, at p. 7.

⁵⁴² Article 2.138 Dutch Public Procurement Act.

⁵⁴³ This different information contained in the three notices above is not clearly defined in the law. I realised this after a discussion with C. Janssen, a Professor of Public Procurement Law at VU Amsterdam, 15 April 2015. Also my discussion with Mr. Henk Wijnen, a representative from the PIANOo (the Dutch Public Procurement Expertise Centre), The Hague, 30 April 2015.

⁵⁴⁴ The contracting authority also has to announce the award notice to TenderNed. This is the Dutch Government's online tendering system. All authorities publish their national and European tenders through TenderNed's announcement platform, so businesses can access all government tenders at one single location. See: <http://www.tenderned.nl/tenderned-english>, last visited 31 March 2015. However, the award notice sent to TenderNed contains the name and address of the winner and the number of bidding participants, but in its reasoning it does not contain the names of the bidding participants, any excluded bidders, and the unsuccessful bidders.

⁵⁴⁵ See: Explanatory Memorandum of Article 2.132 Dutch Public Procurement Act 2012. According to this Article, the report must contain:⁵⁴⁵ (i) the name and address of the contracting authority, (ii) the object and the value of the procurement, (iii) the names of bidding participants which have submitted their tender proposals, (iv) the names of excluded bidders stating the grounds of exclusion, (v) the names of the unsuccessful bidders providing the reason(s), (vi) questions which have been raised by the tender participants and the answers given by the authority, (vii) if applicable, the contracting authority is required to provide an explanation when the authority has rejected a bidding proposal based on an abnormally low tender, and lastly (viii) the name of the successful bidder and the reasoning for selecting this bidder; if relevant, it also contains information on who will be the sub-contractor of the procurement activity. From the phrase "if it is requested" above, it is implied that this report is not widely published, but is limited solely to the Commission. Nevertheless, my research shows that there is another *proces-verbaal* report that can be found

As this research is aimed at promoting the role of aggrieved bidders in persuading the contracting authority to engage in oversight, it is only relevant to discuss the first point. The contracting authority must inform each bidding participant of the award decision. There are two types of notices. The first type is sent to the winner; the other is sent to each of the unsuccessful bidders.⁵⁴⁶ This latter notice should provide sufficient reasoning as to why that bidder was not awarded the contract.⁵⁴⁷ The decision must contain relevant reasoning for having made this decision; for instance, that the bidding proposal does not meet the functional and performance requirements.⁵⁴⁸ It is worth highlighting that the regulation promulgates that the reasoning must enable the bidding participants to understand the ranking of their bids as well as enabling them to properly assess the potential success of the available legal remedies.⁵⁴⁹

Normally this notice does not contain a list of the participants; it merely compares the addressee's offer with the winner's offer. Presumably, this occurs due to the prevention of bid rigging. According to the OECD, disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement; therefore, sending the notice separately without providing a list of participants and their offers can be a good mechanism to avoid bid-rigging.⁵⁵⁰

publicly. According to the representative, this report is only for the construction sector, and according to him, the legal justification for doing this is Article 2.21.2 of the Aanbestedingsreglement Werken (ARW) 2012. In addition, the representative also explained that this report is used for procurement with the selection method by the lowest bidder. The interview was held with a representative from the PIANOO, The Hague, 30 April 2015. The Works Procurement Regulations 2012 (ARW 2012) are mandatory regulations for public works projects under the European procurement threshold. For procurement above the threshold, this guidance is not mandatory. See: <http://www.rijksoverheid.nl/documenten-en-publicaties/richtlijnen/2013/02/20/aanbestedingsreglement-werken-2012.html>, last visited 27 May 2015.

⁵⁴⁶ It is sent either by electronic mail or fax. See: Article 2.130 (3) Dutch Public Procurement Law 2012.

⁵⁴⁷ Article 2.130 (1) Dutch Public Procurement Law 2012.

⁵⁴⁸ Article 2.103 Dutch Public Procurement Law 2012.

⁵⁴⁹ Broerse, D., Peelen, J.J., Vis, B. 2013. "Public Procurement in the Netherlands: the Overview". Available from: <http://uk.practicallaw.com/3-522-7902?q=&qp=&qo=&qe=>, last visited: 10 March 2015.

⁵⁵⁰ The OECD realises that this issue in public procurement is tricky; on the one hand, the government is bound by the transparency requirement to minimise abuse; on the other hand, publishing a huge amount of information may lead to undesirable results. See: OECD, "Policy Roundtables: Public Procurement", available from: <http://www.oecd.org/competition/cartels/39891049.pdf>, last visited 27 March 2015.

The procurement regulations (on the debriefing mechanism)

Before discussing the regulations, it is relevant to briefly explain the history of the debriefing mechanism, which intertwines with the more general transparency issue contained in the ECJ decision. Procedurally speaking, after the contracting authority makes a decision as to who should be awarded the contract, the authority will inform all bidding participants of the decision. From this time, a 'standstill period' is applied. The historical background of the period emanates from an ECJ decision in the *Alcatel* case. *The essence of this ruling is that the requirement for the Member States "to ensure that the award decision prior to the conclusion of the contract (...) is in all cases open to review (...)."*⁵⁵¹ This case highlights the necessity of providing for a mandatory standstill period of at least 10 to 15 days between the award of the contract and a contract award decision before the contract is signed. The former period occurs when the tender is conducted electronically whilst the latter occurs when the tender is conducted 'traditionally'.⁵⁵² In other words, the standstill period aims to provide the necessary time for the unsuccessful bidder to understand the award decision (including seeking additional information via the debriefing mechanism) and to calculate the possibility of successfully seeking legal remedies.⁵⁵³ The DPPA states that the period is a slightly longer (20 days) presumably to facilitate the interests of unsuccessful bidders.⁵⁵⁴

The law dictates the type of information that shall be provided by the contracting authority to the bidding participants. However, the regulation embraces the general situation and does not specifically address the debriefing mechanism. Nevertheless, as the debriefing mechanism is designed to facilitate communication between the unsuccessful bidders and the contracting authority, then the question of to what extent the contracting authority has to provide the information becomes relevant. Regarding this question, the Law does not provide an immediate answer. According to Article 2.57(1), this implies that the contracting authority is instructed not to extensively provide all the information that has been

⁵⁵¹ Case C-81/98, *Alcatel Austria AG and Others v Bundesministerium für Wissenschaft und Verkehr*, para. 29 and point 1 of the ruling.

⁵⁵² Mills and Reeve LLP. Year of publication unknown. 'Award and Standstill', available at: http://www.procurementportal.com/award_and_standstill/, last visited 29 May 2016.

⁵⁵³ Broerse, D., Peelen, J.J., Vis, B. 2013. "Public Procurement in the Netherlands: The Overview". Available from: <http://uk.practicallaw.com/3-522-7902?q=&qp=&qo=&qe=>, last visited: 10 March 2015.

⁵⁵⁴ Article 2.127 (3) Dutch Procurement Law 2012.

requested. In the same article but the following subsection (2), it states that care should be taken when providing information that could distort competition.

Fortunately, the *memorie van toelichting* (explanatory memorandum) to that article provides extensive further information. The contracting authority should consider the document provided by the economic operator(s) as confidential.⁵⁵⁵ Therefore, it should not be disclosed to third parties. The *memorie van toelichting* also mentions the ECJs ruling in the *Varec SA* case.⁵⁵⁶ In essence, this explains that the review body must ensure that “confidentiality and business secrecy are safeguarded (...). It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute(...) so as to ensure that the proceedings as a whole accord with the right to a fair trial.”

This case makes clear that economic operators must be able to provide the contracting authorities with all the necessary information in the context of the tendering procedure without having to fear that this information will be disclosed to a third party and harm their interests. Seemingly, the legislature has considered the possibility of confusion in the implementation level, for instance, because a bidding participant may request information from the authority by arguing that the information is not excepted or restricted according to the certain Dutch Act on Transparency.⁵⁵⁷ Regarding this point, the memorandum explains that one should distinguish between (i) information provided by an economic operator to the contracting authority, and (ii) information drawn up by the contracting authority. The second type of information concerns the call for tender, the contract award, or other tender documents, which should be published. However, the first type of information should be treated as confidential.

The general regulations

Following the above explanation, it is relevant to turn to the discussion on the general regulations. To begin with, it is essential to see how the principle of

⁵⁵⁵ Regarding this aspect, the memorandum even highlights particular issues such as technical or trade secrets and the confidential aspects of tenders.

⁵⁵⁶ Case C-450/06, *Varec SA ('Varec') and the Belgian State*, para. 55.

⁵⁵⁷ The Act Concerning Public Access to Government Information 1991. The English version of the Public Access to Government Information Act can be found in the following link, http://www.freedominfo.org/wp-content/uploads/documents/NL%20public_access_government_info_10-91.pdf, last visited 28 May 2015.

transparency is embodied in the Dutch Constitution. Article 110 of the Dutch Constitution stipulates that “in the exercise of their duties government bodies shall observe the right of public access to information by rules to be prescribed by Act of Parliament”. In other words, it obliges the Government to publish information about its policies where this is in the interest of good and democratic administration based on its initiative.⁵⁵⁸

Relating to the principle of transparency, GALA also embraces this issue in numerous places, such as the following. Article 3:40 of GALA stipulates that “A decision does not take effect until it has been notified”. Logically speaking, it aims to give the opportunity for interested parties to challenge the decision. Indeed, it strengthens the logic which has been explained at the end of Chapter 2 that the principle of transparency is instrumental for the principle of accountability.

Article 3:42 of the GALA, for instance, stipulates that, except when this is regulated otherwise, an administrative decision must be widely published whenever it is not addressed to certain interested parties. In addition, in order to minimise the possibility of an arbitrary decision, the administration must be transparent by providing sufficient reasoning (Article 3:7). The decision (and its reasoning) must be based on sound justifications (Article 3:46). This principle of reasoning has a close correlation with the principle of transparency. It may be recalled in the previous discussion in Chapter 2 that the principles of transparency and equality are instrumental to each other (on this point, it is argued that the principle of reasoning is covered by the principle of equality).

The principle of reasoning itself comprises two dimensions.⁵⁵⁹ The first is a formal dimension which means that the administration’s reasons or motives for making a decision must be recognisable. The other is a substantive dimension and this means the administrative authority must consider the relevant facts, the interests involved, and the rules for its decision. The transparency of this reasoning is necessary not only to explain the decision to citizens and the person concerned (to maintain trust in and the legitimacy of the administration), but also for the citizen so that he or she can prepare his or her defence.⁵⁶⁰

Having said the above, not every single aspect must or can be disclosed. Referring to Article 5:49 of the GALA, there is no general right of access to the file in the procedure for preparing a decision in administrative law (except for a procedure

⁵⁵⁸ Bovend’Eert, P.P.T. and Kortmann, C.A.J.M. 2012. *Constitutional Law in the Netherlands*, Kluwer Law International, Alphen aan den Rijn, the Netherlands, p. 166.

⁵⁵⁹ Addink, G.H., *Good Governance: Concept and Context*, forthcoming, p. 86.

⁵⁶⁰ Jansen, O. “Country Analysis: The Netherlands”, in Jansen, O. (ed). *Administrative Sanctions in the European Union*, Intersentia, Cambridge, p. 434-435.

to impose an administrative fine).⁵⁶¹ In addition, according to Article 2:5, civil servants are not permitted to divulge secret/confidential information except when they are obliged to disclose certain information under a specific regulation. This regulation corresponds with the regulation in the Dutch Information Act. In essence, anyone can ask an administrative authority to provide information and has to specify his or her request; this request will be granted unless certain restrictions apply.⁵⁶²

As it may be seen later, the logic of the above restrictions can also be found in the area of public procurement. It is not allowed for an individual to request information which reveals who will be awarded a contract. Moreover, the contracting authorities must not divulge information which is prohibited or may lead to the distortion of a level playing field in the competition between the bidding participants.

Case law

Regarding the transparency of award decisions, it is worth discussing the following cases. Reference will first be made to the advice provided by the Committee of Tendering Experts, which has dealt with the case similar to the transparency problem described in Indonesia. A contracting authority organised a European tender for consultancy services relating to real estate. A tender participant complained to the Committee by arguing, *inter alia*, that the reasoning in the award decision was flawed. When the Committee examined the complaint, it found that the justification for the award decision made by the authorities was only based on a table score. In this respect, the Committee considered that it was necessary for further information to accompany the table containing the award decision, as this would enable the applicant to understand the reasons as to why his bidding proposal had not been selected.⁵⁶³ The Committee also mentioned the ruling by ECJ in the *Alfastar-Siemens* case. Due to its relevance, this case will be discussed more extensively here below.

⁵⁶¹ Jansen, O. "Country Analysis: The Netherlands", in Jansen, O. (ed). *Administrative Sanctions in the European Union*, Intersentia, Cambridge, p. 429.

⁵⁶² The restrictions are contained in Articles 10 and 11 of Dutch Information Act. See this discussion in Addink, H., Anthony, G., Buyse, A. and Flinterman, C. (eds). 2010. *Human Rights and Good Governance*, SIM, Utrecht, p. 60-61.

⁵⁶³ Advies 209, p 10. Available at: <https://www.commissievanaanbestedingsexperts.nl/advies/klacht-209-heeft-beklaagde-gekozen-voor-een-wijze-van-beoordeling-die-het-risico-van>, last visited 27 May 2016.

In that case, a contracting authority (namely, the EU Council) had provided a bidding evaluation of the Alfastar-Siemens consortium and the evaluation of the successful tenderer. Nonetheless, the information was merely provided in the form of a table showing the scores obtained by the two tenderers in respect of each award criterion, the result of the evaluation of each of these two, and the score result.⁵⁶⁴ Regarding this aspect, the Court considered that the EU Council had not complied with the duty to give reasons.⁵⁶⁵ Moreover, the Court found that no additional information had been given concerning the award decision which “would enable the applicant to understand the reasons” why his bid had not been selected.⁵⁶⁶ Furthermore, the Court considered that the absence of any comments explaining the reasons meant that the applicant was not able to ascertain the details; therefore, it was necessary that explanations should accompany the tables in order for tenderers to see the details of their rejection.⁵⁶⁷ Returning to the case in the Netherlands, the Committee found that the complaint submitted was on the merits.⁵⁶⁸

It is also relevant to discuss the following case. The municipality of Zoetermeer had arranged the procurement of parking management (i.e. the enforcement of regulated parking control, the maintenance of a parking service, the management of parking equipment, etc.). One of the tenderers (‘Inpublic’) felt aggrieved as the award decision had been given to another tenderer (‘P1’). Inpublic argued that the municipality had wrongly assessed the criteria of P1. The relevance of this case is as follows. The court considered that the complaint had been triggered by an insufficiently reasoned decision not to award the contract to Inpublic.⁵⁶⁹ The Court explained that it is important (i) to clarify to the prospective bidder what is expected from him; (ii) that the bids are assessed on the basis of an objective system; (iii) that the contract award decision is so reasoned and thus it enables unsuccessful tenderers to examine (the objectivity) of the assessment.⁵⁷⁰ This ruling along with the opinion and the ECJ decision above explain that the

⁵⁶⁴ Case T 57/09, *Alfastar Benelux SA v. Council of the European Union*, para. 35.

⁵⁶⁵ Case T 57/09, *Alfastar Benelux SA v. Council of the European Union*, para. 36.

⁵⁶⁶ Case T 57/09, *Alfastar Benelux SA v. Council of the European Union*, para. 37.

⁵⁶⁷ Case T 57/09, *Alfastar Benelux SA v. Council of the European Union*, para. 38.

⁵⁶⁸ Advies 209, p. 10-11. Available at: <https://www.commissievanaanbestedingsexperts.nl/advies/klacht-209-heeft-beklaagde-gekozen-voor-een-wijze-van-beoordeling-die-het-risico-van>, last visited 27 May 2016.

⁵⁶⁹ ECLI: NL: RBDHA: 2013 :18433, para. 4.6.

⁵⁷⁰ ECLI: NL: RBDHA: 2013 :18433, para. 4.2. The court then underlined that this is only the case if there are procedural or substantive inaccuracies or ambiguities which could mean that the award decision is erroneous, and then it provides room for the courts to intervene.

award decision must be clear, not only about how the proposal will be assessed, but also the reason for awarding the contract. The reasoning should be substantial and it is, therefore, not sufficient to only provide a table of scores.

4.4.2. Normative framework and provisional finding

The above discussion has elucidated that the regulation requires the contracting authority to provide sufficient information concerning the award decision to the bidding participants. Each losing bidder obtains a decision on the score and the description of the relative weight as to why he has not won and why the winner has been chosen. Therefore, with this document the losing bidder can evaluate the objectivity of the decision. In addition to this, if he does not understand or if he needs further information, he can, by law, request the debriefing mechanism. Furthermore, it has also been shown that the relevant case law indicating that whenever the contracting authority does not comply with the above, the aggrieved tenderer may complain, and the Committee and the court may intervene in the matter. Having noted these situations, arguably, the principle of transparency in this matter is protected in the Netherlands.

4.5. The principle of accountability (clarifying the legal accountability forum): regulation and legal protection

This section will examine how the Netherlands implements the principle of accountability emphasising the issue of the clarity of the legal accountability forum in dealing with a public procurement dispute. The following structure will be employed. The relevance of discussing the matter by explaining the logic of this research will be firstly underlined. Following this will be a description of the availability of certain regulations both in public procurement laws and in general law. Afterwards, relevant cases on the matter will be provided. It will then be argued what these mean if they are examined from a good public procurement approach.

4.5.1. Situation found and an analysis

As happens in Indonesia, it is possible that laymen, lawyers and even judges are confused when it comes to determining which legal accountability forum should apply when dealing with a public procurement dispute.⁵⁷¹ As a

⁵⁷¹ The previous chapter (3.5) has argued that there is a violation of the principle of accountability in the Indonesian public procurement system. The public are confused as to which legal forum should apply in dealing with a public procurement dispute, a civil or an administrative court.

consequence, this undermines the principle of accountability. Therefore, it is relevant to assess how the Netherlands deals with this matter. In the following section, it will be noted that the confusion regarding the accountability forum does not seem to occur in the Netherlands. Interestingly, even the procurement regulation is silent on the matter. As will be seen, the guidance for the court decision is based on general law and the case law.

Before coming to the main discussion, it is worth clarifying that there are two layers of courts (judicial review) which can be used to protect the interest of bidders. The first one is the European Court of Justice (ECJ) and the other layer is the national courts (which can then be broken down into three layers: the first instance court, the appeal court, and the Dutch Supreme Court).

Lodging a complaint to the ECJ is less attractive as it is time-consuming and is designed with the intention of fulfilling the desire of claimants to change the procurement practice in the longer term.⁵⁷² In such a case, the aggrieved bidder must lodge a complaint with the European Commission, and then the Commission will consider whether or not to bring the case to the ECJ. Whenever the Commission decides to bring a case, the Commission will be up against the Member State(s), which violate the public procurement directives.

For this reason, the discussion will not focus on the EU level; it will focus on the national legal system. In this respect, what has been discussed in the introductory section will be reiterated, a doctrine in which the so-called national procedural autonomy will apply. Stemming from a ruling by the European Court of Justice, this doctrine allows the Member States to regulate their own legal procedure to ensure legal protection in certain areas.⁵⁷³

Besides, on some occasions, the Supreme Court has also been satisfied with the argument that the Business Competition and Supervisory Body should become the first instance review forum, in which case the decision of this body is reviewable in the Civil Courts.

⁵⁷² Niejhr, N. and Azau, Q. "European Community", in Gabriel, M. and Topfer, F.R. (eds). 2009. *Remedies and Public Procurement Law in Europe*, Baker and McKenzie. p. 4.

⁵⁷³ It departs from the European Court of Justice (ECJ's) judgement on the refusal of an import licence and is known as the *Salgoil* case. The ECJ provided the first clear ruling on a Member State's competence in the field of judicial organisation, but then the Italian Court requested a further explanation. The ECJ then replied that [...] it is for the national legal system to determine which court or tribunal to give the protection. See: Wouters, K. "Public Procurement Review Bodies (including Anti-fraud Measures)", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law: Public Procurement and Beyond*, Bruylant, Brussels, p. 352.

Procurement regulation(s)

The DPPA does not actually provide any explanation regarding which court should have competence to hear a procurement dispute. Therefore, an attempt will be made to clarify the general regulation, as discussed below.

General regulation(s)

According to the GALA, “decisions taken in the preparation of a private-law juridical act are under civil court competence”.⁵⁷⁴ This means that as a public procurement contract is considered to be a civil law agreement, any judicial review of such decisions does not fall within the ambit of the administrative courts, but is within the jurisdiction of the civil courts and it is enforced using the rules of private law.^{575 576} However, the civil courts may use public law to evaluate the case.

To follow the line which has been taken in the chapter on Indonesia, the discussion below attempts to debate whether the Dutch business competition authority has a role to review the procurement dispute.⁵⁷⁷ The Netherlands has the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt*

⁵⁷⁴ Article 8:1 no.1 of the GALA states that: “an interested party may appeal a decision to the district (civil) court”. Moreover, in the same Article but in no. 3, it is stated that “the following are equated in a decision... (b) a written refusal to approve a decision taken in preparation of a private-law juridical act”. See also Article 8:3 which states, “no appeal lies against decisions taken in preparation of a private-law juridical act”.

⁵⁷⁵ Numerous publications have confirmed this, see: Hebly, J.M. and Wilman, F.G. “Damages for breach of procurement law: The Dutch situation” in Fairgrieve, D. and Lichere, F (eds.). 2011. *Public Procurement Law: Damages as an Effective Remedy*, Hart, Oxford, p. 76. See also: van Heeswijk, A.J. 2015. “The Dutch System of Legal Protection in Public Procurement Procedures”, *Public Procurement Law Review*, Issue 6, No. 24. P. NA195.

⁵⁷⁶ There are few cases where the administrative courts have the competence to deal with. An instance of this is a dispute on issuing a concession for public transport services. See: Broerse, D., Peelen, J.J., Vis, B. 2013. “Public Procurement in the Netherlands: The Overview”. Available from: <http://uk.practicallaw.com/3-522-7902?q=&qp=&qo=&qe=>, last visited: 10 March 2015. See also: Van de Meent, G.W. and Manunza, E.R. et al. 2014. “The Netherlands”, in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 610. Here, it is necessary to underline that this research focuses on the discussion of public contracts for works, supplies and services; and not for concession. Therefore, the emphasis will be on the practices of the Civil Courts.

⁵⁷⁷ As has been explained, the Commissioners of the Indonesian Business Competition Body (the KPPU) consider that their institution has jurisdiction to review an award decision, but does a similar situation exist in the Netherlands? I do realise that the KPPU is considered to be an independent administrative body and, therefore the nature of the discussion shall be on the ‘administrative accountability forum’ instead of the ‘legal accountability forum’. However, in the previous chapter I explained this issue in the section on the legal accountability forum to highlight the inconsistency of the Indonesian courts’ decisions in deciding on the accountability forum.

("ACM")), which is an independent administrative body.⁵⁷⁸ It aims to ensure that the market can function optimally.⁵⁷⁹ To ensure compliance, the ACM can impose a fine as an administrative sanction.⁵⁸⁰ The ACM will deal with a public procurement case where it finds an indication that the bidding participants have engaged in bid-rigging or tender collusion.⁵⁸¹ The contracting authority can report this itself, or it is also possible that the ACM, as a result of its expertise in the markets, provides advice to the contracting authority in order to prevent bid-rigging.⁵⁸² This means that aggrieved bidders and potential aggrieved bidders in the Netherlands cannot lodge a protest at the ACM to challenge the contracting authority's action. The ACM is not an institution that can receive a complaint regarding a bid protest. It explains why the decisions issued by the ACM do not bind the contracting authority, but only the bidding participants.⁵⁸³

⁵⁷⁸ Although according to Articles 5a, 5b, and 5c of the Act, this institution is equipped with certain facilitates, can be instructed to assess the implementation of the regulation and can be ordered to produce a report by the Ministry of Economic Affairs. The ACM is an independent body. See: Article 2 (2) of the Dutch Competition Act, "the framework Act Independent Public Bodies is applicable, with the exception of Article 22 of that Act". In addition, on its website, it is stated that "ACM is an autonomous administrative authority [...] but does not belong to any ministry". See: Autoriteit Consument en Markt, "Mission & Strategy: Our Powers", available from: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/>, last visited 18 March 2015.

⁵⁷⁹ For instance, this can be seen from Article 6 (1) of the Dutch Competition Act, "Agreements between undertakings, decisions of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited".

⁵⁸⁰ See: Autoriteit Consument en Markt, "Mission & Strategy: Our Powers", available from: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/>, last visited 18 March 2015.

⁵⁸¹ Article 2 (1) and Article 5 states that the Netherlands competition authority shall be established and its board shall be charged with duties aimed at the implementation of this Act, and [...]. In relation to this, Article 6 of the Act prohibits anti-competitive agreements; therefore, whenever bid rigging in public procurement occurs, the ACM has the authority to investigate and impose a sanction.

⁵⁸² Autoriteit Consument en Markt, "2014-2015 ACM Agenda: Government Tenders", available from: <https://www.acm.nl/en/about-acm/mission-vision-strategy/2014-2015-acm-agenda-government-tenders/>, last visited 17 March 2015.

⁵⁸³ The following are two instances: the Academic Medical Centre (AMC) of the University of Amsterdam organised a tender for roof renovations, but the bidding participants had colluded, and therefore the ACM fined them. In addition, there was also a case in Gouda where the municipality of that city held a tender for the renovation of the roof of "De springers" sport hall; the tender participants colluded to increase the price and engaged bid rigging. When this fraudulent action became known, the ACM fined them. These two cases are available at the two following links: <https://www.acm.nl/nl/publicaties/publicatie/1133/AMC/>, and <https://www.acm.nl/nl/publicaties/publicatie/935/Aanbesteding-herprofilering-Aambeeldsstraat-en-Mokerstraat-te-Amsterdam-Noord/>, last visited 17 March 2015.

It is relevant to mention that many procurement cases in Indonesia have been examined by the anti-corruption courts; it is necessary to briefly explore whether a similar situation also occurs in the Netherlands. It is indeed very rare that criminal law proceedings are used for procurement cases in the Netherlands.⁵⁸⁴ A report shows that corruption rarely occurs in procurement activities.⁵⁸⁵ This does not necessarily mean, however, that there is no indication of corruption in the Netherlands.⁵⁸⁶

In relation to arbitration, the Netherlands has the Dutch Arbitration Tribunal for the Construction Sector.⁵⁸⁷ The law dictates that this forum should deal with a dispute whenever a contract has been concluded and whenever the parties have agreed to bring the dispute to arbitration.⁵⁸⁸ Thus, in the Netherlands the role of arbitration is more concerned with the contract and its implementation. As this

⁵⁸⁴ The prosecution of public officials and private commercial bribery does not occur very often, although it is admitted that media coverage and press releases have increasingly focused on the investigation of bribery in semi-public bodies. See: Verbruggen, A. and van Roomen, T. 2014. "The Netherlands" in: Mandelsohn, M.F. (ed). *The Anti-Bribery and Anti-Corruption Review*, Law Business Research Ltd, London, p. 195.

⁵⁸⁵ See: Business-anti-corruption, "Dutch Public Procurement", available from: <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/netherlands/show-all.aspx>, last visited 18 March 2015.

⁵⁸⁶ ECLI:NL:RBNHO:2015:3801 is one of the cases on the matter examined by the Rechtbank Noord-Holland. In essence, an officer from the Municipality of Son en Breugel had found instances of numerous criminal actions, including: administrative manipulation by issuing fake invoices; intentionally avoiding tender opportunities in the national online tender system (see section 3.7.2 of the court decision); preferential treatment for a certain bidder (section 4). All of these happened as a result of bribery (section 3.8). Therefore, the court convicted him and sentenced him to three years' imprisonment (section 9). Regarding this, it is important to underline that according to Dutch Criminal Law, breaching public procurement regulations does not qualify as a criminal offence, except when it is as a result of a criminal offence such as bribery or fraud. See: Broerse, D., Peelen, J.J., Vis, B. 2013. "Public Procurement in the Netherlands: The Overview". Available from: <http://uk.practicallaw.com/3-522-7902?q=&qp=&qo=&qe=>, last visited: 10 March 2015. The bribing of a public official with the aim of inducing him or her to perform a non-permitted or unlawful act (Section 177 Dutch Criminal Code (DCC)), and the bribing of a public official with the aim of inducing him or her to perform a permitted or lawful act (Section 177a DCC) are both punishable offences. For the recipient to be punishable, the decisive factor is whether the public official knows or should reasonably have suspected that a gift had been made to induce him or her to act or refrain from acting in a given manner, regardless of whether or not he or she acted 'in breach of his duty' (Sections 362-363 DCC). See: International Association of Anti-Corruption Authorities (IAACA). 2012. "The Netherlands Criminal Code (Extract)", available from: http://www.iaaca.org/AntiCorruptionLaws/ByCountriesandRegions/N/Netherlands/201202/t20120221_808975.shtml, last visited 18 March 2015.

⁵⁸⁷ See the official website of the Raad Van Arbitrage voor de Bouw at: <http://raadvanarbitrage.nl/php/main.php>, last visited 28 October 2016

⁵⁸⁸ Article 4.26 of the Dutch Procurement Act.

book aims to focus on the pre-contractual phase, a discussion on arbitration is, therefore, excluded.

Regarding the role of the Ombudsman in hearing a procurement dispute, a representative from the Committee of Tendering Experts has explained the following.⁵⁸⁹ It is very rare for bidding participants to resort to the Ombudsman. However, he admitted that currently the Committee of Tendering Experts is involved in a preliminary process to draft a Memorandum of Understanding (MoU) with the Ombudsman. The purpose of the MoU is to ensure that if any procurement case is lodged with the Ombudsman, it will be suggested to the complainant that the complaint should be submitted to the Committee. There are two reasons for this: (i) the speciality of the Committee, and (ii) time considerations. The second means that, usually, the Ombudsman needs some time to hear the case due to a thorough investigation. In contrast, the Committee is able to review the case much more quickly.

Case law

Stemming from the literature discussed previously, it can be seen that procurement cases are reviewed by the civil courts. It is true that there are certain rare cases where a procurement to acquire public concessions, such as a public transportation licence or an amusement arcade licence,⁵⁹⁰ will be reviewed under the jurisdiction of the administrative courts. Nonetheless, both the public and the judiciary are clear when it comes to determining which court will deal with a dispute. This can be seen from the case law, which has clearly held that these cases are to be heard by the civil courts.⁵⁹¹ However, although a civil court case may conduct this review, this does not necessarily mean that the court will only apply private law. As has been implicitly seen, the arguments for lodging complaints as well as the legal advice and the court decisions can emanate from public law sources, such as the principle of reasonableness,⁵⁹² the duty to provide reasons,⁵⁹³

⁵⁸⁹ Interview with Janssen, C., vice chairman of the Committee of Tendering Experts and a Professor of Private Law at VU Amsterdam specialised in Public Procurement Law, Amsterdam, 15 April 2015.

⁵⁹⁰ ECLI: NL: RVS: 2016: 1421.

⁵⁹¹ ECLI:NL:HR:2014:1078; ECLI: NL: RBZUT: 2011: BU9991; ECLI: NL: RBDHA: 2013: 18433.

⁵⁹² ECLI: NL: HR: 2016: 503, para. 3.2.3.

⁵⁹³ Advies 202, para. 5.3.8. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/935>, last accessed 27 May 2016; See also: Case ECLI: NL: RBDHA: 2013 :18433, para. 4.2.

the principle of transparency,⁵⁹⁴ the principle of proportionality,⁵⁹⁵ the principle of equality⁵⁹⁶ etc. It is also worth re-emphasising that the competition authority (ACM) does not extend its authority to review a procurement dispute.

4.5.2. Normative framework and provisional finding

It has been shown that the DPPA remains silent as to which court has competence to deal with a procurement dispute. Nonetheless, the general regulations do clarify this matter. Moreover, it may be implied from the literature that the judiciary has created consistent decisions on the matter. Furthermore, from the case law it can also be seen that the judiciary has consistently decided that public procurement disputes belong to the competence of the civil courts – although the courts may employ legal sources from public law whenever this is relevant. Thus, it can be said that confusion as to the competence of the accountability forum is not an issue in the Netherlands, and it can, therefore, be concluded that the Netherlands adheres to the principle of accountability when it comes to clarity with regard to the legal accountability forum.

4.6. The principle of accountability (effective remedies): regulation and legal protection

This section will assess how the Netherlands implements the principle of accountability concerning the availability of effective remedies. In order to discuss this, the following structure will be employed. To begin with, the reason for discussing the matter will be recalled. Thereafter the availability of certain regulations both in public procurement laws and in general laws will be examined. Subsequently, the relevant cases on the matter will be dealt with, followed by an analysis what these cases mean if they are examined from a good public procurement approach.

⁵⁹⁴ Advies 161, para. 5.2.2. Available at: <https://www.commissievanaanbestedingsexperts.nl/node/934>, last accessed 27 May 2016.

⁵⁹⁵ Advies 237, para. 6.6.1. Available at: <https://www.commissievanaanbestedingsexperts.nl/advies/advies-237-disproportionele-omzeteis>, 27 May 2015.

⁵⁹⁶ ECLI: NL: RBAMS: 2014: 2540.

4.6.1. Situation found and an analysis

It is indeed possible that the available remedies do not work properly⁵⁹⁷ and, as a consequence, the situation violates the principle of accountability. Relating to this, the following elaboration will explain that this situation does not exist in the Netherlands, and therefore the principle in question is not violated. However, before coming to the main discussion, three matters will be clarified.

The main purpose of the remedies is that of correcting the mistake(s) made by the contracting authority. If relevant, the contracting authority must also compensate any mistakes that have been made. As this research focuses on the pre-contractual phase, the relevance of discussing remedies may be questioned, as it may be assumed that this does not happen in a pre-contractual phase. Two answers to this question will be provided. As will be seen later, the first two types of remedies occur during the pre-contractual phase, so they are relevant to the discussion. It may be true that the other two types of remedies occur after the contract has been concluded; however, as the mistakes take place during the pre-contractual phase, these will be included in the discussion.

The second point which needs to be made is that although the discussion aims at elaborating on public procurement in the Netherlands, due to its relevance for the Netherlands it is pertinent to commence the discussion from the perspective of EU Directives. The remedies can be classified as the following actions:⁵⁹⁸ (i) interim protection, (ii) setting unlawful decisions aside, and (iii) actions for damages. Besides, there is an additional action which is the so-called (iv) declaration of ineffectiveness.⁵⁹⁹

Lastly, it should be clarified why interim relief ('interim protection') will again be discussed. It may have been noticed that interim relief has already been discussed in the section on the principle of equal opportunity. In that section, it was used to determine the success or the failure of the legal system in ensuring the protection of the principle of equality. Here, the aim will be to highlight whether or not the legal system provides effective remedies. It is, therefore, obvious that the

⁵⁹⁷ Section 3.6 has argued that a violation of the principle of accountability occurs in the Indonesian public procurement system. This occurs because the procurement regulations are silent on providing effective remedies. Moreover, other general regulations are not always clear in explaining these issues. The procurement for acquiring a system and machinery for the production of identity cards has been discussed to describe this situation.

⁵⁹⁸ Bovis, C. "Review and Remedies", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law Public Procurement and Beyond*, Bruylant, Brussels, p. 371.

⁵⁹⁹ Heard, E. and Brealey, L. 2010. "Public Procurement Remedies: A New Era", available at <http://www.bevanbrittan.com/articles/Pages/PublicProcurementRemedies-anewera.aspx>, last visited 1 December 2015.

discussion is interwoven between one and another, though its aims and emphasis can still be distinguished.

Procurement and general regulation(s)

Unlike the previous sections which divided the discussion on the availability of regulations into two parts (i.e. procurement regulations and general regulations) and for the sake of simplicity, the following description will combine these into one single explanation. Indeed, the DPPA does not always provide clear explanations regarding the availability of remedies; these issues are clarified by the general regulations that need to be considered in a public procurement context. One author describes the situation as follows: “the determination of the scope of protection in Dutch public procurement is a matter of interpretation.”⁶⁰⁰

Interim relief

Interim protection functions as the ability to suspend an award procedure prior to the award decision. Interim protection serves several objectives, namely: (a) to correct the alleged infringement, (b) to prevent further damage to the interested party, (c) to ensure the suspension of the procedure for the award contract, and lastly (d) to ensure the suspension of the implementation of any decision taken by the contracting authority.⁶⁰¹ Aggrieved tenderers may, therefore, initiate proceedings to set aside or to annul unlawful decisions (which occur before the award decision) or to remove discriminatory technical, economic, or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.⁶⁰²

Interim relief is regulated under Articles 289-297 Dutch Code of Civil Procedure and this has long been recognised and implemented in Dutch public

⁶⁰⁰ See: van Heeswijk, A.J. 2015. “The Dutch System of Legal Protection in Public Procurement Procedures”, *Public Procurement Law Review*, Issue 6, No. 24, p. NA199.

⁶⁰¹ Bovis, C. “Review and Remedies”, in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law Public Procurement and Beyond*, Bruylant, Bruxelles, p. 372, 374. In addition, the party applying for the interim measure has to show that he has a prima facie case and to show urgency which implies that he will suffer serious and irreparable harm if the protection is not granted. See: Treumer, S. “Remedies and Enforcement”, in Arrowsmith, S. 2010. *EU Public Procurement Law: An Introduction*, Nottingham, p. 289.

⁶⁰² See an older publication by Van de Meent, G.W.A. “Enforcing the Public Procurement Rules in the Netherlands”, in Arrowsmith, S (Ed.). 1993. *Remedies for Enforcing the Public Procurement Rules*, Earlsgate, South Humberside, p. 223.

procurement disputes.⁶⁰³ The types of interim relief are the following:⁶⁰⁴ (i) an injunction in order to be admitted to a tender procedure, (ii) an injunction to be granted the contract, (iii) an injunction prohibiting the contracting authority from granting the contract to a certain tenderer, (iv) an injunction requiring the authority to apply the correct procurement rules or prohibiting the authority from applying incorrect rules, and (v) a suspension of the tender procedure. From these, it can be deduced that interim relief deals with a dispute that needs to be resolved quickly. It will be explained later that this involves certain civil law judicial procedures.

Setting aside

According to the literature, the DPPA does not provide a mechanism to set aside a decision made by the contracting authority.⁶⁰⁵ A 'decision' here refers to the award decision (and not a decision as has been discussed in interim relief). Arguably, this is not problematic, because of the protection afforded by interim protection. Therefore, the objective of the remedies in the Directives is maintained.⁶⁰⁶

Damages

Damages in public procurement may be available as a consequence of the contracting authority breaching certain legal provisions, thereby resulting in harm or loss for a certain tenderer.⁶⁰⁷ Damages are requested when the contract has been concluded and even executed. A request for damages is allowed based on Article 74, Book 6, Dutch Civil Code: "every imperfection in the compliance with an obligation is a non-performance of the debtor and makes him liable for the damage which the creditor suffers as a result, unless the non-performance is not attributable to the debtor."

In the event that damages will be awarded by the court, the amount of damages is to be calculated on the basis of Article 95, Book 6, Dutch Civil Code: "the

⁶⁰³ Van de Meent, G.W.A. "Enforcing the Public Procurement Rules in the Netherlands", in Arrowsmith, S (Ed.). 1993. *Remedies for Enforcing the Public Procurement Rules*, Earlsgate, South Humberside, p. 223-235.

⁶⁰⁵ van Heeswijk, A.J. 2015. "The Dutch System of Legal Protection in Public Procurement Procedures", *Public Procurement Law Review*, Issue 6, No. 24. P. NA198.

⁶⁰⁶ van Heeswijk, A.J. 2015. "The Dutch System of Legal Protection in Public Procurement Procedures", *Public Procurement Law Review*, Issue 6, No. 24. P. NA198.

⁶⁰⁷ Bovis, C. "Review and Remedies", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law Public Procurement and Beyond*, Bruylant, Brussels, p. 388.

damage that has to be compensated by virtue of a statutory obligation to repair damages (due by virtue of law), consists of material loss and other disadvantages, the latter as far as the law implies that there is an additional entitlement to a compensation for such damage.” Besides this, it is relevant to also take into account the Article 98, Book 6, Dutch Civil Code, which states that “only damage that is connected in such a way to the event that made the debtor liable (...) and of the damage caused can be attributed to him (...) is eligible for compensation”.⁶⁰⁸

Presumably, due to the difficulty of providing evidence that the contracting authority has acted in an unlawful way, which subsequently leads to damages, a request for damages is relatively rare.⁶⁰⁹ This causality, according to some scholars, should be provided to ensure that requests for compensation may be granted.⁶¹⁰ In addition, scholars have noted that the number of Dutch cases where claimants have been entitled to recover all of their damage, including the loss of profit, is in fact very limited. In many cases compensation is, however, awarded on a pro-rata basis, based on the number of tender participants.⁶¹¹

Ineffectiveness

The court refers to the last type of remedy as a declaration of ‘ineffectiveness’. This can be requested where the contracting authority has clearly breached the procurement procedure and this breach is considered to be a very serious infringement under ECJ law, such as not advertising the contract or rapidly signing the contract while the legality of the award decision is still being challenged. A declaration of ineffectiveness results in the consequence that the

⁶⁰⁸ Van de Meent, G.W., Manunza, E.R., et al. “The Netherlands”, in Neergaard, U., Jacqueson, C., Olykke, G.S. 2014. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 641.

⁶⁰⁹ Van de Meent, G.W., Manunza, E.R., et al. “The Netherlands”, in Neergaard, U., Jacqueson, C., Olykke, G.S. 2014. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 641. The difficulty is because the Court is certain that (i) the aggrieved bidder would have awarded the contract without the unlawful act; (ii) how much profit of the aggrieved bidder would have made under the contract.

⁶¹⁰ Van de Meent, G.W. and Manunza, E.R. et al. 2014. “The Netherlands”, in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 641.

⁶¹¹ Being granted the full claim of damages actually does not occur very often, as it is not an easy task to prove that the claimant would have won the tender. See: Van de Meent, G.W. and Manunza, E.R. et al. 2014. “The Netherlands”, in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 642. Here the authors referred to the decisions of the District Court of Zuthpen 28/12/2011; the District Court of Amsterdam, 29/05/2012; and the Leeuwarden Court of Appeal 23/04/2013.

procurement process must restart from the beginning and the authority will face a fine. The court may also order the contract period to be shortened or it may award compensation. However, the Dutch legislature decided not to include this in the legislation for the sake of simplicity.⁶¹² Therefore, stemming from Article 4.15 DPPA, if the contracting authority has infringed the standstill period, it will be sufficient to consider the contract ineffective (where the contracting authority may face fines).⁶¹³ In one publication, it has been explained that a request to annul a contract must be made against the contracting authority, as well as against the party that was awarded the contract.⁶¹⁴

Two types of civil procedure

The core issue discussed in this section is effective remedies. Therefore, besides discussing the substantive law mentioned above, it is also relevant to discuss the procedural law. The Dutch Civil Procedure Act recognises two types of civil procedure, namely: (i) summary proceedings (*kort geding*) and an action on the merits, which is the normal full procedure (*bodemprocedure*).⁶¹⁵ The former applies to a case which needs to be immediately resolved,⁶¹⁶ whereas the latter applies to a case where time is not considered to be of the essence. With regard to this, interim relief is dealt with by summary proceedings and damages are dealt with by the normal procedure. In principle, no damages can be awarded in proceedings for interim relief.⁶¹⁷

⁶¹² van Heeswijk, A.J. 2015. "The Dutch System of Legal Protection in Public Procurement Procedures", *Public Procurement Law Review*, Issue 6, No. 24. P. NA199-NA200.

⁶¹³ van Heeswijk, A.J. 2015. "The Dutch System of Legal Protection in Public Procurement Procedures", *Public Procurement Law Review*, Issue 6, No. 24. P. NA199-NA200.

⁶¹⁴ Broerse, D., Peelen, J.J., Vis, B. 2013. "Public Procurement in the Netherlands: the Overview". Available at: <http://uk.practicallaw.com/3-522-7902?q=&qp=&qo=&qe=>, last visited: 10 March 2016.

⁶¹⁵ See: Rechtspraak, "Civielrechtelijke procedure", available at: <https://www.rechtspraak.nl/naar-de-rechter/civiele-rechter/procedures/pages/default.aspx>, last visited 30 November 2015.

⁶¹⁶ Broerse, D., Peelen, J.J., Vis, B. 2013. "Public Procurement in the Netherlands: the Overview". Available at: <http://uk.practicallaw.com/3-522-7902?q=&qp=&qo=&qe=>, last visited: 10 March 2015. This has been occurring for a long time, see an older publication: Van de Meent, G.W.A. "Enforcing the Public Procurement Rules in the Netherlands", in Arrowsmith, S (ed.). 1993. *Remedies for Enforcing the Public Procurement Rules*, Earls Gate, South Humberside, p. 204.

⁶¹⁷ Hebly, J.M. and Wilman, F.G. "Damages for Breach of Procurement Law: the Dutch Situation" in Fairgrieve, D. and Lichere, F. 2011. *Public Procurement Law: Damages as an Effective Remedy*, Hart, Oxford, p. 76. Here, the author also provides two examples of court decisions, Rotterdam District Court decision LJN BD2742 and Utrecht Court decision LJN BD0636.

In summary proceedings, the court usually issues its decision within four to nine weeks after the case is filed with the court. It is possible that aggrieved bidders submit an appeal. In this case, it has to be submitted within four weeks of the judgement. The appeal court judgment can be expected within three to four months.⁶¹⁸ Finally, the bidders can appeal to the Dutch Supreme Court.⁶¹⁹

Regarding the appeal and subsequent appeal to the Dutch Supreme Court, it is essential to highlight that, although theoretically speaking the summary proceeding judgment is provisional, the losing parties tend to respect the judgment and consider this as the final judgment.⁶²⁰ This implies that extensive efforts in litigation related to public procurement in the courts are not typical in Dutch legal culture.

The summary proceeding also attracts a positive response, because the judge will often decide by anticipating the decision that will be made in the main procedure.⁶²¹ In doing so, the judge weighs the interests of the parties.⁶²² Therefore, it is not surprising to see that most procurement cases in the courts are submitted based on this classification, as approximately 92% of cases between 2004 and 2009 were settled in summary proceedings.⁶²³

Turning to the *bodemprocedure*, an aggrieved bidder who has resorted to this procedure should explain the real infringement of the law. For instance, an interested bidder finds that the contracting authority has awarded the contract to a particular bidder without following the procurement procedure. In this instance, it is obvious that a violation has occurred. As the interested bidder has not

⁶¹⁸ Van de Meent, G.W. and Manunza, E.R. et al. 2014. "The Netherlands", in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 642-643.

⁶¹⁹ Bianchi, T. and Guidi, V. 2010. *The Comparative Survey on the National Public Procurement Systems Across the PPN*, Authority for the Supervision of Public Contracts, Rome, p. 146.

⁶²⁰ This occurs in both procurement and non-procurement cases. For a non-public procurement context, see: Snijders, H.J. 2006. "Civil Procedure", in Chorus, J., Gerver, P.H., Hondius, E. *Introduction to Dutch Law*, Kluwer International, Alphen aan den Rijn, p. 263. For procurement cases, see: Van de Meent, G.W. and Manunza, E.R. et al. 2014. "The Netherlands", in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 641.

⁶²¹ Snijders, H.J. 2006. "Civil Procedure", in Chorus, J., Gerver, P.H., Hondius, E. *Introduction to Dutch Law*, Kluwer International, Alphen aan den Rijn, p. 266.

⁶²² Snijders, H.J. 2006. "Civil Procedure", in Chorus, J., Gerver, P.H., Hondius, E. *Introduction to Dutch Law*, Kluwer International, Alphen aan den Rijn, p. 263.

⁶²³ Van de Meent, G.W. and Manunza, E.R. et al. 2014. "The Netherlands", in Neergaard, U., Jacqueson, C., Olykke, G.S. *Public Procurement Law: Limitations, Opportunities and Paradoxes*. DJØF Publishing, Copenhagen, p. 642-643.

participated in the tender, time is not of the essence as far as he is concerned. In these circumstances, the complaint can be lodged and reviewed in a normal procedure. However, this is a rare occurrence.

Case law

The following describes four court decisions regarding interim relief and one regarding damages. It is necessary to underline that examples of interim relief are frequent, while damages, as has been explained above, are rarely awarded by the courts. Therefore, the same numbers of examples are not provided for both. It is also relevant to note that two of the four examples of interim relief have been discussed previously. These examples are again utilised to stress the effectiveness of the rulings by the judiciary.

This section will commence with the procurement case involving Dutch Railways (*Nederlandse Spoorwegen* (NS)), a Dutch state-owned company, which operates the public train network, which wanted to buy many new trains. A number of companies submitted proposals, including the companies Alstom and Bombardier. NS decided to award the contract to Bombardier. Alstom felt aggrieved and argued that the award decision was based on unclear criteria (it was not transparent and non-objective, also it could not be verifiable). Alstom, therefore, asked the court to prevent NS from awarding the contract to Bombardier and instead to select Alstom as the preferred bidder.⁶²⁴ In its response, due to the size and complexity of the procurement procedure, the court found that NS had failed in its obligations to clarify the criteria and its sub-criteria.⁶²⁵ The court ordered that NS should again clarify the award criteria so that bidders can monitor whether or not they are being treated equally; moreover, the court stated that NS must ensure that the criteria can be understood in the same way by every bidder.⁶²⁶ However, the court rejected Alstom's second request. The court determined that NS had to recommence the procurement process by inviting these companies to again submit their proposals. It is not known exactly when the plaintiff submitted the suit; but from the court decision it is known that this case commenced on 10th March 2005 and was heard before the court on 14th April 2005. The interim order was issued on 28th April 2005 and it was published on the same day as the decision.

⁶²⁴ ECLI: NL: RBUTR: 2005: AT4799, para. 3.1.

⁶²⁵ ECLI: NL: RBUTR: 2005: AT4799, para. 3.2.

⁶²⁶ ECLI: NL: RBUTR: 2005: AT4799, para. 3.14.

It is essential to examine the procurement case in the municipality of Zoetermeer on parking management as discussed above once again; it was dealt with in summary proceedings.⁶²⁷ It is not known when the plaintiff petitioned the court; however, it is known that the plaintiff submitted an objection relating to the awarding of the contract on 13th November 2013. The defendant replied to the objection on the following day. The hearing took place on 16th December 2013; the ruling was delivered on 23rd December 2013 while the decision was published on 27th January 2014. In the example of the procurement for refurbishment services by the Municipality of Rotterdam which was earlier discussed,⁶²⁸ the hearing was held on 1st February 2016; interim protection was ordered on 15th February 2016, and on 24th February the decision was published. In the other procurement case involving a company, which had a special partnership agreement with the Municipality of Leiden, the interim relief went as follows. The hearing was held on 12th June 2012, the decision was delivered on 19th June 2012, and it was published on 29th June 2012.⁶²⁹ From the four cases above, it can be seen that interim relief is not only available, but can be acquired in weeks, which can be considered effective – particularly because the parties respect the decision by not challenging it before a higher court.

Another example of damages discussed previously is *Kadaster v. HLA*.⁶³⁰ However, in this case, the Dutch Supreme Court was satisfied with the argument raised by *Kadaster*. The HLAs request for compensation (damages) was, therefore, refused. Nonetheless, this case provides an example of how, by law, it is possible for an economic operator to request damages.

4.6.2. Normative framework and provisional finding

This section has demonstrated that the Dutch Public Procurement Act is not always clear in explaining the availability of remedies in cases of public procurement. Nevertheless, the public in general and lawyers in particular are guided by the EU Directives and general regulations, such as the Dutch Civil Code and the Dutch Code of Civil Procedure. The available remedies are interim relief and a request for damages. It is worth stressing that the discussion on interim relief in this section has focused on the effective remedies. It therefore has a different emphasis to the discussion on the function of interim relief to protect the principle

⁶²⁷ ECLI: NL: RBDHA: 2013 :18433.

⁶²⁸ ECLI:NL:RBROT:2016:1205, para. 4.5.

⁶²⁹ ECLI: NL: RBSGR: 2012: BW9894.

⁶³⁰ ECLI: NL: HR: 2016: 503.

of equality as was discussed earlier. It has been explained that aggrieved bidders may request interim order before the civil courts. If time-pressure exists, the order shall be dealt with by means of the so-called summary (quick) proceedings, which, according to the literature and the case law, can be acquired in a matter of weeks. In addition, aggrieved bidders can also request damages, which will be heard in a normal procedure. Hence, aggrieved bidders have the necessary legal mechanisms to effectively correct the administration's mistake and they can also obtain compensation as a result of the mistake – although compensation (damages) is rarely awarded. It can, therefore, be concluded that the principle of accountability concerning the availability of effective remedies is protected in the Netherlands.

4.7. Conclusion

The following general remarks on the basis of this chapter can be drawn. Some problems in Indonesian public procurement also occur in the Netherlands (i.e. the violation of the principle of equal opportunity, equal treatment and transparency). However, as it can be noted from the case studies above, these problems are far less pronounced than the problems illustrated in Indonesia. In addition, the two problems on the principle of accountability do not occur in the Netherlands. The judiciary provides consistent decisions regarding to the clarity of the accountability forum as well as the availability of the remedies. Another general remark is that, arguably, both public law and private law influence public procurement procedure in the Netherlands. Public law, such as GALA, influences the substantive part related to legal obligation, which should be adhered by the contracting authorities, i.e. adhering to the principle of carefulness, proportionality, sufficient reason, etc. Private law, such as Dutch Civil Code, is applied as the procedural law to review decision made in public procurement.

It can be said that the five principles of good public procurement have been protected. On certain occasions, each principle may intertwine with other relevant principles. In preparing the procurement document for instance, the contracting authority shall not only adhere to the principle of equal opportunity, but also to the principle of proportionality. The requirements determined in the procurement document shall not be disproportionate by amounting to an irrelevant burden, which can distort competition. In the administrative review procedure, the principle of equal treatment is more protected whenever the principle of impartiality and the principle of independence are undertaken. It is perceived that the contracting authority in the Netherlands has assessed the objection impartially. However, if the bidders still feel aggrieved after the objection, they may seek a non-binding albeit it influential, advice from the Dutch Committee of Tendering Experts. As a body on the outside of contracting authority, its advice is considered more objective and

impartial. Turning to the issue of explaining the award decision, the principle of transparency is interwoven with the principle of reasoning (the duty to provide reasons) which has to be balanced by the principle of confidentiality.

When the principle of equal opportunity, the principle of equal treatment, and/or the principle of transparency are infringed, the aggrieved bidders may seek protection utilising the principle of accountability (in this context: legal redress by the court). The accountability forums may order the contracting authority to conduct equally or to provide a more transparent award decision. Besides this, the principle of transparency is instrumental for the principle of equal treatment; by having a transparent award decision, each bidding participant may have a better sense whether he has been treated objectively (equally) by the contracting authorities. The principle of transparency also helps each bidder to determine whether he needs to seek legal redress; this means the principle of transparency is instrumental for the principle of accountability. By minimising the asymmetry of information between the bidders and the contracting authority, if an aggrieved bidder lodges the complaint to the court, his argument will be based on merit. The two following paragraphs provide an overview of findings. Further detailed findings related to each good public procurement principle can be found below.

Section 4.2 discusses how the Netherlands exercises the principle of equal opportunity in the phase of preparing the procurement document by the contracting authority. First of all, the DPPA promulgates that contracting authorities are not allowed to include specifications and qualifications, which can distort competition. The Proportionality Guide also lays down that the requirements determined in the procurement document shall not be disproportionate. Whenever this obligation is infringed, an interested bidding participant who feels aggrieved has the possibility to review the procurement document (or in the procurement term: to seek the interim relief). This has also been illustrated with reference to some cases, which confirm the above practice. This means that whenever the principle of equal opportunity is infringed, it can be corrected by certain legal procedures; therefore, it can be said that the principle of equal opportunity in this context is protected in the Netherlands.

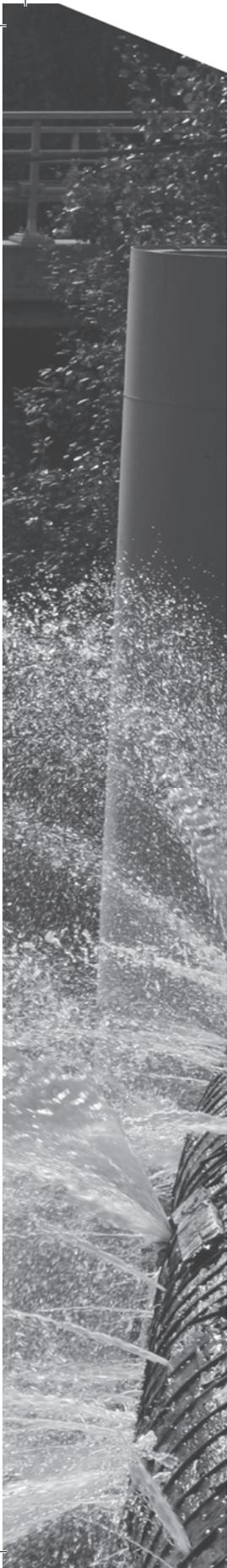
Section 4.3 discusses how the Netherlands deals with the principle of equal treatment in the administrative review phase. The description started by explaining the prohibition on the contracting authority dealing with the bidding participants unequally. Logically speaking, this prohibition also applies to the administrative review phase. Afterwards, it was explained that the DPPA lays down that the administrative review procedure shall also be available at an independent administrative body; the so-called Dutch Committee of Tendering Experts. The Committee may assess the complaint and issue non-binding legal advice, but the

advice has an influential power. As the advice is provided by a body from outside the contracting authority, it is considered more objective or impartial. In this section, some of the relevant advice by the committee which reflects the impartiality of the Committee has been provided. Thus, whenever any principle (in this section's context: the principle of equal treatment) is violated, it can be corrected by two layers of the administrative review procedure. The first layer occurs inside the contracting authority. The second layer happens on the outside of the contracting authority. The availability of the latter means the principle of equal treatment in this context is (more) protected in the Netherlands.

The following section attempts to illustrate how the Netherlands exercises the principle of transparency especially in the context of the decision in awarding the contract. The DPPA dictates that public bodies must supply sufficient information so that the bidders can evaluate their positions and decide whether or not they want to seek legal remedies. This takes place by sending the informative decision letter to each bidding participant. The letter provides not only the weighted score for each component but also the reasons for the given score. The letter intended for the losing bidder must provide a comparative description of why the winner has been chosen. Furthermore, the DPPA also grants an opportunity for bidders to make use of the so-called debriefing mechanism: the right to raise questions in order to obtain additional clarification on the award decision. Two following points can be underlined regarding the debriefing mechanism. First of all, debriefing is not an objection; rather, it allows the bidder to determine whether he wishes to submit an objection. With this, his objection will be based on merit. Another point is that debriefing can only be used to seek clarification for the evaluation of the bidding proposal made by the requesting person, and not for seeing the proposals of other bidders. Thus, when the contracting authority does not provide sufficient information on the award decision and/or debriefing, the aggrieved tenderer may object to the contracting authority and may seek legal redresses. Considering this, the principle of transparency in this matter is protected in the Netherlands.

The following section explains how the Netherlands exercises the principle of accountability especially concerning the clarity of the legal accountability forum (court competence) when it comes to a procurement dispute. The DPPA is silent on the matter. Nonetheless, the GALA explains that the civil courts shall review a procurement dispute. It is implied from the literature as well as from the case law that there is no confusion in practice regarding the legal accountability forum. It is worth highlighting that although the civil courts deal with procurement disputes, the courts may employ the legal sources from public law.

The final section explains how the Netherlands exercises the principle of accountability especially concerning clarity with regard to the availability of effective remedies. In section 4.6, it has been discussed that the public procurement system in the Netherlands provides two types of remedies: interim relief and the awarding of damages. The DPPA is indeed silent on this issue; however, the EU Directive, the Dutch Civil Code as well as the Dutch Code of Civil Procedure shed some light on the matter. Pertaining to interim relief, the Directive provides a legal basis for making use of this relief. With this, the procurement process can be suspended and the decision issued during the procurement procedure can be set aside (annulled). The Directive suitably matches the Dutch Civil Code, so that the code can be used as a legal basis to provide relief. The Dutch Code of Civil Procedure recognises the so-called summary (quick) procedure and with this, the aggrieved bidders may obtain effective relief in a timely manner. Interestingly, although the decision in the summary proceedings can be challenged, the parties tend to show great respect by generally accepting the decision. These practices shape the effectiveness of delivering the result of the dispute. Regarding damages, the DPPA is also silent on the matter, but the Dutch Civil Code can be used as a legal basis. In practice, the courts rarely award damages. It should be emphasised that damages are usually sought by means of the normal proceedings and not summary proceedings. As aggrieved bidders have such legal mechanisms to effectively correct the administration's mistake and are able to obtain compensation as a result of the mistake, it can, therefore, be concluded that the principle of accountability in terms of the availability of remedies is protected in the Netherlands.



Chapter 5

Public Procurement in the United Kingdom; protection (of the principles) of good public procurement

5.1. Introduction

This chapter attempts to analyse whether the five fundamental problems in Indonesia also occur in the United Kingdom (UK). To do so, the implementation and the protection of the selected principles of good public procurement will be examined. It can be carried out by analysing whether the law, the administration, or the judiciary in the United Kingdom is in line with the normative framework as concluded in the Section 2.7.

The UK consists of Great Britain and Northern Ireland, and Great Britain is made up of England, Wales and Scotland.⁶³¹ With regard to this, due to the relevance of this research mentioned in Chapter 1, this research concentrates on England, Wales and Northern Ireland. Scotland has its separate regulation (although the substance of that regulation is in line with the EU Directives). Nevertheless, on rare occasions and whenever it is considered relevant, case law from the Scottish Judiciary may also be cited.

This chapter contains seven sections: an introduction, five main sections explaining how the selected principles are dealt with in the UK, and a conclusion. The main sections are as follows. The first discussion will be on the protection of the principle of equal opportunity (Section 5.2), afterwards, the protection of the principle of equal treatment (Section 5.3), and then the protection of the principle of transparency (Section 5.4). The following sections will discuss the protection of the principle of accountability concerning the clarity of the legal accountability forum (Section 5.5), whereas the last section will explain the protection of the principle of accountability especially concerning the availability of effective remedies (Section 5.6).

The structure in each section is not be the same as provided in chapters three and four of this research. In the previous chapter, each section started with the reason for discussing the specific issue, then proceeded to explain the public procurement laws on regulating the matter; afterwards, the discussion of non-public procurement laws clarified the issue, and the relevant case law was provided. The structure applied in each section of this chapter indeed attempts to follow that line, but in a more flexible manner. This flexibility is required for the following three considerations. First of all, the PCRs 2015 may have rigidly explained the issues that need to be clarified; therefore, discussing the general regulations may not be wholly relevant. In addition, general regulations may not always be available (relevant) for discussing the UK public procurement system; the UK has less codified regulations

⁶³¹ Thompson, K and Jones, B. "Administrative Law in the United Kingdom" in Seerden, R.J.G.H. (Ed). 2007. *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 222.

(i.e. the UK neither has a civil code,⁶³² nor certain relevant public Acts (such as the GALA in the Netherlands)). The non-availability of a code or statute occurs due to the doctrine of binding precedent, which emphasises judicial decisions as a source of law.⁶³³ The existence of this doctrine also results in another consequence for the structure; unlike the situation in Indonesia and the Netherlands, in the structure it seems to be better not to separate the discussion of regulations and the case law.

Public Procurement in England, Wales and Northern Ireland is currently regulated by Public Contracts Regulations (PCRs) 2015. The PCRs are Statutory Instruments (SIs); “a form of legislation which allows the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act.”⁶³⁴ It is explained that SIs are different from Acts; “often, Acts only contain a broad framework and SIs are used to provide the necessary detail that would be considered too complex to include in the body of an Act”. The PCRs 2015 contain six public procurement procedures. These procedures will all be discussed later, but here the two most utilised procedures will be emphasised: namely the ‘open procedure’ and the ‘restricted procedure’.⁶³⁵

Arguably, the substantive stages in the open and restricted procedures are as follows.⁶³⁶ In the *open procedure*, the contracting authority will advertise the contract opportunity. Afterwards, the authority shall assess whether each tenderer meets the grounds to be excluded from the tender procedure. The proposals of the remaining tenderers will then be assessed according to the award criteria and the additional criteria set in the procurement document. The subsequent step is to announce the award decision. After applying the standstill period, the contracting authority takes two final steps, namely to announce the award decision and conclude the contract. In the *restricted procedure*, the contracting authority shall

⁶³² Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden, p. 15.

⁶³³ “English binding precedents are capable of possessing the quality of a proper source of law and can bind future judges unless overruled or distinguished. This is unlike continental judicial decisions which normally refer to sources of law, although nevertheless court decisions are often followed.” See: Vong, D. [No Year]. “Binding Precedent and English Judicial Law-Making”, available on: <https://www.law.kuleuven.be/jura/art/21n3/vong.pdf>, last visited 10 December 2015.

⁶³⁴ House of Commons Information Service, “Statutory Instruments”, available at: <https://www.parliament.uk/documents/commons-information-office/107.pdf>, last accessed 13 June 2016.

⁶³⁵ Houlden, J. and Jackson, C. 2014. “Public Procurement in UK (England and Wales): Overview”, available at: <http://uk.practicallaw.com/8-525-0631#a360326>, last visited 8 June 2016.

⁶³⁶ Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*. Sweet and Maxwell, London, p. 605. The PCRs 2015 do not contain specific information on the stages in the procurement procedure, presumably because this information has been specified in the EU Directive, and contracting authorities must follow the rules for the relevant procedure set out in the Directive.

announce the contract opportunity and choose the economic operators that must be invited to tender. After receiving the tender proposals from those economic operators, the authority assesses whether or not each of 'the candidates' satisfies any of the grounds to be excluded from the tender procedure. If not, then the contracting authority continues the assessment to check whether the candidate meets the eligibility requirements. A further stage is to evaluate the remaining candidates based on the contracting authority's selection criteria. The selected candidates are then invited to submit their tender proposals. Afterwards, the proposals submitted by the tenderers are assessed based on the award criteria and additional criteria determined in the procurement document. The remaining stages are the same as in the open procedure, namely: (a) announcing the award decision, (b) applying the standstill period, and (c) concluding the awarded contract.

In this introductory section, it is necessary to explain what will happen if the tenderer feels aggrieved with the award decision. This information is a general overview; a detailed discussion may be provided later in certain sections. I would like to highlight that administrative review procedures such as the 'objection' and an 'administrative appeal' within the contracting authority are not recognised in the UK public procurement system. Also, no independent administrative review body has the power to deal with a procurement dispute. Nonetheless, according to a representative, there is a mechanism termed 'consultation'. Therefore, the possibility exists that a dispute is dealt with informally by the contracting authority. The formal means laid down in the regulation entails conducting a judicial review. The aggrieved bidder may skip the consultation stage and may directly bring the dispute before the courts. It is worth stressing that court decisions on public procurement are rare in the UK.⁶³⁷ There are numerous reasons as to why this is so. Research shows that most problems are resolved before a court hearing can take place.⁶³⁸ Besides, there are two other reasons which may contribute to shaping the

⁶³⁷ In the literature, it is stated that: "judicial resolution of the challenges to procedure is rare, and successful claims even rarer". Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 205. Scholars have noted that the frequency of claims in the UK is the lowest among the EU MS, with only a few cases per year (although the numbers have recently increased) compared to a considerable number of challenges in Germany (approximately 1000 cases per year), France and Italy (with more than 4000 cases per year). According to these authors, the differences may be the result of cultural differences and also legal costs. See: Fairgrieve, D. and Lichere, F. "Procedures and Access to Justice in Damages Claim for Public Procurement Breaches" in Fairgrieve, D. and Lichere, F. 2011. *Public Procurement Law: Damages as an Effective Remedy*. Hart Publishing, Oxford, p. 192.

⁶³⁸ OECD. 2000. "Public Procurement Review Procedures", SIGMA Papers No. 30, OECD Publishing, p. 29. Available at: <http://dx.doi.org/10.1787/5kml60w0qbfv-en>, last visited 8 June 2016.

situation: the contracting authorities are open to discussing and to dealing with aggrieved bidders in an informal way,⁶³⁹ and litigation fees are very expensive.⁶⁴⁰

It is necessary to provide background information on public procurement law in the UK. After a brief history of public procurement regulations in the UK, the general content of the current public procurement regulations will be explained. Afterwards, information on the administration of public procurement activities will be presented. Thereafter, the discussion will be on the public procurement procedure.

5.1.1. A brief history of the UK public procurement regulations

The United Kingdom has long been recognised as a country that regulates its government activities based on private law. Public law, even nowadays, is relatively less developed. This can be seen in a famous case which will be discussed later, *Blackpool Aero Club*. This case explains that public procurement procedures are manifested through the private law doctrine of the implied contract; therefore, if a contractor has been excluded from being considered for a contract, although he has submitted his proposal on time, then it shall be considered as a breach of an implied contract.⁶⁴¹

It has been noted that “no formal laws dealing with public procurement (procedure) existed in the 1970s. This happened both in central and local government”.⁶⁴² There were indeed specific rules concerning the awarding of a contract, but these were few in number. Turpin has noted that the most notable rule on the matter was the requirement for Parliament to approve the budget

⁶³⁹ Prof. Davies has explained that there are not many (public procurement) cases because the government tries to promote negotiation whenever something goes wrong. Interview with Prof. Anne Davies, Oxford Law School, on 15 October 2015. As will be seen later in the section on accountability, other legal scholars have also explained the same in this respect.

⁶⁴⁰ One has to spend around 100,000 GBP merely to conduct litigation in the High Court. The court fee is 20,000 GBP and that is excluding the lawyers’ fee which is around 80-90,000 GBP. Interview with Dr. Albert Sanchez-Graells, Bristol Law School, on 30 October 2015.

⁶⁴¹ de Mars, S. 2011. *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France*, Ph.D. thesis at the University of Nottingham, Nottingham, p. 65.

⁶⁴² de Mars, S. 2011. *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France*, Ph.D. thesis at the University of Nottingham, Nottingham, p. 65-66.

before the contract is signed.⁶⁴³ The 1970s was the first time that an EU Directive influenced public procurement law in the UK; however, it was not effective. According to the literature, the implementation method by means of administrative circulars (instructions for the administration), which was considered to be not generally enforceable in domestic law, and therefore largely inadequate.⁶⁴⁴

Regarding the EU Directive, it is necessary to underline that a directive is a measure of general application which requires Member States to achieve certain results, but leaves it to each Member State to decide on the precise form and method of implementation.⁶⁴⁵ Also, it is necessary to once again underline the doctrine of national procedural autonomy, which is based on a ruling issued by the European Court of Justice. This allows the Member States to regulate the legal procedure for ensuring legal protection concerning certain aspects.⁶⁴⁶ In this regard, it is necessary to mention Article 10, Treaty Establishing the European Community. This provision requires Member States to have a measure in line with the Treaty of the European Community - including the interpretation of Community Law as provided by the ECJ.⁶⁴⁷ This measure shall also be adhered to by the judiciary, "whenever possible, national courts must interpret national law in a manner which complies with the relevant Community Directives".⁶⁴⁸ Thus, when a provision in the regulations is ambiguous, for example, and only one of two possible meanings

⁶⁴³ de Mars, S. 2011. *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France*, Ph.D. thesis at the University of Nottingham, Nottingham, p. 66.

⁶⁴⁴ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para. 3.40, p. 161.

⁶⁴⁵ Article 288 Treaty on the Functioning of the European Union (TFEU), "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

⁶⁴⁶ It departs from the European Court of Justice (ECJ's) judgement on the refusal of an import licence known as the *Salgoil* case. The ECJ provided the first clear ruling on a Member State's competence in the field of judicial organisation, but then the Italian Court requested a further explanation. The ECJ then replied that [...] it is for the national legal system to determine which court or tribunal to give the protection. See: Wouters, K. "Public Procurement Review Bodies (including Anti-fraud Measures)", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law: Public Procurement and Beyond*, Bruylant, Brussels, p. 352.

⁶⁴⁷ Article 10 of the Treaty establishing the European Community states that "The Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

⁶⁴⁸ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para. 3.44, p. 165.

gives effect to the Directive, the courts must adopt the one that gives effect to the Directive.⁶⁴⁹

Returning to the subject of the history of public procurement regulations, particularly during the 1980s, the UK government provided its administration non-binding guidance in the field of public procurement.⁶⁵⁰ This guidance contained practices which were made mandatory for procurement officials by the departments for which they procured, and these were intended as internal standards which must be consistently applied.⁶⁵¹ This was criticised at the EU level in 1984. In a report to the Prime Minister in 1987, it was explained that “the procurement guidelines should at all times be read in the light of the UK’s international obligations, (...) they are intended to be fully consistent”.⁶⁵²

The UK Government issued three Regulations on public procurement in the next decade, namely: The Public Works Contracts Regulations 1991, the Public Services Contracts Regulations 1993, and the Public Supply Contracts Regulations 1995.⁶⁵³ These were as a follow-up to the EU Directives. The Public Works Contracts Regulations transposed Directive 71/305/EEC, as amended by Directive 89/440/EEC, in its entirety. These regulations also implement Remedies Directive 89/665/EEC. The second of these regulations, the Public Services Contracts Regulations, contained Directive 92/50 and Remedies Directive 89/665. Lastly, the Public Supply Contracts Regulations 1995 transposed Directive 93/36 and Remedies Directive 89/665.⁶⁵⁴

During the 2000s these three regulations were repealed in order to adjust to developments at the EU level. The most obvious difference can be seen in the Public Contracts Regulations (PCRs) 2000 as they combine the three above-mentioned

⁶⁴⁹ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para 21.30, p. 1392.

⁶⁵⁰ de Mars, S. 2011. *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France*, Ph.D. thesis at the University of Nottingham, Nottingham, p. 67.

⁶⁵¹ de Mars, S. 2011. *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France*, Ph.D. thesis at the University of Nottingham, Nottingham, p. 68.

⁶⁵² de Mars, S. 2011. *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France*, Ph.D. thesis at the University of Nottingham, Nottingham, p. 67-68.

⁶⁵³ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para. 3.41, p. 162-163.

⁶⁵⁴ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para. 3.41, p. 162.

regulations into a single statutory instrument. The PCRs 2000 transposed Directives 97/52/EC, 93/36/EEC, and 93/37/EEC concerning the co-ordination of procedures for the awarding of public services contracts, public supply contracts and public works contracts, respectively. The PCRs 2000 were then repealed by the PCRs 2006 (as amended by the Public Contracts and Utilities Contracts (Amendment) Regulations 2007). The Regulations from 2007 were, in turn, amended by the Public Contracts Regulations 2009 which were further amended by the Public Procurement (Miscellaneous Amendments) Regulations 2011. These regulations were based on Directives 2004/18/EC and 2007/66/EC. The latest Regulations in this field are the PCRs 2015, which are based on Directive 2014/24/EU.⁶⁵⁵

It is noteworthy to underline the two approaches in implementing the Directives in the public procurement field. The first one is called by 'reference', and the other is 'detailed implementation', as explained further below.⁶⁵⁶ In the 'reference', Member States only need to enact legislation mentioning that the covered entities must follow the rules in the Directive, without setting out the coverage and procedures in detail. In contrast, the 'detailed implementation' may take place with two possibilities. It may simply repeat the directives' text in the national legislation, or it may adopt a distinct national text by, for example, rewording or restructuring or reintegrating the rules with other legal provisions on public procurement. The UK has implemented the Directives in detail and there has been some reordering to make the rules more intelligible.⁶⁵⁷

5.1.2. The general overview of the current public procurement regulations

The structure of the regulations generally consists of a number of 'parts'. Each part consists of a number of 'chapters'. Each chapter contains 'articles'. The PCRs 2015 consist of five parts, nine chapters and 122 articles.

Part one deals with general information, such as citation, commencement, the extent and application as well as definitions. This Part does not contain any chapters. Part two is on "Rules Implementing the Public Contracts Directive". This

⁶⁵⁵ Slater, D. 2014. "England and Wales: Public Procurement 2015". Available online at: <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2015/england-and-wales>, last visited 9 December 2015. See also the list of UK Statutory Instruments on Public Contracts which can be found at: <http://www.legislation.gov.uk/title/public%20contracts?page=1>, last visited 7 June 2016.

⁶⁵⁶ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para. 3.42, p. 163.

⁶⁵⁷ Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*, Sweet and Maxwell, London, para. 3.42, p. 163.

Part consists of four chapters dealing with the following issues. The first chapter is on the scope and general principles; the second chapter is on the rules of public contracts. The third chapter discusses the particular procurement regimes, while the fourth chapter looks at records and reports.

Part three explains the remedies. This part is divided into two chapters. Chapter five promulgates the facilitation of remedies whereas chapter six explains applications to the courts. Part four elucidates on the Miscellaneous Obligations. This part has three chapters. Chapter seven is on additional rules applying to 'part 2 procurements'. The following chapter explains procurement lower thresholds. Chapter nine is about miscellaneous provisions. The last part, part five, deals with the following: Revocations, Consequential Amendments, Savings and Transitional Provisions. Similar to part one, part five does not contain any chapters; it directly lays down specific articles.

5.1.3. The administration involved in public procurement

When referring to the administration, the PCRs 2015 use the term 'contracting authorities'. 'Contracting authorities' mean "the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity".⁶⁵⁸ This definition is in line with the definition of 'contracting authorities' laid down in the Directives: "the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law".⁶⁵⁹

Logically speaking, there are officials within a contracting authority who are charged with certain tasks to deal with a certain public procurement procedure within a specific period of time, because it is unlikely one person will deal with a

⁶⁵⁸ Article 2 (1) PCRs 2015.

⁶⁵⁹ See: Article 2 (1) and (4) of the Directive 2014/24 (formerly Article 1 (9) of Directive 2004/18). It also adds an explanation that a 'body governed by public law' means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

procedure in its entirety.⁶⁶⁰ According to a representative, this matter is not clarified in a statutory instrument (in the PCRs 2015), but rather in a decentralised way by each contracting authority; therefore, the persons involved may be different between one contracting authority and another.⁶⁶¹

5.1.4. The (legal) public procurement procedures

There are six optional procedures which can be applied by the contracting authorities subject to regulations, namely: (a) open procedures, (b) restricted procedures, (c) competitive procedures with negotiation, (d) competitive dialogue, (e) innovation partnership, and (f) the negotiated procedure without prior publication. Each procedure is used in a different context.

In *open procedures*, any interested economic operator may submit a tender in response to a contract notice.⁶⁶² The contracting authority, however, will obviously not be interested in receiving proposals which do not meet the minimum requirements.

The following procedure is called the *restricted procedure*. With this, any economic operator may submit a “request to participate” in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.⁶⁶³ Nonetheless, only those economic operators invited to do so by the contracting authority following its assessment of the information provided may go on to submit a tender.⁶⁶⁴ The main reason for choosing this procedure is to avoid wasting the resources of tenderers when submitting their bids as well as to prevent the authority from being employed in evaluating large numbers of bids, particularly when this will provide no advantages in terms of

⁶⁶⁰ The PCRs 2015 may be silent on this issue because including such detail for technical officers involved in public procurement are unlikely to be explained in a Statutory Instrument. This situation is not the case in Indonesia where public procurement is regulated by Presidential Regulations.

⁶⁶¹ Interview with Mr Andrew Shorter, Head of Category Management - Housing & Construction, Westminster City Council, London, on 15 November 2015.

⁶⁶² Article 27 (1) of the PCRs 2015.

⁶⁶³ Article 28 (1) of the PCRs 2015.

⁶⁶⁴ Article 28 (3) of the PCRs 2015.

better value for money.⁶⁶⁵ However, in order to ensure competition, the minimum number of candidates in this procedure must be five.⁶⁶⁶

The next procedure is called *competitive procedures with negotiation*. With this, any economic operators may submit a request to participate in response to a call for competition. Obviously, this takes place by providing information for qualitative selection requested by the contracting authority.⁶⁶⁷ Only those economic operators invited by the authority may submit an initial tender; the tender shall be the basis for the subsequent negotiations.⁶⁶⁸

In *competitive dialogues*, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.⁶⁶⁹ Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue.⁶⁷⁰ Contracting authorities shall open a dialogue with the aim of identifying and defining the means which are best suited to satisfying their needs, and may discuss all aspects of the procurement with the chosen participants during this dialogue.⁶⁷¹

The subsequent procedure is the *innovation partnership*. With this, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.⁶⁷² The contracting authority shall be clear in the procurement document, among other things identifying the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market.⁶⁷³ The objective of doing this is to enable

⁶⁶⁵ Arrowsmith, S. 2010. *EU Public Procurement Law: An Introduction*, University of Nottingham, Nottingham, p. 156.

⁶⁶⁶ Article 65 (3) of the PCRs 2015.

⁶⁶⁷ Article 29 (1) of the PCRs 2015.

⁶⁶⁸ Article 29 (11) of the PCRs 2015.

⁶⁶⁹ Article 30 (1) of the PCRs 2015.

⁶⁷⁰ Article 30 (3) of the PCRs 2015.

⁶⁷¹ Article 30 (8) of the PCRs 2015.

⁶⁷² Article 31 (1) of the PCRs 2015.

⁶⁷³ Besides indicating which elements of this description define the minimum requirements to be met by all tenders. Article 31 (2) of the PCRs 2015.

economic operators to identify the nature and scope of the required solution and to decide whether to request to participate in the procedure.⁶⁷⁴

The last procedure is the *negotiated procedure without prior publication*. This procedure may be used in any of the three following situations. First of all, this is used where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure (...). Alternatively, it may take place where the works, supplies or services can only be supplied by a particular economic operator for certain reasons.⁶⁷⁵ Lastly, it may be used where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. However, this last point shall only be applied as is strictly necessary. Besides the above, there are some additional particular aspects, which apply to public supply contracts,⁶⁷⁶ to public service contracts that follow a design contest,⁶⁷⁷ and to new works or services which repeat similar ones.⁶⁷⁸

5.2. The principle of equal opportunity: situation and legal protection

This section will examine how the UK deals with the principle of equal opportunity especially in setting the requirements in the procurement document. In doing so, the section begins by explaining the necessity to discuss the matter. Afterwards will be an elaboration on the availability of public procurement regulations, literature, and case law on the matter. Similar to the line of research in chapters on Indonesia and the Netherlands, the elaboration will be complemented by non-public procurement law and case law. It will then be argued what these

⁶⁷⁴ Article 31 (3) of the PCRs 2015.

⁶⁷⁵ According to Article 32 (2) (b) of the PCRs 2015, any reason is as follows: (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance; (ii) competition is absent for technical reasons; (iii) the protection of exclusive rights, including intellectual property rights, but only in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

⁶⁷⁶ Article 32 (5) – (6) of the PCRs 2015. There are four grounds, inter alia, where the products involved are manufactured purely for the purpose of research, experimentation, study or development (...); for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations (...).

⁶⁷⁷ Article 32 (7) – (8) of the PCRs 2015.

⁶⁷⁸ Article 32 (9) – (12) of the PCRs 2015.

situations mean when examined according to the principle of good public procurement.

5.2.1. Situation found and an analysis

It is possible that the contracting authorities unintentionally make mistakes or even abuse their powers so that the formulation of the procurement document violates the principle of equal opportunity.⁶⁷⁹ As a consequence, interested bidding participants may feel aggrieved. It is, therefore, interesting to examine how the UK regulates legal redress to defend this principle.

Procurement regulations

It is relevant to start the discussion by highlighting that the principle of equality is clearly mentioned as one of the principles in the PCRs 2015.⁶⁸⁰ Concerning the procurement document, it has been clearly defined that the document should not create unnecessary restrictions that can artificially narrow competition,⁶⁸¹ favour, or disadvantage certain economic operators.⁶⁸²

⁶⁷⁹ It is relevant to recall the situation discussed in Indonesia (section 3.2.) where a violation occurred in the procurement of a great mosque in west Bandung regency and in the procurement of scanning machines at Jakarta Province. The interested bidding participants (candidates) felt aggrieved; they believed that the contracting authorities had requested unjustified specifications and qualifications in the procurement documents which could distort competition. In another illustration, a confession by an official at a different procuring entity had been made; he had to follow the instructions of his superior to favour a certain bidding participant by unjustifiably designing the procurement document. While distrust towards the contracting authority may exist, the procurement regulation does not provide for any legal mechanism which can be used by aggrieved interested bidders to challenge the procurement document.

⁶⁸⁰ Article 18 (1) of the PCRs 2015, “the contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner”.

⁶⁸¹ Article 18 (2) of the PCRs 2015, “the design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition”.

⁶⁸² Article 18 (3) of the PCRs 2015, “For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.” It is indeed possible for the contracting authorities to request advice from an economic operator before conducting procurement; however, the authorities are responsible for ensuring that competition is not distorted by the participation of that operator. See: Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 45.

One of the contents of the procurement document is the technical specifications.⁶⁸³ In this regard, the principle of equal opportunity is also implied by the requirement to determine the technical specifications. It is laid down that “technical specifications shall afford equal access to economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition”.⁶⁸⁴ The principle of equal opportunity is also related to the principle of proportionality, as this states that the requirements (i) are appropriate to achieve the objectives, (ii) do not go beyond what is needed to attain the objectives, and (iii) are necessary (or otherwise they create an excessive burden).⁶⁸⁵ It is necessary to further discuss point (i) above. In *Concordia Bus Finland*, the ECJ judgment explains that requirements determined by the contracting authority to set ecological criteria must not infringe the principle of non-discrimination. This is because, *inter alia*, the criteria are linked to the subject matter of the contract and do not confer an unrestricted freedom of choice on the authority.⁶⁸⁶

The above explanation stresses that the authorities should be careful in designing the requirements so as to ensure that these requirements do not infringe the principle of equal opportunity and proportionality.⁶⁸⁷ Also, the contacting authorities are not allowed to refer to specific information, which can indicate certain products or services.⁶⁸⁸ The contracting authorities are required to

⁶⁸³ Besides containing the requirements on the qualifications of the economic operator or specifications concerning the goods which will be acquired, the procurement document also contains *award criteria*. This has to be made available and has to be understood in the same way between the authorities and the bidding participants. The test developed by the ECJ pertaining to the matter is called “reasonably well informed and normally diligent tender”. See: Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 114.

⁶⁸⁴ Article 42 (10) of the PCRs 2015.

⁶⁸⁵ Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 51.

⁶⁸⁶ Case C-513/99, available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CJ0513>, last visited 9 December 2015.

⁶⁸⁷ It is considered that “instead of prescribing inputs or the precise manner in which supplies, services, or works are to be provided, such specifications focus on the outcome to be achieved”. See: Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 106. As is apparent, the principles of equal opportunity and proportionality are also related to the principle of carefulness. The principle of carefulness is one of the prominent administrative principles which is defined as “the careful preparation of an administrative order.” See: Addink, G.H. (Forthcoming). *Good Governance: Concept and Context*, OUP, Oxford, p. 85.

⁶⁸⁸ Article 42 (12) of the PCRs 2015. It is stated there that “unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products”.

accompany the technical reference with the words “or equivalent.”⁶⁸⁹ By so doing, a potential infringement can be prevented.

The PCRs 2015 also emphasise that the contracting authorities should further consider the functions and solutions contained in the goods/services, not based on the technical specifications.⁶⁹⁰ This requirement has a significant correlation with the principle of equal opportunity; the contracting authorities shall not reject a tender by merely referring to technical specifications. The rejection shall be based on merit mentioning that the goods/services do not satisfy the solutions proposed by the procurement document. In other words, it will be difficult for the authorities to create unjustified requirements by creating certain specifications.

It may be argued that the principle of equal opportunity is closely related to the principle of non-discrimination⁶⁹¹ discussed at the EU level. This may be so because it is not allowed to adopt procurement documents that provide advantages to certain bidders based on nationality.⁶⁹² Although the issue of non-discrimination between bidders originating from different Member States does not really fall within this research,⁶⁹³ it at least concerns similar issues where it is prohibited to restrict the competition unjustifiably by setting such requirements in the procurement document. An example of a relevant case is, for instance, *Commission v Italy*.⁶⁹⁴ The European Court of Justice ruled that a requirement by an Italian contracting authority which dictated that motor vehicles to be purchased

⁶⁸⁹ Article 42 (11) of the PCRs 2015.

⁶⁹⁰ Article 42 (14) of the PCRs 2015.

⁶⁹¹ The principle of non-discrimination is more about the negative and positive obligations which should be adhered to by the authorities in every member state. The negative obligation concerns the prohibition on restricting access to the market, particularly, but not limited to, restrictions based on nationality whereas the positive obligations on organising procurement procedures in a particular way, i.e. advertising contracts (above the threshold) to enable economic operators in every member state to be aware of the opportunities. See: Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 4-20 to 4-22.

⁶⁹² Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 42. Semple underlines that it is not allowed to determine such conditions (including in the procurement documents and/or in any other decisions/actions) which favour certain bidding participants. He then refers to the *Beentjes* case by highlighting one important Court ruling: the contracting authority infringes the Treaty if it becomes apparent that such a condition could be satisfied only by tenderers from the state concerned or tenderers from other Member States would have difficulty in complying with it.

⁶⁹³ This may be so because Indonesia is not currently bound by any multinational or international treaties which oblige Indonesia to treat international bidders and national bidders equally.

⁶⁹⁴ This case also implies that the (potential) bidder who feels aggrieved should challenge at the earliest opportunity. Otherwise the Court may not be sympathetic to a claim which should have been submitted earlier. See: Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 4-21.

must come from a domestic manufacturer, which was a condition determining eligibility for obtaining certain subsidies, had infringed Article 34 of the Treaty on the Functioning of the European Union. A similar infringement can also be seen in the *Storebaelt* case, which concerned a clause whereby a Danish contracting authority required the use of Danish materials as far as possible.⁶⁹⁵

If any interested bidder feels aggrieved by the specifications or requirements set by the contracting authority in the procurement document, he may seek interim relief. Stemming from the EU Remedies Directives, these are forms of legal redress that can be resorted to before the contract is concluded. It enables candidates to obtain legal protection quickly whenever they feel aggrieved.⁶⁹⁶ Interim relief (this term is used interchangeably with interim orders or interim measures) aims at (i) correcting the alleged infringements, or (ii) preventing further damage to the interests concerned either by suspending the award procedures or suspending the implementation of any decision.

Arguably, interim relief can be classified as a suspension mechanism and an interim order. The following elaboration will discuss these two, respectively. According to Article 95(1) PCRs 2015, the contracting authority is required to refrain from entering into contracts where: a claim form has been issued, or the contracting authority has become aware that the claim form has been issued.⁶⁹⁷ With this, a 'suspension' (usually called an 'injunction to suspend') of the public procurement procedure applies. The suspension occurs automatically; there is no need for a separate request, and this shall continue until the court lifts the suspension. There are two possible grounds for lifting the suspension:⁶⁹⁸ (i) where the court is satisfied with the request submitted by the contracting authority, or where (ii) the

⁶⁹⁵ Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 4-21. *Storebaelt* is a remarkable case. This highlights that the principle of equal treatment which is considered to lie "at the very heart of the directive whose purpose is to ensure [...] effective competition, and [...] lays down criteria for selection and for award of the contracts". Case C 243/89 para. 33, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0243>, last visited 9 December 2015.

⁶⁹⁶ Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 208.

⁶⁹⁷ According to Article 95 (1) of the PCRs 2015, there are three grounds where interim relief shall apply, as follows: (a) a claim form has been issued in respect of a contracting authority's decision to award the contract; (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and (c) when the contract has not been entered into, the contracting authority is required to refrain from entering into the contract.

⁶⁹⁸ The legal grounds for automatic suspension can be seen in Article 95 (2) PCR 2015 which explains that "the requirement continues until any of the following occur: (a) the Court brings the requirement to an end by interim order under regulation 96 (1); (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example, in connection with an appeal or the possibility of an appeal)".

proceedings, at first instance, have already been determined, or they have been discontinued.

Besides the suspension, another form of relief which is available is called 'interim orders'. During the proceedings, the court may issue an order(s):⁶⁹⁹ to restore or to modify the requirement; to suspend the procedure; or to suspend the implementation of any decision or action conducted by the contracting authority. In contrast, it is also possible that the court will issue an order to lift the suspension mechanism.⁷⁰⁰ This occurs when the court considers that the suspension will give rise to considerable further delay which could result in losses both for the public interest and the parties involved.⁷⁰¹

There is no precise UK case law which can specifically define unreasonable requirements by the contracting authority in the procurement document. As has been mentioned earlier, this may occur due to the informal mechanism to solve the problem at the contracting authority (by facilitating consultation). However, there are some relevant cases which can show the protection of the principle of equal opportunity.

The first case is *Blackpool*.⁷⁰² This case entails a tenderer who felt aggrieved because he could not participate in the tender. The tenderer may seek legal protection by means of judicial review. The case can be summarised as follows.⁷⁰³ It involved a tender invitation by a municipal council to some airline operators to submit tenders for a concession contract for operating pleasure flights. The plaintiff's tender was mistakenly considered to have been late and was thereby excluded. Justice Bingham stated that "if he submits a conforming tender before the deadline, he is entitled not as a matter of mere expectation but as a matter of contractual right, to be sure that his tender will be opened and considered [...]."

⁶⁹⁹ Article 96 (1) (b), (c), (d) of the PCRs 2015.

⁷⁰⁰ Article 96 (1) (a) and 96 (2) (b) of the PCRs 2015.

⁷⁰¹ In the literature, it has been noted in *BFS Group Ltd v Secretary of State for Defence and Purple Foodservice Ltd* that the Court admitted that damages would not be a wholly adequate remedy; nonetheless, an injunction was declined to ensure the performance of the contract without any considerable further delay which could result in losses. According to them, it would be wiser for the Court to provide interim relief at the beginning, rather than damages later, and not to quickly determine damages, as this, *inter alia*, will not provide a learning process as far as the contracting authority is concerned. See: Banks, F. and Bowsher, M. "Damages in England, Wales and Northern Ireland", Fairgieve, D and Lichere, F. 2011. *Public Procurement Law: Damages as an Effective Remedy*, Hart, Oxford, p. 66, 73, and 74.

⁷⁰² *Blackpool and Fylde Aero Club Ltd. v Blackpool Borough Council* [1990] EWCA Civ 13, available from: <http://www.bailii.org/ew/cases/EWCA/Civ/1990/13.html>, last visited 12 July 2016.

⁷⁰³ Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 2-162.

Justice Stocker added that “if the council did decide not to accept any tender or award the concession, the decision would have to be *bona fide* and honest”. This case also highlights a situation where the private law doctrine (i.e. implied contract and commercial expectations) is applied in public procurement in the UK.⁷⁰⁴

Another case is *Edenred*.⁷⁰⁵ The factual background of this case is as follows.⁷⁰⁶ Edenred made a claim regarding an award decision made by HM Treasury. The award decision was related to the provision of services in a new tax-free childcare scheme by supporting working families with the costs of childcare (‘the contract’). Edenred claimed that the prospective involvement of National Savings and Investments (NSI) via a private company, Atos, in delivering these services would be unlawful. The reason for this was that it constituted an illegal direct award of a contract. As this case was examined before the court, interim relief (in this context an automatic suspension) was granted. The Treasury requested that the suspension be lifted, but the court rejected a further examination to protect the interest of Endered. Although the court ruled that the claim by Endered was unsuccessful,⁷⁰⁷ the relief (i.e. the suspension), which was implemented can be seen as evidence of the protection of the principle of equal opportunity. By ordering a suspension, the court could check the legality of the action/decision made by the contracting authority.

General regulation(s)

The following discussion is intended to complement the above discussion by explaining the reasoning behind the challenge of a procurement document from a non-public procurement law perspective. This can be considered as a decision made by the contracting authority on ‘the rules of the game’, which legally bind

⁷⁰⁴ Butler, L.R.A. “Below Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach”, in Dragos, D., and Caranta, R. (Eds). 2012. *Outside the EU Procurement Directives – Inside the Treaty?*, DJØF Publishing, Copenhagen, p. 312, 316-317.

⁷⁰⁵ *Edenred (UK Group) Ltd v Her Majesty’s Treasury & Ors* (Rev 1) [2015] EWCA Civ 326, available from: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/326.html>, last visited 12 July 2016.

⁷⁰⁶ Ashmore, R. 2015. “Fresh Hope for a Fresh Award but Realism Must Prevail: High Court Upholds Automatic Suspension on Contract-Making in a Public Procurement Action but Finds no Illegal Award or Material Variation: *R (Edenred (UK Group) Limited v HM Treasury and others*”, *Public Procurement Law Review*, Vol. 24, Issue 3, NA 89-90.

⁷⁰⁷ The Court found that the arrangement made by the Treasury and NSI was merely based on a memorandum of understanding which was not legally binding and enforceable. Ashmore, R. 2015. “Fresh Hope for a Fresh Award but Realism Must Prevail: High Court Upholds Automatic Suspension on Contract-Making in a Public Procurement Action but Finds no Illegal Award or Material Variation: *R (Edenred (UK Group) Limited v HM Treasury and others*”, *Public Procurement Law Review*, Vol. 24, Issue 3, NA 89-90.

both the contracting authority and the bidding participant. Arguably, this decision can be challenged based on numerous reasons as follows.

If the contracting authority produces a procurement document, which aims unjustifiably to distort competition (for example, to favour a certain potential bidder), then it can be argued that the authority has exercised a delegated power which is not within the actual power delegated ('*ultra vires*' or beyond the powers provided). Initially, this means that the authority has overstepped the limit of its authority, and it has not done as much as it was required to be done.⁷⁰⁸

The above paragraph does not necessarily mean that the administration may not use its discretionary power. The necessity of discretionary power cannot be questioned.⁷⁰⁹ However, this power must be exercised for a proper purpose and relevant considerations.⁷¹⁰

Whenever the administration ('the contracting authority') has acted *ultra vires*, arguably, its action is necessarily unreasonable, and it is, therefore, subject to judicial review.⁷¹¹ This logic also acts as a suitable ground from which to challenge the procurement document. It is possible to challenge by arguing that the requirements determined in the procurement document are unreasonable.⁷¹² This principle emanates from the *Wednesbury* case, summarised as follows.⁷¹³ This case concerned a minor of 15 years of age being prohibited from entering a cinema on

⁷⁰⁸ Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden, p. 168.

⁷⁰⁹ Thompson, K and Jones, B. "Administrative Law in the United Kingdom" in Seerden, R.J.G.H. (Ed). 2007. *Administrative law of the European Union, its member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 264.

⁷¹⁰ As summarised by scholars, an interesting case in this respect is *R v Ealing London Borough Council, ex parte Times Newspaper Ltd*, where a local authority banned some publications from their libraries in order to damage the newspaper group. It is argued that the publication ban is irrelevant as under the Public Libraries and Museum Act 1964, the authority has a duty to provide a comprehensive library service. It is relevant to emphasise that the term used above is 'irrationality' which is the narrow meaning of unreasonableness. Irrationality means that the decision challenged lies in what may inelegantly be called the macro-political field. See: Thompson, K and Jones, B. "Administrative Law in the United Kingdom" in Seerden, R.J.G.H. (Ed). 2007. *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 265-267.

⁷¹¹ Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

⁷¹² Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

⁷¹³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947], available from: <http://www.bailii.org/ew/cases/EWCA/Civ/1947/1.html>, last visited 15 December 2015.

a certain day. This decision was challenged because it did not seem to be logical. Lord Greene, who heard the case, was not satisfied with the argument of the claimant, because the prohibition was aimed at protecting the moral well-being of the youth. In the case, Lord Greene also laid down a test to be applied: “it is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere”. It is also worth underlining that the court may only deliver a favourable ruling where the challenge is based on serious misconduct or an abuse of power.⁷¹⁴

In a later development, the ground for judicial review has evolved, from one ground, as mentioned above, to three grounds, namely: (i) an error of law, (ii) irrationality, and (iii) procedural unfairness or a breach of natural justice.⁷¹⁵ This refers to a test laid down by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* as is summarised below.⁷¹⁶

Regarding the first point, “illegality” as a ground for judicial review means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. If he is questioned in exercising this, the judges, by whom the judicial power of the state is exercisable, can intervene. Related to “irrationality”, Lord Diplock referred to “Wednesbury unreasonableness”. It applies to a decision which is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”. Lastly, “procedural impropriety” means a failure to observe basic rules of natural justice or a failure to act with procedural fairness towards the person who will be affected by the decision.

5.2.2. Normative framework and provisional finding

It is evident that the principle of equal opportunity is intertwined with the principle of proportionality. If the value of the procurement is above the threshold, the contract notice may attract the interest of cross-border economic operators.

⁷¹⁴ Butler, L.R.A. “Below Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach”, in Dragos, D., and Caranta, R. (Eds). 2012. *Outside the EU Procurement Directives – Inside the Treaty?*, DJØF Publishing, Copenhagen, p. 324.

⁷¹⁵ Falle, J., and Dwyer, C. “United Kingdom”, in Davey, J., and Falle, J., (Eds.). 2014. *The Government Procurement Review*, Law Business Research, London, p. 300.

⁷¹⁶ *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9 (22 November 1984), available at: <http://www.bailii.org/uk/cases/UKHL/1984/9.html>, 14 December 2015.

When this happens, the principle of equal opportunity is also interwoven with the principle of non-discrimination. This principle prohibits the contracting authority from discriminating against an economic operator from the other Member States. In other words, the requirements specified in the procurement document shall not provide certain advantages to the national economic operator. Besides this, the contracting authorities shall adhere to the principle of reasonableness in preparing the procurement document. If the requirements determined in the document are unreasonable and can unjustifiably obstruct the participation of an interested bidding participant, then from the perspective of the UK legal system the procurement document is reviewable. The above description demonstrates the availability of legal redress embodied in the UK legal system. The PCRs have prohibited the contracting authority from distorting competition unjustifiably via the setting of requirements in the procurement document. Also, by referring to the EU Directives and the PCRs, whenever the prohibition occurs, the interested bidders who feel aggrieved have a right to seek interim relief to challenge the procurement document. It has been argued that the *Blackpool* case can be used as an example of an action or decision by a contracting authority turning down the participation of an interested bidder, which is reviewable by the courts. Besides, in the *Edenred* case, the court decided to continue the interim relief by not lifting the suspension of the procurement procedure. The court is then afforded the opportunity to thoroughly examine the allegation of directly awarding the decision to a certain economic operator. Arguably, this examination is evidence of the protection of the principle of equal opportunity. The above reasons have provided ample evidence that the principle of equal opportunity is protected in the UK.

5.3. The principle of equal treatment: regulation and legal protection

This section will examine how the UK exercises the principle of equal treatment especially concerning the process of administrative review. This process refers to a review mechanism applied by the administration, either at the contracting authority or at the independent administrative body. In doing so, the following structure is utilised. To begin with, the relevance of discussing the matter for this research will be stressed. Afterwards follows an elaboration of the public procurement law, the literature, and interviews concerning the matter. Based on the information gathered from the elaboration, it will then be argued what the information means if this is examined from the principle of good public procurement.

5.3.1. Situation found and an analysis

In certain legal systems, the following situation may occur. An economic operator feels aggrieved by the action or decision of a contracting authority. However, that economic operator is reluctant to challenge this action or decision via an objection or an appeal. This hesitation is caused by the distrust towards the independent authority and the impartiality of the administrative review system.⁷¹⁷ Consequently, it is relevant to analyse how the UK protects the principle of equal treatment, particularly during the administrative review phase. The following discussion will be limited to the review conducted by the administration; the review conducted by the judiciary will be provided in the section on accountability.

Before coming to the main issue, it is beneficial to provide some relevant information. Equal treatment has long been considered as one of the general principles in awarding contracts⁷¹⁸ and is a phrase mentioned in the PCR 2015. Equal treatment is considered as an indication that no conflict of interest occurs during the procurement process.⁷¹⁹ This principle imposes important constraints when a contracting authority has organised a formal bid process as part of the procedure.⁷²⁰

The administrative review procedure is not stipulated in the PCRs 2015.⁷²¹ As is clearly evident in the PCRs 2015, particularly in chapter five (concerning remedies) and chapter six (concerning applications to the court), the PCRs 2015

⁷¹⁷ For instance, see section 3.3 which has illustrated the situation in Indonesia. This section contained three cases which show that the administrative review mechanism within a contracting authority may be neither independent nor impartial. Each case shows the following similar pattern. The official who assessed the administrative review (administrative appeal) was the head of the contracting authority. This official was the one who had previously instructed his subordinate to engage in unequal treatment in order to favour a certain bidding participant.

⁷¹⁸ Articles 56 (4) and 76 (2) and (4) PCR 2015.

⁷¹⁹ Article 24 particularly section (1) PCRs 2015. In the literature, it is also mentioned that employees of contracting authorities may need to be aware of other rules, such as the Local Authorities (Model Code of Conduct) Order 2007 which promulgates that members of local authorities shall disclose personal interests and not take part in discussions where there is a risk of bias. See: Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

⁷²⁰ The following are some instances. The authorities are not allowed to permit one economic operator to change its submitted proposals while prohibiting others from doing so. The authorities are also not permitted to accept an offer from a certain economic operator which does not comply with fundamental requirements which have been set. See: Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 9 - 89.

⁷²¹ OECD. 2007. "Public Procurement Review and Remedies Systems in the European Union", OECD Papers, Vol. 7/4, p. 107. Available at: http://dx.doi.org/10.1787/oecd_papers-v7-art13-en, last visited 8 June 2016.

provide for a direct procedure to seek legal redress with the judicial review.⁷²² Another work also emphasises that "... no bodies other than the court is competent to deal with claims".⁷²³ There is even no requirement to first notify the contracting authority before starting court proceedings.⁷²⁴

A representative from a contracting authority confirmed the situation by explaining that an objection or an appeal (an administrative review procedure) is not recognised in UK public procurement.⁷²⁵ Nevertheless, he explained that the following informal situation occurs in practice.⁷²⁶ A dissatisfied bidder may consult the contracting authority regarding its unsuccessful tender. It is called 'consultation' (rather than 'objection'), because the nature of the communication does not reflect a contravention. The purpose of this is to explain the reason why the losing bidder has not been awarded the contract. The representative further explained that this kind of communication may take place by any means other than a face-to-face meeting, and this will be dealt with by a so-called "procurement leader". The leader must be the one who led the procurement team (this is the team which issued the award decision). On rare occasions, and only if the case contains very serious issues (such as when it is likely to be the subject of court proceedings), the leader's superior will be consulted and may play a role in communicating with the dissatisfied bidder. However, again, this is not considered to be an objection or even an appeal; it is merely a matter of consultation.

The consultation procedure described above is intended as a debriefing mechanism, rather than an administrative review. Debriefing here refers to a request for a fuller debriefing submitted by an economic operator during the standstill period. Although it is not clearly laid down in the regulations, debriefing is explained in the standstill guide issued by the UK Government.⁷²⁷ In earlier sections, a discussion on debriefing has been provided in the section on

⁷²² See: Part 3 of the PCRs 2015, particularly on chapter 5 concerning the facilitation of the remedies and chapter 6 pertaining to applications to the court.

⁷²³ This occurs in England, Wales, Scotland and Northern Ireland. See: Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 206.

⁷²⁴ Houlden, J. and Jackson, C. 2014. "Public Procurement in UK (England and Wales): Overview", available at: <http://uk.practicallaw.com/8-525-0631#a360326>, last visited 8 June 2016.

⁷²⁵ Interview with Mr Andrew Shorter, Head of Category Management - Housing & Construction, Westminster City Council, London, on 14 December 2015.

⁷²⁶ Interview with Mr Andrew Shorter, Head of Category Management - Housing & Construction, Westminster City Council, London, on 14 December 2015.

⁷²⁷ Crown Commercial Service. 2015. "The Public Contracts Regulations 2015: Guidance on the Standstill Period", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417945/Guidance_on_Standstill.pdf, last visited 14 June 2016.

transparency. To ensure consistency, debriefing has been further discussed in that section.

In a report prepared for the Chancellor of the Exchequer and the Secretary of State for Trade and Industry, it has been noted that economic operators are hesitant “to raise problems through formal channels at the early stages of the public procurement process and to use remedies available for challenging breaches of public procurement rules”.⁷²⁸ Nonetheless, as can be seen, the review procedure provided by the PCRs above is directed at the judiciary. It is true that there is an informal procedure (‘consultation’) within the contracting authority itself; however, it may still be questioned whether economic operators are eager to defend their rights with that mechanism, particularly because they may not want to ‘bite the hand that feeds them’.

The unavailability of the administrative review procedure has called into question whether the system is sufficient.⁷²⁹ However, the interviews with numerous procurement experts in the UK indicate that they do not consider the unavailability of an administrative review as a problem.⁷³⁰ They argued that this matter is covered by judicial review. As the aim of this section is to focus on the administrative review system, the court decisions will not be examined with regard to any specific case.

⁷²⁸ Wood, A. 2004. “Wood Review: Investigating UK Business Experiences of Competing for Public Contracts in other EU Countries”, Office of Government Commerce, London, p. 69. Mirror link available at: <https://www.bipsolutions.com/docstore/pdf/8756.pdf>, last visited 8 June 2016.

⁷²⁹ Trybus, M. “An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales”, in Treumer, S., and Lichere, F., (Eds). 2011. *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, p. 232.

⁷³⁰ Based on my impression, British scholars and practitioners do not really consider the unavailability of independent administrative bodies as an obstacle to their impartiality (and thus equal treatment) to review the complaint from the dissatisfied/aggrieved bidders. Dr. Sanchez-Graells explained that there has not (yet) been any negative news regarding the impartiality of the official who deals with aggrieved bidders. Prof. Davies considered that an independent administrative body may reduce the effectiveness of the review mechanism in the procurement process. Mr. Shorter argued that impartiality is ensured because the oversight mechanism works well. Both he and Dr. Sanchez-Graells referred to the whistleblower mechanism, so-called “mystery shoppers”, as an effective mechanism for effective oversight. Prof. Trybus predicted that the reason why the British do not really think about this matter is perhaps because an independent administrative body is not really within the nature of British law. Interview with Prof. Anne Davies, Oxford Law School, on 15 October 2015; Dr. Albert Sanchez-Graells, Bristol Law School, on 30 October 2015; Prof. Martin Trybus, Birmingham Law School, on 4 November 2015, and Mr Andrew Shorter, Head of Category Management Housing & Construction at Westminster City Council - London, on 15 November 2015.

5.3.2. Normative framework and provisional finding

The above elaboration has shown that PCRs 2015 prohibit the contracting authority from treating bidding participants unequally. This prohibition applies to the phase of administrative review. Nonetheless, the UK does not recognise an administrative review within the contracting authority. The UK, however, recognises informal procedures referred to, in practice, as ‘consultation’. The aggrieved bidder may consult with the contracting authority as to why he has been unsuccessful. It is, therefore, similarly to debriefing, a mechanism for having a fuller debriefing from the contracting authority (debriefing will also be discussed in the section on transparency). The public procurement system in the UK also lacks an independent administrative review for public procurement disputes. The PCRs promulgate that the review is only available via the courts. Having realised this, it is not an easy matter to conclude this section. On the one hand, the unavailability of administrative review may put the aggrieved bidder in an unfavourable position because his sole option is a judicial review. On the other hand, it may be considered serving the promptness of the procurement procedure, as it skips the administrative review procedure. Although it may not be initially clear, there are pros and cons as to the unavailability of an administrative review procedure. However, it seems that the public still trusts the contracting authority, so that the unavailability of an administrative review procedure has not been considered to be problematic. Realising this, it may be questioned whether the principle of equal treatment is optimally protected. This is because only the judiciary provides the protection, whereas litigation costs are expensive.

5.4. The principle of transparency: regulation and legal protection

This section will examine how the UK deals with the principle of transparency particularly when explaining the award decision. The following structure will apply to this assessment. To begin with, the relevance of discussing the matter will be underlined. Following this there will be an elaboration of the availability of public procurement regulations, the literature, a document obtained from an interview, and the case law on this particular issue. Additionally, it will be complemented by information based on non-public procurement law and any relevant case law. It will then be argued what these situations mean when examined from the principle of good public procurement.

5.4.1. Situation found and an analysis

It is possible that bidding participants may not understand the reasoning in the award decision issued by the contracting authority.⁷³¹ It has been argued in the earlier chapter that the occurrence of this situation means a violation of the principle of transparency. Regarding this, it is relevant to understand how the UK deals with this issue.

The procurement regulations (focusing on the clarity of the award decision)

Contracting authorities are required to announce the award decision⁷³² in writing, including information on the standstill period.⁷³³ As this is aimed at providing an understanding of the objectivity of the decision, it is necessary to ensure the clarity of the award decision. Regarding this, the PCRs 2015 instruct the contracting authorities to inform each candidate and tenderer⁷³⁴ as soon as possible concerning the procurement decision.⁷³⁵ The award decision should be based on the criteria laid down in the regulations, and should comply with the requirements,

⁷³¹ In section 3.4, it has been doubted that the bidding participants in Indonesia can understand the procurement process report; a report which can be requested by the bidding participants which contains more detailed information on the bidding proposal assessment than on the award decision. Based on three examples of procurement process reports at different procuring entities, it has been argued that these reports are not self-explanatory. In addition, the regulations do not provide for a possibility for bidders to request further clarification.

⁷³² Unlike in Indonesia where only one type of notice is used for both bidding participants and the public; in the UK (and in other EU MS) the notice is differentiated. One is sent to the bidding participants and it contains much more detailed information than the one uploaded on the web. However, this research aims to focus on providing information to the bidding participants, so they can understand the reasoning for the award decision made by the contracting authorities.

⁷³³ This is a period when the procurement process is halted to enable the tenderers to understand the decision made by the authority, to seek clarification, and whenever they feel aggrieved, this also allows them to prepare their defence.

⁷³⁴ A “candidate” refers to an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership whereas a “tenderer” means an economic operator that has submitted a tender; See: Articles 2 (1) and 86 (1) PCR 2015.

⁷³⁵ Article 55 (1): Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system, including the grounds for any decision — (a) not to conclude a framework agreement, (b) not to award a contract for which there has been a call for competition, (c) to recommence the procedure, or (d) not to implement a dynamic purchasing system.

conditions and criteria set out in the contract notice or the invitation in order to confirm interest in the procurement documents.⁷³⁶

According to the law, the contracting authorities shall state the reasons for the award decision.⁷³⁷ The reasons shall include the characteristics and relative advantages of the tenderer who receives the notice and the successful tenderer.⁷³⁸ The reasons should be clear, mentioning why the candidate was unsuccessful and the reasons for any decision by the contracting authority to the effect that the economic operator did not meet the technical specifications.⁷³⁹

It is relevant to underline a statement in the case of *Strabag Benelux* as follows.⁷⁴⁰ "The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion [...] to make the persons concerned aware of the reasons [...] enable them to defend their rights and to enable the court to exercise its supervisory jurisdiction". This case highlights the necessity for the contracting authority to supply its reasoning behind awarding the contract. This duty to provide reasons underpins the principle of transparency. Furthermore, as is indicated above, the principle of transparency is instrumental for allowing the bidder to understand the award decision and to seek legal redress

⁷³⁶ Article 56 particularly section (1) and Article 86 (2) PCR 2015.

⁷³⁷ In the notice of the award decision sent to each bidding participant, it is also relevant to restate the award criteria which have been used, as they have been included in the procurement document. Also, it is required to provide such a summary of the reasons for the decision made. It may not always be clear to what extent the summary should be provided, but arguably, it should provide brief information as to the score of the winning tenderer was higher than the tenderer receiving the letter. See: Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 7 - 303.

⁷³⁸ Article 86 (2) (b) of the PCR 2015. As explained by one scholar, the transparency of the award decision was previously made in two stages. It started when a letter was sent to each bidding participant containing basic information about their bid. Later on, the unsuccessful bidder could request a debriefing with a request for additional information including the strengths of the successful tenderer. These two stages were considered less effective, and therefore they were amended in 2009. Consequently, the information on the comparative advantages of the successful tenderer has been given on a first-opportunity basis. See: Trybus, M. "An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales", in Treumer, S and Lichere, F (Eds). 2011. *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, p. 217.

⁷³⁹ Article 86 (3) of the PCR 2015. It is seen as a duty to give reasons. See: Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 62. In addition, stemming from Article 86 (2) (b) of the PCRs 2015, the contracting authorities shall also provide information when the standstill period applies up to the end of the date before the contract concluded.

⁷⁴⁰ *Strabag Benelux*, Case T 183/00, available from: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130ded28ed577285d4b218b8da7bc37004564.e34KaxiLc3eQc40LaxqMbN4NchyKe0?text=&docid=85718&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&1&cid=519666>, last visited 8 December 2015.

whenever necessary. If this occurs, then the clarity of the award decision will be used as a point of departure for the judiciary in conducting judicial review. In other words, this decision emphasises that the principle of transparency is instrumental for the principle of accountability.

It is useful to provide a concrete illustration of the implementation of the duty to give reasons. The following description is a summary of an award decision letter sent by the City of Westminster, London, to an unsuccessful tender participant.⁷⁴¹ The letter starts by thanking the tenderer for participating in the public procurement conducted by the municipality. It then provides information based on the evaluation result and states that the winning bidder (named xxxxx) had obtained an 82.85% score for xxxxxx. It then includes the comparative score of the tenderer who has received the letter, which was 65.48%. The letter then contains an Annex, which explains the evaluation result and includes comparative information on the result obtained by the successful tenderer.

In the Annex, the information starts with the general comparative result between the winner and the unsuccessful tenderer who has received the letter. The criteria applied in this tender are explained again (which was a combination of the price criterion (60%) and the quality criterion (40%)). The price criterion is easy to identify as it is based on a tangible notion, namely the price offered. Therefore, the following explanation will focus on the quality criterion.

A separate table contained the following information: the sub-criteria; the weight attached to the sub-criteria; the assessment score both of the winner and of the unsuccessful tenderer who has received the letter; and descriptive reasons for the assessment scores in each sub-criterion. Whenever the score of the unsuccessful tenderer is lower than that of the successful tenderer (or the opposite), the Annex also provides qualitative information as to why this is so. The explanation in its entirety clarifies why one has been unsuccessful while the winner was indeed successful.

The procurement regulations (on the debriefing mechanism)

In addition, the bidding participants can request a fuller debriefing as long as it is submitted by an economic operator during the standstill period. This matter

⁷⁴¹ A scan of this document can be seen in the Annex to this book. This document was obtained from Mr. Andrew Shorter, Head of Category Management – Housing and Construction at Westminster City Council. Communication of 19 November 2015.

has been explained in the PCRs 2015 concerning the standstill period issued by the Crown Commercial Service.⁷⁴²

The debriefing process may include a 'consultation' where the contracting authority provides clarification. This is an issue that has been discussed in the earlier section. However, debriefing may also concern a request from the bidding participant to obtain additional sensitive information. If the latter is the case, the contracting authority must be careful when providing such information.⁷⁴³ According to Article 86(6) (Articles in statutory instruments are referred to as Regulations),⁷⁴⁴ a contracting authority may withhold any information (...) where the release of such information: (a) would impede law enforcement or would be contrary to the public interest, (b) would prejudice the legitimate commercial interests of a particular economic operator, or (c) might prejudice fair competition. A representative has explained that sensitive information is, therefore, rarely provided – except where this is regulated otherwise.⁷⁴⁵

A relevant case on this matter is *Alstom Transport v. Eurostar International Ltd* where Justice Vos ordered the specific disclosure of the defendant's completed evaluation templates and other documents identifying the detailed scores produced by the evaluators.⁷⁴⁶ However, while adhering to the ruling in *Alstom Transport*, the contracting authorities shall also balance the protection of sensitive information as dictated in the *Varec* case, as is briefly discussed as follows.⁷⁴⁷ The CJEU determined that "the body responsible for the reviews [...] must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action,

⁷⁴² Crown Commercial Service. 2015. "The Public Contracts Regulations 2015: Guidance on the Standstill Period", Place is unknown, p. 7. available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417945/Guidance_on_Standstill.pdf, last visited 14 June 2016.

⁷⁴³ The contracting authorities are not permitted by law to forward disclosed information, which they have designated as confidential, to other economic operators, and this includes, but is not limited to, technical or trade secrets and confidential aspects of tenders. See: Article 21 (1) PCR 2015.

⁷⁴⁴ Similar content can also be seen in Article 55 (3) of the PCRs 2015.

⁷⁴⁵ Interview with Mr Andrew Shorter, Head of Category Management - Housing & Construction, Westminster City Council, London, on 15 November 2015.

⁷⁴⁶ Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 218; *Alstom Transport v Eurostar International Ltd & Anor* [2010] EWHC 2747 (Ch). According to Semple, an order to disclose was also made in *Amaryllis v HM Treasury and Croft House Care and Others v Durham County Council*.

⁷⁴⁷ See: C-450/06, available from: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5ee0b36e0db694f859b19d69518805a0c.e34KaxiLc3eQc40LaxqMbN4Oc3iMe0?text=&docid=71573&pageIndex=0&doClang=EN&mode=lst&dir=&occ=first&part=1&cid=187544>, last accessed 10 December 2015.

particularly by the contracting authority, although it may appraise itself of such information and take it into consideration". This judgement also instructs the contracting authorities "to safeguard the confidentiality and secrecy of that information". The *Varec* judgement underlines the necessity to protect the principle of confidentiality as laid down in Regulation 86(6)(c).

Having considered the situation in the UK, practitioners and procurement scholars are of the opinion that the PCRs 2015 have provided sufficient safeguards to ensure the principle of transparency. The regulations have guided the contracting authority to ensure that the notice regarding the award decision is clear and understandable.⁷⁴⁸

The general regulations

The discussion above has underlined the necessity to provide reasons. Here, it is beneficial to examine whether the fact of being required to provide reasoning has also been recognised in a non-public procurement context. According to the literature, there is no general formal code that instructs the administration to provide sufficient reasons when issuing a certain decision.⁷⁴⁹ However, stemming from the Tribunals and Inquiries Act 1992, one scholar has argued that any tribunal must give reasons for its decision if asked to do so by a party to the dispute.⁷⁵⁰

The case law also confirms a coherent line as to the obligation of the administration to provide reasons. The literature has underlined judges' considerations in *Padfield v. Minister of Agriculture, Fisheries and Food*, as follows.⁷⁵¹

Lord Reid stated: "it was argued that the Minister is not bound to give reasons [...]. But I do not agree [...]. It is the Minister's duty not to act so to frustrate the policy and objects of the Act, and if appears from all the circumstances [...] of the Minister's refusal, then it appears to me that the court must be entitled to act". Lord Upjohn also added:

⁷⁴⁸ Interview with Prof. Anne Davies, Oxford Law School, on 15 October 2015; Dr. Albert Sanchez-Graells, Bristol Law School, on 30 October 2015; Prof. Martin Trybus, Birmingham Law School, on 4 November 2015, and Mr Andrew Shorter, Head of Category Management Housing & Construction at Westminster City Council, London, on 15 November 2015.

⁷⁴⁹ Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden, p. 117.

⁷⁵⁰ Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden, p. 117.

⁷⁵¹ Thompson, K and Jones, B. "Administrative Law in the United Kingdom" in Seerden, R.J.G.H. (Ed). 2007. *Administrative law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Antwerpen, p. 273.

"[...] if he does not give any reasons for his decision it may be, if the circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion." As there are subsequent cases regarding the matter, it is safe to say that the duty to give reasons does apply in British Law.

In this section, it is important to mention the Freedom of Information Act ("FOIA") 2000. This Act does not explain the necessity for supplying reasons but concludes that there is a general right to have access to information.⁷⁵² Also, FOIA embraces the issue of how the government shall treat confidential documents or information. It is possible that the government certifies that a document is confidential and should not be disclosed. If this occurs, the court may not order production, but the document will be disclosed during the court examination, though this does not have to be made public.⁷⁵³ According to this Act, some relevant reasons for secrecy are related to trade secrets and commercially sensitive information.⁷⁵⁴

5.4.2. Normative framework and provisional finding

It has been shown above that the principle of transparency is intertwined with the duty to provide reasons. The regulation requires the contracting authority to provide sufficient information related to the award decision to each bidding participant. 'Sufficient' here means that each unsuccessful bidder receives a letter, which contains an Annex. The Annex explains the score and a description of the relative weight attached to why he has been unsuccessful and why the winner has received the contract. Therefore, the losing bidder can evaluate the objectivity of the decision made by the contracting authority. The necessity for giving reasons can be seen in the *Strabag Benelux* case. In a non-public procurement context, this can be seen in the ruling in *Padfield v. Minister of Agriculture, Fisheries, and Food*. An example of the letter of notice issued by the City of Westminster has also been provided, the information described in the letter containing not only the score but

⁷⁵² Based on the FOIA, the Judiciary can, for example, allow an unsuccessful tenderer to obtain information about the conduct of a procurement process, in addition to the information which the authority is required to provide to tenderers pursuant to the Regulations. See: Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

⁷⁵³ Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden-Baden, p. 119.

⁷⁵⁴ Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

also the wording pertaining to the comparative description of the score obtained by the winner and the unsuccessful bidder who received the letter. If the losing bidder needs further clarification, he can request a fuller debriefing. This can be a 'consultation' as was explained in the section on the principle of equal treatment. Alternatively, it can also be a request to have additional information, which may contain sensitive information. Depending on the merits of the case, the Court may issue an order to the contracting authority to disclose the information; this can be seen in *Alstom Transport*. Therefore, it can be concluded that the principle of transparency in this matter is protected in the UK.

5.5. The principle of accountability (clarity as to the legal accountability forum): regulation and legal protection

This section will examine how the UK deals with the principle of accountability especially concerning the issue of the clarity of the legal accountability forum when dealing with public procurement disputes. To discuss this, the following structure will be employed. To start with, the relevance of discussing the matter will be underlined. Afterwards, the availability of public procurement regulations and the information gathered from interviews will be provided. Additionally, this will be complemented by information based on non-public procurement law when relevant. It will then be argued what these situations mean when examined from the principle of good public procurement.

5.5.1. Situation found and an analysis

It is possible that laypersons, lawyers and even judges are confused when it comes to determining which legal accountability forum will apply when dealing with a public procurement dispute: the administrative courts or the civil courts?⁷⁵⁵ Logically, this situation undermines the principle of accountability. Therefore, it is relevant to examine how the UK deals with this matter. In the following, it will be explained that the above situation does not occur in the UK due to clarity with regard to the procurement regulations.

⁷⁵⁵ On section 3.5, it has been argued that there is a violation of the principle of accountability in the Indonesian public procurement system. The Supreme Court is confused as to which legal forum should apply when dealing with a public procurement dispute: the civil or administrative courts?

Procurement Regulation(s)

The PCRs 2015 do not explicitly explain which court has competence to hear a procurement dispute. The PCRs, however, explain that the forum in which to seek remedies is the High Court.⁷⁵⁶ In addition, procurement scholars and practitioners in England have also confirmed that the High Court is the legal accountability forum for dealing with procurement disputes; the so-called Queen's Bench Division of the High Court hears such disputes.⁷⁵⁷

The Queen's Bench Division has five specialist courts, namely the Administrative Court, the Admiralty Court, the Mercantile Court, the Commercial Court, and the Technology and Construction Court.⁷⁵⁸ According to the regulations and literature, public procurement cases are heard before the Administrative Court, but whenever the cases involve civil engineering or technology; the case will be reviewed by the Technology and Construction Court.⁷⁵⁹ Although the dispute is examined in these Courts (one of which is the Administrative Court), the procedure which applies in the Queen's Bench Division is governed by the Civil Procedure Rules (CPRs).⁷⁶⁰

Besides the issue of the legal accountability forum, it is relevant to briefly consider which law the court applies. Regarding this, a scholar has identified at least

⁷⁵⁶ Article 91 (2) in essence stated that a breach of any duty owed must be started in the High Court. See also Article 102 (7) and (9) on the possibility of the High Court of England, Wales and Northern Ireland to impose civil financial penalties.

⁷⁵⁷ Interview with Prof. Anne Davies, Oxford Law School, on 15 October 2015 and Dr. Albert Sanchez-Graells, Bristol Law School, on 30 October 2015. The Queen's Bench Division is one out of six divisions of the High Court. As noted by Partington, this division deals with contract and tort cases. See: Partington, M. 2014. *Introduction to the English Legal System*, OUP, Oxford, p. 49.

⁷⁵⁸ Ministry of Justice. 2014. "The Queen's Bench Guide: A Guide to the Working Practices of the Queen's Bench Division within the Royal Court of Justice", available at: <https://www.justice.gov.uk/downloads/courts/queens-bench/queen-bench-guide.pdf>, p. 3, last visited 11 December 2015.

⁷⁵⁹ Article 54.1 and Article 60.1 of the Civil Procedure Rules, respectively. See also: Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015. Surprisingly, although at first instance the case may be heard before the Administrative Court, whenever the claimant wishes to appeal, this will be dealt with by the Civil Division of the Court of Appeal. See: Trybus, M. "An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales", in Treumer, S and Lichere, F (Eds). 2011. *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, p. 201-2, 204.

⁷⁶⁰ This applies for the general context, but certain exceptions may apply. See: Ministry of Justice. 2014. "The Queen's Bench Guide: A Guide to the Working Practices of the Queen's Bench Division within the Royal Court of Justice", available at: <https://www.justice.gov.uk/downloads/courts/queens-bench/queen-bench-guide.pdf>, p. 1, last visited 11 December 2015.

three roles for public law in government contracts; (i) creating public institutions and enabling them to perform public tasks, (ii) controlling the government action, and (iii) creating procedures of accountability.⁷⁶¹ It has been reported that there is a tendency to apply both public and private law; however, the emphasis is more on private law, because the applicability of public law in the UK is still debatable.⁷⁶² A literature has noted the limitation of public law by explaining the following.⁷⁶³ In *R. v. Hibbit and Sanders Ex p. the Lord Chancellor's Department*, a disappointed bidder alleged that the Department had acted contrary to the applicant's legitimate expectations; however, the court held that "whilst the applicant's expectations were not met, there was no element of public law to render the decision to judicial review." It has also been noted that, since then, other cases have also generally followed the approach in the *Hibbit* case.⁷⁶⁴

General regulation(s)

In order to be consistent with the presentation in earlier chapters, it will be elaborated in this section whether the UK Courts have endorsed the fact that the competition authority is also the review body for a public procurement dispute. Although it is noted that this discussion also fits within the issue of the administrative review forum contained in the section on the principle of equal treatment, this discussion is provided here as the emphasis lies on analysing whether or not the judiciary is consistent when deciding on the accountability forum.⁷⁶⁵

The UK competition authority is called the Competition and Markets Authority (CMA). It is a new body, which merged the Office of Fair Trading (OFT) and the Competition Commission (CC). These two ceased to exist on 1st April 2014. The

⁷⁶¹ Davies, A.C.L. 2008. *The Public Law of Government Contracts*, OUP, Oxford, p. 325.

⁷⁶² The UK courts have often stated that "there can be no review unless there is a "special public law" element to the decisions". It has also been explained that "the only exception was review for bad faith". See: Arrowsmith, S. 2014. *The Law of Public and Utilities procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 2-144 – 2-145.

⁷⁶³ Arrowsmith, S. 2014. *The Law of Public and Utilities procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 2-147.

⁷⁶⁴ Arrowsmith, S. 2014. *The Law of Public and Utilities procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 2-145.

⁷⁶⁵ It has been explained in section 3.5 that the Indonesian Supreme Court is confused as to which legal forum should apply when dealing with public procurement disputes: the civil or administrative courts? Moreover, the Supreme Court is also satisfied with the argument that the Business Competition and Supervisory Body should become the first instance review forum (in which the decision of this body is reviewable by the Civil Courts).

CCs functions were transferred to the Competition and Markets Authority (CMA) whereas the OFT's responsibilities were distributed among different organisations including the CMA and the Financial Conduct Authority.⁷⁶⁶ By analysing policy guidelines and publications, it can be concluded that the CMA does not take a position as an independent administrative review body to deal with public procurement disputes. Rather, the CMA encourages contracting authorities to be careful when it comes to bid rigging and reports of any suspicious behaviour should be sent to the CMA.⁷⁶⁷

As this handover has occurred fairly recently, it is, therefore, relevant to look at the OFT and CC to see whether the abovementioned authority has been retained by these bodies. Based on the documents, it has been found that these bodies had tentative dealings with procurement. From its last annual report, it was again implied that the OFT had tentative dealings with public procurement issues, but the OFT position was as a researcher and advisor,⁷⁶⁸ and also a trainer⁷⁶⁹ of the government when designing a suitable policy for public procurement based on the competition perspective. A similar position was also stated in the last annual report of the CC. It declared its position as a government advisor to promote competition.⁷⁷⁰ Thus, it is safe to say that the competition authority in the UK has

⁷⁶⁶ UK Government, "Office of Fair Trading and Competition Commission: final annual reports published", available from: <https://www.gov.uk/government/news/office-of-fair-trading-and-competition-commission-final-annual-reports-published>, last visited 11 December 2015.

⁷⁶⁷ Competition and Markets Authority. 2014. "Bid Rigging: Advice for Public Sector Procurers", available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378097/Bid_rigging_-_advice_on_procurement.pdf, last visited 13 December 2015.

⁷⁶⁸ "We identified a number of areas of concern and, as a result, launched a market study in October 2013. We subsequently found that competition could work better in [...] public sector, and recommended that [...] improving the way it procures and manages contracts with suppliers, [...]" See: Office of Fair Trading. 2014. "Annual Report and Accounts 2013 to 2014", available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322820/9988-2901757-TSO-OfT_Annual_Report_Web_ACCESSIBLE.pdf, p. 37, last visited 11 December 2015.

⁷⁶⁹ "Alongside our markets' work we continued our programme of advocacy with policymakers, public sector commissioners and procurers." See: Office of Fair Trading. 2014. "Annual Report and Accounts 2013 to 2014", available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322820/9988-2901757-TSO-OfT_Annual_Report_Web_ACCESSIBLE.pdf, p. 38, last visited 11 December 2015.

⁷⁷⁰ "The CC continued to share its back-office services with other organisations as both a provider and a receiver to reduce costs and improve the quality of the service, and to ensure that all services were effectively procured to achieve value for money". See: Competition Commission, "Annual Report & Accounts 2013-2014", available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322811/40626_2902424_Web_Accessible_v1.1.pdf, p. 56, last visited 11 December 2015.

never taken a position as a review body for the contracting authorities in public procurement procedures.

Due to its relevance, it is worth briefly discussing whether the UK Ombudsman has competence to deal with procurement cases. There are ten Ombudsmen in the UK, two of which may have dealt with procurement cases: (i) the parliamentary and health service Ombudsman and (ii) the local government Ombudsman.⁷⁷¹ These two have powers to investigate complaints of maladministration by the Central Government and Local Government in England and Wales. It is, however, explained that procurement is covered by a general exclusion “for action in matters relating to contractual or other commercial transactions”.⁷⁷² Therefore, it is not unsurprising that no case relating to procurement has been found in the repositories of either ombudsman.^{773 774}

5.5.2. Normative framework and provisional finding

It has been shown that the PCRs 2015 implicitly state that the High Court has competence to deal with procurement disputes. The literature has further explained that the Queen’s Bench Division of the High Court will deal with the matter, especially the Administrative Court and the Technology and Construction Court. Furthermore, there is no indication that the Competition Authority has adopted the position of being the first instance forum to deal with procurement disputes. Public procurement is also not an issue that can be dealt with by the Ombudsmen. Having said this, confusion as to the competence of the

⁷⁷¹ There are two other Ombudsmen which at first sight might have had tentative dealings with procurement complaints, namely the financial ombudsman and the legal ombudsman. However, after a check, the financial Ombudsman deals with complaints involving the financial sector whereas the legal ombudsman deals with complaints by clients concerning their lawyers. See: Citizens Advice, “How to use an Ombudsman in England”, available at: https://www.citizensadvice.org.uk/law-and-rights/civil-rights/complaints/how-to-use-an-ombudsman-in-england/#local_government_ombudsman, last visited 16 December 2015.

⁷⁷² Arrowsmith, S. 2005. *The Law of Public and Utilities Procurement*. Sweet and Maxwell, London, para. 2.94, p. 113-114.

⁷⁷³ Parliamentary and Health Service Ombudsman, “Case Summaries”, available at: http://www.ombudsman.org.uk/make-a-complaint/case-summary-simple-search-and-listing?title_keyword=procurement, last visited 16 December 2015.

⁷⁷⁴ There are numerous pages where “procurement” appears, but only one which specifically refers to a case: concerning a Warrington teenager who needed language therapy. It is about the need for the NHS to procure a (therapist) service in order to meet its responsibilities. This has nothing to do with a bid protest. See: Local Government Ombudsman. 2013. “Warrington Teenagers Denied Speech Language Therapy”, available from: <http://www.lgo.org.uk/news/2013/nov/warrington-teenagers-denied-speech-language-therapy/>, last visited 16 December 2015.

accountability forum is not an issue in the UK; it can, therefore, be concluded that the principle of accountability concerning clarity as regards the legal accountability forum is protected.

5.6. The principle of accountability (availability of (effective) remedies): regulation and legal protection

The discussion below will assess how the UK implements the principle of accountability concerning the availability of (effective) remedies. In doing so, the following structure will be used. To start with, the necessity of discussing the matter will be examined. After this, there will be a description of the availability of public procurement regulations, the academic literature and case law. Any information on non-public procurement law, which is considered to be relevant will also be provided. The discussion will conclude with an interpretation of the situations referred to when examined from the principle of good public procurement.

5

5.6.1. Situation found and an analysis

It is possible that effective remedies are not available or do not work properly in a certain country;⁷⁷⁵ as a consequence, this situation undermines the principle of accountability. The following will attempt to explain that remedies are indeed available, and the principle in question has not been violated. However, before coming to the main discussion, the three following matters should be clarified.

The main purpose of the remedies is that of correcting mistake(s) by the contracting authority. If relevant, the contracting authority must also compensate any mistakes that have been made. As this research focuses on the pre-contractual phase, the relevance of discussing the remedies may be questioned, because remedies can also be seen as an issue, which occurs after the pre-contractual phase. In this regard, two answers can be provided. First of all, some remedies are provided in order to correct mistakes by the contracting authority during a pre-contractual phase. In addition, there are also remedies that are provided after the contractual

⁷⁷⁵ Section 3.6 has argued that a violation of the principle of accountability occurs in the Indonesian public procurement system. This occurs because the procurement regulations are silent on providing effective remedies. Moreover, other general regulations are not always clear in explaining these issues. The procurement to acquire a system and machinery for identity cards has been discussed to describe the situation.

phase; however, these are based on mistakes which were originally made during the contractual phase.

The following issue which needs to be underlined is that, as the UK is one of the EU Member States, it is important to briefly discuss the EU Remedies Directive.⁷⁷⁶ The remedies can be classified as the following actions:⁷⁷⁷ (i) interim protection, (ii) the setting aside of unlawful decisions, and (iii) actions for damages. Another action is (iv) a declaration of ineffectiveness.⁷⁷⁸ Later it will be explained how the UK embodies these actions in its national legal system. Regarding this aspect, it is necessary to state that the legal terminology used by the UK may be slightly different from that which has been used by the Netherlands.⁷⁷⁹

The final point that must be clarified is the necessity of - once again - discussing interim relief ('interim protection') in this section. As has been seen, interim relief has been discussed in the section on the principle of equal opportunity; however, the emphasis of that elaboration lay on detecting the success or failure of the legal system in ensuring the protection of the principle of equality opportunity. Here, the aim is to highlight whether the legal system provides effective remedies. Although the object of the discussion is therefore the same, conceptually speaking, the issue can be classified in two different sections. However, the information will be simplified whenever it may be considered to be redundant.

Procurement Regulation(s)

The remedies are explicitly contained in the UK public procurement regulation: the PCRs 2015. The reason for requesting a remedy is due to the breach of 'the duty owed' by the contracting authority and that this breach has resulted in an economic operator suffering or risking suffering a loss or damage.⁷⁸⁰ The duty owed means that the contracting authority is obliged to comply with the

⁷⁷⁶ Directive 89/665/EEC and its amendment in Directive 2007/66/EC.

⁷⁷⁷ Bovis, C. "Review and Remedies", in Trybus, M., Caranta, R., Edelstam, G. (Eds.) 2014. *EU Public Contract Law Public Procurement and Beyond*, Bruylant, Brussels, p. 371.

⁷⁷⁸ Heard, E. and Brealey, L. 2010. "Public Procurement Remedies: A New Era", available at <http://www.bevanbrittan.com/articles/Pages/PublicProcurementRemedies-anewera.aspx>, last visited 1 December 2015.

⁷⁷⁹ As has been explained in section 4.6. The Netherlands has two remedies, interim relief and damages. The former includes interim relief and setting aside. The latter covers damages and ineffectiveness. The Netherlands also has remedies based on general law instead of public procurement law.

⁷⁸⁰ Article 91 (1) of the PCRs 2015.

regulations as determined by part 2 of the PCRs (concerning the rules implementing the public contract directive).⁷⁸¹ The contracting authority is also obliged to comply with any enforceable EU obligation in the field of public procurement (...) within the scope of part 2.⁷⁸²

Interim relief

As it has been explained previously, stemming from Article 95(1) of the PCRs 2015, interim relief can be classified as a suspension mechanism and interim orders. A suspension occurs automatically when aggrieved bidders submit a case to the Courts. The contracting authority is not entitled to continue the procurement procedure (therefore, any further loss for the aggrieved bidder can be prevented). The suspension can be lifted when the contracting authority requests this and the Court is satisfied with that argument. Interim orders, according to Article 96(1) of the PCRs 2015, can be issued by the Court so as:⁷⁸³ to restore or to modify the requirement; to suspend the procedure; and to suspend the implementation of any decision or action conducted by the contracting authority.

5

Setting aside

The legal redress of setting aside is explicitly explained in the PCRs 2015. It is stipulated that whenever a duty owed has been breached, and the contract has not been entered into, the court may order one of the following actions:⁷⁸⁴ (a) to set aside the decision or action, or (b) to order the contracting authority to amend any document. It is also possible that the Court issues other orders than those as the following section of the Article states that "this regulation does not prejudice any other powers of the Court."⁷⁸⁵

Regarding setting aside, the case law shows that the courts will not be sympathetic towards the claimant if the case is not a strong one. It is worth considering Lord Malcolm's judgement in *British Telecommunications Plc v. Common Services Agency*: the court may not set aside the award decision whenever the

⁷⁸¹ Article 89 (1) (a) of the PCRs 2015.

⁷⁸² Article 89 (1) (b) of the PCRs 2015. According to Article 89 (2), the obligation applies to an economic operator from the UK or from another European Economic Area (EEA) State.

⁷⁸³ Article 96 (1) (b), (c), (d) of the PCRs 2015.

⁷⁸⁴ Article 97 (1) and (2) (a) and (b) of the PCRs 2015.

⁷⁸⁵ Article 97 (3) of the PCRs 2015.

nature of the breach was not very serious, and the claimant had not shown that he would have won the contract if the breach had not occurred.⁷⁸⁶ In the case of *Woods Building Services v. Milton Keynes*, the High Court did not consider it appropriate to set aside. Therefore, the High Court determined that the claimant was entitled to damages.⁷⁸⁷ Damages are further discussed below.

Damages

The PCR's explain that damages can be awarded either before⁷⁸⁸ or after⁷⁸⁹ the contract has been concluded. The reason for awarding damages applies both in the pre-contract award stage and the post-contract award stage because breaches of regulations are actionable.⁷⁹⁰ It is possible that the breach of regulations had occurred before the contract concluded, but then it was detected somewhat later after the contract has been concluded. In addition, this occurs because judges use a contractual approach when assessing damages in public procurement.⁷⁹¹

⁷⁸⁶ Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 205. *British Telecommunications Plc v Common Services Agency* concerns a tenderer who felt aggrieved with the award decision of a contracting authority based on the ground that the authority was not transparent concerning the award criteria. The court was indeed satisfied with this claim; however, the court rejected the claimant's demand to set aside the award decision and to restart the tender due to (preventing the delay and therefore guarding) the public interest, and in return the court agreed to award damages (para. 38). See: [2014] CSOH 44, available from: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a54986a6-8980-69d2-b500-ff0000d74aa7>, last visited 10 December 2015. To put emphasis on the point of seriousness, *AAR* can be considered as a relevant case. All About Rights Law Practice (AAR) submitted its proposal via an electronic portal. However, the tenderer mistakenly uploaded a blank page for a required element of its submission. The tenderer argued that they should have been permitted to submit the required information after the deadline. Nonetheless, the Court considered that there was no good reason for doing so based on the principles of proportionality and equal treatment. This was also to ensure that the system was not unjust to other bidders who were bound by the same tender conditions and made no such mistake. See: *R (on the application of All About Rights Law Practice) v Legal Services Commission* - [2011] EWHC 964, available from: <http://www.bailii.org/ew/cases/EWHC/Admin/2011/964.html>, last visited 15 December 2015.

⁷⁸⁷ Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

⁷⁸⁸ Article 97 (2) (c) of the PCR's 2015.

⁷⁸⁹ Article 98 (c) of the PCR's 2015.

⁷⁹⁰ Slater, D. 2015. "Public Procurement 2015: England and Wales", available from: International Comparative Legal Guides (ICLG), <http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2016/england-and-wales>, last visited 13 December 2015.

⁷⁹¹ See again the *Blackpool* case which has been explained based on the principle of equal opportunity; the judge gave a ruling based on the doctrine of implied contract.

The claim will be based on the merits if the claimant can argue that if the breach had not occurred, he would have succeeded. Otherwise, the participant will not recover anything, not even his bidding costs.⁷⁹² In contrast, when the case is based on merit, the ruling in the *Harmon* case shows that the tender costs, the gross margin, and the loss of profit are recoverable.⁷⁹³ A scholar has underlined that the number of cases in which the claimants have requested damages remains low. Presumably, this is because claimants are reluctant to disclose their projected profit margins to the courts as a basis to claim damages and they prefer to focus on interim relief as the ultimate remedy.⁷⁹⁴

It is worth underlining that damages can be assessed according to a 'loss of chance' rule. According to Arrowsmith, the court will assess the extent to which the tenderer would have had a chance of receiving the contract if the contracting authority had not breached the procurement laws and policies.⁷⁹⁵ She also explains that the 'loss of chance' requires a real or substantial chance of being awarded the contract.⁷⁹⁶

Declaration of ineffectiveness

A declaration of ineffectiveness is also available in the PCRs 2015. Where a declaration of ineffectiveness is made, the contract is to be considered as prospectively (not retrospectively) ineffective as from the time when the declaration is made.⁷⁹⁷ The court must order at least one and may order both of the

⁷⁹² Arrowsmith, S. 2014. *The Law of Public and Utilities Procurement: Regulation in the EU and UK (Vol 1)*, Thomson Reuters, London, para. 2-172. See also: Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 228-229.

⁷⁹³ It is a complex case where Harmon as a claimant questioned whether he has been treated equally and fairly by the defendant on the procurement to build parliamentary building at Westminster. See ruling judgement particularly on the issues and answer 26 and 27, *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons* [1999] EWHC Technology 199 (28th October, 1999), available from: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/1999/199.html&query=Harmon%2Band%2BCFEM%2Band%2BFacades%2Band%2B%28UK%29%2Band%2BLtd>, last visited 11 December 2015.

⁷⁹⁴ Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 227.

⁷⁹⁵ Trybus, M. "An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales", in Treumer, S and Lichere, F (Eds). 2011. *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, p. 228.

⁷⁹⁶ Trybus, M. "An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales", in Treumer, S. and Lichere, F. (Eds). 2011. *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, p. 228.

⁷⁹⁷ Article 101 (1) of the PCRs 2015.

following penalties:⁷⁹⁸ (a) the duration of the contract is shortened based on the court order, or (b) the contracting authority must pay a civil financial penalty, the amount of which is specified in the order.

The court may order a declaration of ineffectiveness whenever it satisfies both the general requirements, as well as the specific requirements. The general requirements are the same as the requirements when seeking the above damages, where (i) a decision or action taken by a contracting authority has breached the duty owed, and where (ii) the contract has been entered into. The specific requirements are: the contract has been awarded without prior publication;⁷⁹⁹ the contracting authority has quickly concluded the contract;⁸⁰⁰ or certain other reasons.⁸⁰¹ However, the Court may not order ineffectiveness where the general interest requires the contract to be maintained.⁸⁰² This overriding reason shall only apply in exceptional circumstances if the ineffectiveness would lead to disproportionate consequences.⁸⁰³

It may have been intended that all four remedies specified in the EU Directives have been transposed in the PCRs 2015. Regarding this, it is also relevant to discuss the response of disputing parties towards court decisions.⁸⁰⁴ Disputing parties tend to respect decisions by the courts at first instance. This may be due to the quality of the court decision; also, it may be due to the following two disincentive reasons.

It is possible for the disputing party to lodge an appeal with the Court of Appeal; however, before the appeal, permission has to be first obtained from the court concerned to ensure that the appeal is based on merit or involves an

⁷⁹⁸ Article 102 (3) of the PCRs 2015.

⁷⁹⁹ Article 99 (2) of the PCRs 2015.

⁸⁰⁰ Rushing in concluding the contract means that the contract is concluded although the contracting authority must apply the standstill period, a suspension, or the interim order to restore or modify the requirement. Article 99 (3) of the PCRs 2015.

⁸⁰¹ Article 99 (5) of the PCRs 2015. The reason is here based on the mechanism of the so-called framework agreement or under the dynamic purchasing system. A framework agreement is an arrangement whereby a procuring entity provides and establishes the terms on which purchases may or will be made over a period of time. A dynamic purchasing system is a mechanism to acquire products or services under the so-called electronic catalogue. These two are beyond this research and therefore will not be further discussed.

⁸⁰² Article 100 (1) (b) of the PCRs 2015.

⁸⁰³ Article 100 (2) of the PCRs 2015.

⁸⁰⁴ To reiterate the situation in Indonesia, the aggrieved bidders may continue to challenge the decisions at the second and/or final instances, and this situation has been regarded as ineffective because it delays the procurement procedure.

important question of law.⁸⁰⁵ Due to the fact the litigation fees in the High Court are already expensive, it is doubtful whether one would be keen to continue the dispute in a higher court.⁸⁰⁶ These two reasons mean that the parties are often reluctant to continue proceedings in the higher court.

General regulation(s)

The availability of remedies has been explicitly embodied in the UK public procurement regulations (the PCRs 2015). Therefore, general regulations may not be needed to elucidate the matters.⁸⁰⁷ However, to complement the discussion, it is beneficial to discuss the relevant general regulations and non-public procurement case law, which can be used to explain or clarify the issue of remedies.

Before discussing the remedies, it is important to stress that remedies are not only important for the aggrieved bidder, but also for the citizen in general. A judicial review submitted by an aggrieved bidder contains the request to correct the decision or action made by the contracting authority. This correction may be based on the interest of the taxpayer because it may test whether that decision or action by the contracting authority, among other things, has been made based on value for money. According to one scholar, “the value for money is embedded within the fiduciary duty imposed by case law under general principles of administrative law”. This means that the government is required to hold and spend public money, which belongs to the citizens (...) to be spent in a proper manner

⁸⁰⁵ Trybus, M. “An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales”, in Treumer, S. and Lichere, F. (Eds). 2011. *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, p. 201-204. Permission to appeal is required in judicial review cases. It can be obtained from the Administrative Court at which the decision to be appealed was made or from the Court of Appeal by way of a notice of appeal. The Court of Appeal only has two divisions, civil and criminal. This matter will be reviewed in the civil division. Under the rules of civil procedure, permission will only be granted if the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. See: Thompson, K. and Jones, B. “Administrative Law in the United Kingdom” in Seerden, R.J.G.H. (Ed). 2007. *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 252.

⁸⁰⁶ As it has been mentioned previously, 100,000 GBP may be spent only on litigation in the High Court. Therefore, the aggrieved bidder may not be interested in bringing the case to the Appeal Court. Moreover, the aggrieved bidder also needs to receive permission prior to the case being heard before the Appeal Court. Interview with Dr. Albert Sanchez-Graells, Bristol Law School, on 30 October 2015.

⁸⁰⁷ Unlike the situation in the Netherlands where the DPPA is silent on the availability of (effective) remedies as contained in the general regulations, such as the GALA, the Civil Code, and the Code of Civil Procedure.

(...).⁸⁰⁸ Departing from this, the claimant (the aggrieved bidder) may make a claim to review the lawfulness of an enactment or a decision, action or a failure to act concerning the exercise of a public function based on the Civil Procedure Rules.⁸⁰⁹

The discussion below will explain interim relief, interim orders, damages, and a declaration of ineffectiveness, respectively, from a general law perspective (i.e. the perspective of non-public procurement law or non-public procurement case law). Arguably, a suspension (in the form of an 'injunction') is similar to a *prohibition* as mentioned above. The suspension has also been shaped by a famous general case, *American Cyanamid*. This case concerned a patent where a plaintiff (American Cyanamid) alleged that another company had breached its patent on tissue production. The judges queried whether to receive the case or not, because at first appearance the claim may not have had sufficient merits, but those merits may become apparent on further examination. The question then arose whether, during the examination, the defendant could be "enjoined temporarily from doing something" and whether damages were available. Regarding this, the court stated as summarised below:⁸¹⁰

"The court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss [...] between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, [...]. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, [...the defendant...] would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them,

⁸⁰⁸ Arrowsmith, S. 2014. *The Law of Public and Utilities procurement: Regulation in the EU and UK*, Thomson Reuters, London, para. 2-14.

⁸⁰⁹ Thompson, K and Jones, B. "Administrative Law in the United Kingdom" in Seerden, R.J.G.H. (Ed). 2007. *Administrative law of the European Union, its member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 253.

⁸¹⁰ *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1, available from: <http://www.bailii.org/uk/cases/UKHL/1975/1.html>, last visited 10 December 2015.

there would be no reason upon this ground to refuse an interlocutory injunction.”

This case is important, as the courts have used the above ruling as a test, known as the *Cynamid test*, to determine whether or not an injunction can be issued. In *Letting International*, the court determined a test to the effect that an injunction will be granted:⁸¹¹ (i) if there is a serious issue to be tried, (ii) if so, would damage be an adequate remedy, and, (iii) does the balance of convenience favour granting or refusing interim relief?

Regarding the interim order, it can be argued that this has long been included in the British legal system. This has been broken down into three types, namely *mandamus* (ordering an official to act); *prohibition* (ordering an official not to act in a particular way) and *certiorari* (quashing the decision) which were later replaced by the modern terms: “mandatory”, “prohibiting”, and “quashing order”, respectively.⁸¹² With regard to this, from an administrative law perspective, if the court finds that an administrative body has acted incorrectly, it can quash what has been done, and direct that the matter must be dealt with afresh by the administrative body.⁸¹³ It is important to highlight that the court does not act as an appellate body in the matter; it does not substitute its decision. Instead, it detects an error or a flaw in the action or decision, and orders the administrator to decide again and to correct the decision.⁸¹⁴

Regarding damages, the argument to request damages lies in tort law. The literature has noted that a public body is liable in tort under the following criteria.⁸¹⁵

⁸¹¹ Semple, A. 2015. *A Practical Guide to Public Procurement*, OUP, Oxford, p. 220. See also: *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB), available from: <http://www.bailii.org/ew/cases/EWHC/QB/2008/1583.html>, last visited, 12 July 2016. In brief, Letting argued that the London Borough of Newham (LBN) had awarded a contract based on sub-weighting criteria which had not been disclosed earlier. As this case was lodged with the Court, the suspension mechanism automatically applied. However, the High Court lifted the suspension. According to the Court, although the case was arguable, the merits of the case were not sufficiently strong. Nonetheless, the Court of Appeal overturned that decision: the suspension was to continue. According to the Court of Appeal, insufficient knowledge of the weighting could have affected Lettings in preparing its tender. This meant that Lettings could demonstrate that it had lost the opportunity to compete and this reason was sufficient for the Court to prevent LBN from entering into any contract. This case means that a remedy (in this context a suspension) is available and exercised by the courts.

⁸¹² Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden-Baden, p. 170.

⁸¹³ Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden-Baden, p. 164.

⁸¹⁴ Lyall, F. 2002. *An Introduction to British Law*, Nomos Verlagsgesellschaft, Baden-Baden, p. 158.

⁸¹⁵ Thompson, K and Jones, B. “Administrative Law in the United Kingdom” in Seerden, R.J.G.H. (Ed). 2007. *Administrative law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 275.

First of all, the defendant must be a public official. Also, there must be an exercise of power as a public official. Moreover, the claimant must demonstrate either targeted malice on the part of the public official or that the official has acted knowing that he has no power to do so and that it is likely to harm the claimant. Furthermore, the claimant has sufficient interest to sue. The literature has also emphasised the following two issues.⁸¹⁶ Causation between the action complained of and the damage should exist, and the claim must involve actually foreseen or probable damage.

Here, an argument in support of the declaration of ineffectiveness will not be given. Arguably, this declaration is a combination of interim orders and damages. Thus, the explanation given in the two previous paragraphs has represented an explanation from the perspective of non-public procurement law or non-public procurement case law.

5.6.2. Normative framework and provisional finding

This chapter has shown that in order to deal with the principle of accountability concerning the availability of effective remedies, the UK has laid down four remedies in the PCRs 2015, in line with the EU Directive, namely: interim relief (suspension and interim orders), setting aside, damages and a declaration of ineffectiveness. It has also been discussed that all these remedies are not something new in the UK legal system. Interim relief has been recognised in the *American Cyanamid* case. In addition, interim relief and setting aside have long been recognised in the UK legal system as *prohibition*, *certiorari*, and *mandamus*. Damages have long been recognised under tort law. As the declaration of ineffectiveness can be argued as a combination of setting aside and damages, this can also mean that this declaration is not 'alien' to the UK legal system. It has also been briefly discussed that the disputing parties tend to respect the ruling of the courts at first instance. The courts also have a mechanism to screen whether or not a case can be re-examined in the higher court. Consequently, the possibility of a delay in the procurement procedure is not an issue in the UK. The availability of these forms of legal redress means that the principle of accountability concerning the availability of (effective) remedies has been protected in the UK.

⁸¹⁶ Thompson, K and Jones, B. "Administrative Law in the United Kingdom" in Seerden, R.J.G.H. (Ed). 2007. *Administrative law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Antwerp, p. 275.

5.7. Conclusion

The chapter underlines that some problems in Indonesian public procurement also occur in the UK: violations of the principles of equal opportunity, equal treatment and transparency. However, as it can be seen from the case studies discussed above, these problems are less distinct than the problems that occur in Indonesia. In addition, the two problems on the principle of accountability do not take place in the UK. The judiciary and the relevant statute provide consistent decisions regarding to the clarity of the accountability forum as well as the availability of the remedies.

This chapter has shown how the UK deals with the selected principles of good public procurement, namely the principles of equal opportunity, equal treatment, transparency, accountability regarding the clarity of the legal accountability forum, and accountability regarding the availability of (effective) remedies. The context of the discussion occurs in the pre-contractual phase. Generally speaking, some of the principles are intertwined with the other principles. The principle of equal opportunity, for instance, is interrelated with the principle of proportionality. The requirements determined in the procurement document must be proportional, so that they do not create an unnecessary burden for the interested bidding participants and relevant for the procurement purposes. For a contract above the threshold and which may involve the interests of cross-border economic operators, the principle of equal opportunity may be interwoven with the principle of non-discrimination. The requirements determined in the procurement document shall not favour the national economic operator. The principle of equal opportunity is also related to the principle of reasonableness. If the requirements laid down in the document are unreasonable (i.e. the requirements are not related to the procurement purposes) and can unjustifiably obstruct the participation of the interested bidding participant, logically, the procurement document is reviewable. Also, the principle of transparency (in this context, transparency of the award decision) is closely coupled with the duty to provide reasons. The award decision shall be clear and understandable so that each unsuccessful bidder can understand the reasons of the contracting authority for not awarding the contract. By this transparency action, an unsuccessful bidder may determine whether or not the violation of equal treatment has occurred and whether or not he needs to seek the legal redress to the court (a concerning issue under the principle of accountability). In the following, a more focused finding that specifically relates to each good public procurement principle is evident.

Section 5.2 has explained that the principle of equal opportunity, especially concerning the laying down of requirements in the procurement document, has been protected under UK law. The PCRs have prohibited the contracting authority

from distorting the competition unjustifiably via the setting of requirements in the procurement document. Also, by referring to the EU Directives and the PCRs, whenever the prohibition occurs, the interested bidders who feel aggrieved have a right to seek interim relief to challenge the procurement document. It has been argued that the *Blackpool* case can be used as an example where the action or decision of the contracting authority, which has turned down the participation of the interested bidder, is reviewable by the court, or the *Edenred* case which illustrates the application of interim relief in the UK. Cases relating to the necessity for the contracting authority (the administration) to act reasonably have also been discussed. As the violation of the principle of equality can be corrected by a certain legal procedure, it can be said that in this context, the principle of equal opportunity is protected in the UK.

The following section regards the principle of equal treatment, particularly in the administrative review phase. It has been discussed that the UK does not recognise an administrative review within the contracting authority. However, it recognises consultation, which may be seen as debriefing (a procedure to seek additional information from the contracting authority). It has also explained that there is no independent administrative review for dealing with a public procurement dispute in the UK. The PCRs determine that a review is only available via the courts (as is evident later, courts here refers to the Administrative Court and the Technology and Construction Court). Thus, drawing a conclusion in this section is challenging. Arguably, on the one hand, the unavailability of administrative review can result in a case where the aggrieved bidder's problem can only be handled formally via judicial review. On the other hand, the unavailability of administrative review may serve the effectiveness of the procurement process. Also, the consultation procedure has been performed as an informal approach to solving the dispute. Moreover, it seems that the public still trusts the contracting authority. As a consequence, the unavailability of an administrative review procedure has not been considered to be an issue. The above situation leads to the conclusion that the principle of equal treatment in this regard is protected. However, due to the fact that only the judiciary provides access to the protection, while litigation costs are expensive, it is questionable whether this principle has been optimally protected.

Section 5.3 has discussed the principle of transparency particularly related to explaining the award decision. The PCRs and the case law have shown that the contracting authority shall provide sufficient information related to the award decision to each bidding participant. 'Sufficient' here means each losing bidder receives a letter, which contains an Annex explaining the score and a description of the relative weight as to why he has been unsuccessful and why the winner has been awarded the contract. Therefore, the losing bidder can evaluate the objectivity of the decision made by the contracting authority. The example of the

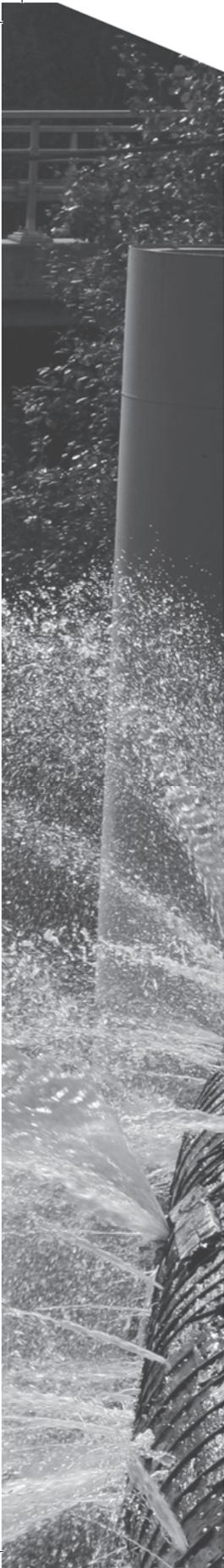
letter issued by the Municipality of Westminster has been used to illustrate the matter. If the losing bidder needs further clarification, he can request a debriefing. This mechanism has also been mentioned in the principle of equal treatment as the so-called 'consultation' procedure. If a bidder thinks that the contracting authority has infringed the principle of transparency, he may seek the protection from the court. The court may order the contracting authority to disclose specific information, as has happened in *Alstom Transport* case. Realising that the regulation has been clear on instructing the administration to act in a transparent way in explaining the award decision, and recalling the availability of legal protection when this principle is infringed; therefore, it can be said that the principle of transparency is protected in this context.

Section 5.4 has elaborated the principle of accountability especially concerning the matter of clarity with regard to the legal accountability forum. It has been shown that the PCRs 2015 declare that the High Court has competence in dealing with a procurement dispute. Within the High Court, there are numerous chambers, and two of which are the 'Administrative Court' and the 'Technology and Construction Court.' These two deal with public procurement cases. It is relevant to note that the procedure which applies in these courts are Civil Procedure Rules. Moreover, if the claimant wishes to appeal, this will be dealt by the Civil Division of the Administrative Court. This happens even though at first instance the case was heard before the Administrative Court. This presumably indicates that the character of the continental legal system may have influenced the UK legal system. It has been mentioned that the Competition Authority or Ombudsmen do not take a position as a first instance forum to deal with procurement disputes. Having said this, confusion as to the competence of the accountability forum is not an issue in the UK, and therefore the principle of accountability concerning clarity with regard to the legal accountability forum is protected.

The last section is also on the principle of accountability, but instead focuses on the availability of effective remedies. The UK has determined four remedies in the PCRs 2015 which are coherent with the EU Directive, namely: interim relief (suspension and interim orders), setting aside, damages and a declaration of ineffectiveness. All the remedies are also in line with the UK legal system. These have long been recognised in UK case law and doctrine. Interim relief was recognised in the *American Cyanamid* case. Also, interim relief and setting aside have long been recognised in the UK legal system as *prohibition*, *certiorari*, and *mandamus*. Damages have been included in tort law. As the declaration of ineffectiveness can be argued to be a combination of setting aside and damages, this can also mean that this declaration is not 'alien' to the UK legal system. It has also been briefly discussed that the disputing parties tend to respect the ruling of the courts at the first instance. The court has a mechanism to screen whether the

case can be re-examined in the higher court. Consequently, the possibility of a delay in the procurement procedure is not an issue in the UK. It has then been concluded that the principle of accountability concerning the availability of (effective) remedies is protected in the UK.

All in all, the UK has been shown to exercise the selected principles of good public procurement. It can be seen that the principles have been embodied and exercised based on the EU Directives, the public procurement regulations, the general regulations, and case law. The UK judiciary has been performing well in protecting these principles. The lessons learned deriving from this chapter may be applied to Chapter 6 in a comparative discussion.



Chapter 6

Comparative analysis

6.1. Introduction

This chapter aims to undertake a comparative analysis of the discussions conducted in the three previous chapters. It will assess – from a good public procurement approach - the implementation of good public procurement principles concerning certain public procurement issues in Indonesia, the Netherlands, and the United Kingdom. At the end of this chapter, opinions will be provided - based on each principle - which country provides the best protection, which country provides sufficient protection, and which country should give better protection to the principles of good public procurement. The conclusion and recommendations from the comparative analysis will not yet be drawn, as these will be given in the following chapter.

This chapter contains seven sections. It will commence with an introduction which will embrace the information on the different legal systems and the relevant principles of good public procurement. Afterwards, five sections will be presented. Each section will be divided into two subsections. The first subsection elaborates the implementation of the selected principle in three comparative countries. The second subsection will highlight the provisional findings; showing the similarities and dissimilarities which can be acquired from the first subsection. The discussion will begin with the two aspects of the principle of equality: the principle of equal opportunity and the principle of equal treatment. The comparison will continue with the principle of transparency. Finally, attention is given to two aspects of the principles of accountability: the principle of accountability concerning clarity with regard to the legal accountability forum, and the principle of accountability concerning the availability of (effective) remedies, respectively. This chapter ends with some qualification assessments as has been mentioned in the above paragraph.

6.1.1. The principles of good public procurement and the good public procurement approach

It has been discussed in Section 2.3 that there are numerous components under 'the umbrella' of the concept of good governance (GG). Three of these are equality, transparency and accountability. These three are considered as the most important and relevant components of GG to be discussed further for this research. It then has been argued that the concept of GG including those three components have legal characters. Therefore, the concept of GG can be called the principle of good governance (principle of GG) and those three components can be called the principles of transparency, equality and accountability. By stating the above, it does not necessarily mean that the principle of GG only contains three principles.

However, no information will be provided regarding what the other principles under the 'umbrella' of the principle of GG are, besides those three as they fall beyond the scope of this research.

It has been argued that the principle of GG can be utilised to enshrine public procurement activities. In Section 2.5 it has been shown that these three principles are also recognised by public procurement laws. The three principles can be specified further as five principles of good public procurement. These codified principles can be called the principles of good public procurement. Similar to the logic explained in the above paragraph, there may be other principles which can be classified as principles of good public procurement; however, due to the relevancy with the the research objective, this matter is not dealt with in this research. The essence of the five principles of good public procurement has been concluded in Section 2.7, and it will be reiterated briefly below.

The principle of equal opportunity instructs the contracting authority to set reasonable, proportional, justified requirements; the requirements shall not distort the competition. Also, the bidders are entitled to equal protection whenever the authorities violate the principle. The protection may be provided either at the inside of the contracting authorities or at certain institution(s) other than the contracting authorities.

The principle of equal treatment requires the contracting authorities to treat and evaluate equally the bidding proposals, i.e. evaluation is conducted based on the same grounds criteria as announced earlier. This principle also embraces the administrative review procedure. The contracting authority shall review impartially the objection and/or the administrative appeal lodged by the aggrieved bidders.

The principle of transparency underlines the necessity to provide simple and accessible language of the award notice. The notice should not only contain the numerical information (score), but also accompanied by the wording explanation of the score. If the notice containing the decision is sent to a losing bidder, it should provide comparative information on the evaluation of the award winner. To prevent the bid rigging, certain information shall be limited or treated confidential.

The principle of accountability focuses on the role of judiciary to cross check that things are being done based on the law. In the context of this research, the aggrieved bidders (including the legal enforcers themselves) must know which court has the competence to deal with a public procurement case. This also means that the court itself must be consistent on applying its interpretation related to the competence. This can be called the principle of accountability concerning clarity as to legal accountability forum. Besides this, there is a principle of accountability

concerning the availability of effective remedies. The court must have effective remedies to rectify breaches of the law. The remedies shall be appropriate to address the violations and the ruling shall be delivered promptly.

The embodiment of these principles in each regulation may differ between one jurisdiction and another. Therefore, it is relevant to conduct comparison of these countries in order to gather the lessons learnt.

6.1.2. Legal systems and other relevant legal information

In the following, the background related to the legal systems of and types of regulations used in the three compared countries will be briefly repeated and compared. The information may be useful in allowing the broader picture to be seen relating to the compared countries.

As has been mentioned in the introductory chapter, Indonesia has been classified as a 'mixed legal system' since 2001, whereas the Netherlands has been classified as a civil law country. The judiciary in the Netherlands, however, has the power to develop the law in a pragmatic way if the code remains silent; this is typical of common law. The UK is regarded as a common law system.

Public procurement is regulated in different forms in three compared countries. Public procurement in Indonesia is regulated by a Presidential Regulation (PR); public procurement in the Netherlands is regulated by the Dutch Public Procurement Act (DPPA); public procurement in the UK is regulated by Statutory Instruments (SIs), the so-called Public Contracts Regulations (PCRs).

As the PR is not a statute, this may contain a great deal of detailed information, such as the organisational structure of public procurement applied in each procuring entity. On the contrary, the DPPA and the PCRs do not explain information on the organisational structure which shall be applied by each contracting authority; something which may be worth clarifying in the future. Accordingly, one may understand the procurement organisational structure more precisely, it will help the public to understand 'who do what, when, and how'. However, the PCRs contain more detailed information than the DPPA, especially on the legal protection of the bidding participants in the Court.

6.2. The principle of equal opportunity

This section aims to demonstrate the implementation of the principle of equal opportunity on the phase of the preparation of the procurement document in the three compared countries. It will also embrace the discussion on the

possibility to challenge this document by the (interested) aggrieved bidder. Afterwards, the discussion will continue by describing the similarities and dissimilarities of what has been implemented in those countries.

6.2.1. Comparative analysis

Section 3.2 has demonstrated some cases in Indonesia that show that procurement documents are intended to hamper competition or to favour a certain bidding participant. This situation not only infringes the principle of equal opportunity but also violates the PR. The regulation prohibits the procuring entity from 'setting discriminatory criteria, requirements or procedure'.

Nevertheless, the regulation does not enable the 'interested bidding participant' who feels aggrieved to challenge the procurement document. The Indonesian review mechanism is only available to challenge the award decision, and not to challenge the procurement document. Due to this situation, it can be said that the principle of equal opportunity has not been protected in Indonesia.

Section 4.2 has explained that the DPPA prohibits the contracting authority from determining requirements, which can distort competition. It can also be argued that the contracting authority must adhere to the principles of equal opportunity, proportionality⁸¹⁷ and carefulness when the authority determines the requirements in the procurement document. Whenever the interested bidding participant feels aggrieved, he may seek legal redress.

Stemming from the EU Directives, whenever the prohibition occurs, the interested bidders who feels aggrieved has a right to challenge a procurement document. The procurement document binds the contracting authority and the bidding participants as detailed 'rules of the game', which can determine the award winner. This right to challenge fits within the Dutch national legal instrument: The General Administrative Law Act (GALA). This document can be considered to be an administrative decision, which has been issued to prepare another administrative decision. According to the GALA, the first mentioned decision can be challenged as long as the prior decision can influence the result of the latter decision. Also, two cases (*Zeeland* and *Kadaster*) have shown that if a request to participate in a tender has been turned down by the contracting authority, the aggrieved candidate can

⁸¹⁷ The Dutch government issued the proportionality guide which can assist the contracting authority to engage in proportionally, inter alia, in setting the requirements in the procurement document, so that it will not distort competition.

resort to legal redress. Thus, the principle of equal opportunity is protected in the Netherlands.

Section 5.2 highlighted that PCRs have prohibited the UK contracting authority from distorting competition by determining unjustified requirements in the procurement document. It has also been explained that the contracting authority must adhere to the principle of proportionality. If the value of the procurement is above a given threshold, the contracting authority shall ensure the implementation of the principle of non-discrimination. The principle prohibits the contracting authority from discriminating against an economic operator from another Member State. This means that the requirements specified in the procurement document must not give certain advantages to a national economic operator. The contracting authorities shall adhere to the principle of reasonableness, which means the requirements must be relevant for the procurement purposes. If the requirements laid down in the document are unreasonable, conceptually speaking from the perspective of the UK legal system this procurement document is reviewable.

By referring to the EU Directives and the PCRs, whenever the prohibition is applicable, the interested bidders who feel aggrieved have a right to seek interim relief to challenge the procurement document. It has been argued that the *Blackpool* case can be used as an example on the matter. A decision of a contracting authority, which has falsely rejected the participation of an interested bidder, is reviewable by the courts. In addition, in the *Edenred* case, the court decided to continue the interim relief by not lifting the suspension of the procurement procedure. The court could then thoroughly examine the allegation that a contract had been directly awarded to a certain economic operator. Arguably, the availability of legal redress can be seen as evidence of the protection of the principle of equal opportunity in the UK.

6.2.2. Provisional findings

The similarity, which can be discerned in this context, is that all the above countries have prohibited their contracting authorities from creating unjustified requirements in the procurement document. Such requirements distort competition or favour certain bidding participants, and this leads to a violation of the principle of equal opportunity. The Netherlands and the UK have emphasised that their contracting authorities adhere to the principle of proportionality in preparing the document. The Netherlands has stressed the principle of carefulness whereas the UK has underlined the principle of reasonableness. In the Indonesian context, these principles are rarely discussed both in theory and in practice.

The dissimilarity which can be underlined in this setting is as followed. It is questioned whether Indonesia has protected the principle of equal opportunity because the PR does not provide for a procedure to challenge the procurement document. In contrast, the Netherlands and the UK do provide for legal redress to protect this principle. These countries follow the logic of the Remedies Directive. In the Netherlands, the grounds for reviewing the procurement document emanate from the GALA and case law. In the UK, the grounds for a review can be found in the PCRs and case law.

6.3. The principle of equal treatment

This section aims to show the implementation of the principle of equal treatment on the administrative review phase in the three compared countries. The administrative review phase here refers to the objection and the administrative appeal, which can be handled by the contracting authority or by an independent administrative body. Afterwards, the similarities and differences of the implementation in those countries will be evaluated.

6.3.1. Comparative analysis

Section 3.3 highlighted some Indonesian cases. Each case revealed that the head of the procuring entity instructed his subordinates to favour a certain bidding participant. Each case shows that these subordinates follow his orders. It has been argued that such action violates the principles promulgated in the PR; ‘the principle of competition’ and ‘the principle of fairness/the prohibition of discrimination’. The former principle determines that “public procurement should be conducted in a fair competition (...) without any intervention which distorts the market mechanism.” The latter principle instructs “the procuring entity to engage in equal treatment towards bidding participants” as well as the prohibition of “not providing favourable treatment to a certain bidding participant (...).”

The action carried out or the decision made by such subordinates may be challenged via an administrative review procedure. According to the PR, this procedure refers to an objection (*sanggah*) submitted to the procurement committee. Whenever necessary, the aggrieved bidder may then request a *sanggah banding*: a request submitted to the head of the procuring entity to again review his objection. Nonetheless, as a result of the cases mentioned earlier, aggrieved

bidders may have doubts regarding the impartiality⁸¹⁸ of the administrative review procedure. This is particularly so given that the official who evaluates the *sanggah banding* is the same person who instructs that a certain bidding participant must be given favourable treatment.

It is also relevant to stress that the action conducted or the decision made by the contracting authority mentioned above 'may' be reviewable by an independent administrative body and 'is' reviewable by the judiciary. The term 'may' is used here because the situation in Indonesia with regard to the authority of an independent administrative body to deal with a procurement dispute is unclear. This situation is exacerbated by the inconsistency of relevant court decisions on the matter. Since the issue is related to the judiciary, it will be discussed further in the section on accountability concerning on the clarity of legal accountability.

The principle of equal treatment in the Netherlands has been discussed in Section 4.3. The DPPA promulgates that the contracting authority must treat all economic operators in the same manner. Arguably, this prohibition also influences the administrative review procedure. This procedure can be conducted within the contracting authority. An aggrieved bidder may pose a question to the contracting authority. If the issue escalates, he may lodge an objection.

An independent administrative body can also operate within the confines of an administrative review. It has been argued that this procedure is in line with Article 1:5 GALA.⁸¹⁹ This administrative body is referred to as the Dutch Committee of Tendering Experts. The Committee cannot issue a binding decision; the Committee provides advice. This advice is considered to be more objective, as it is provided by a body which is outside the contracting authority. Arguably, the Committee's advice has influential power. Having considered the Dutch situation, one can safely conclude that the principle of equal treatment in this particular situation is indeed protected.

Information on the principle of equal opportunity in the UK has been provided in Section 5.3. It has been highlighted that the PCRs prohibit the

⁸¹⁸ It is relevant to emphasise the difference between impartiality and independence. Impartiality is about fair-minded, neutral decision making whilst independence is created primarily by structural aspects of government. Conceptually speaking, independence may enhance impartiality. See: Moliterno, J.E. 2006. "The Administrative Judiciary's Independence Myth", *Wake Forest Law Review*, Vol. 41, p. 1200, 1203.

⁸¹⁹ GALA explains that there are three types of control with regard to the decision. The first type is that of 'lodging an objection'. This means the right to request the administrative authority that has taken the decision to reconsider it. The second type is that of 'lodging an administrative appeal'. This means the right to request an administrative authority other than the one which has taken the decision to review it. Lastly, 'lodging the appeal' which means lodging an administrative appeal or lodging an appeal before the courts.

contracting authority from dealing with bidding participants unequally. Arguably, this prohibition also influences the administrative review phase. Nevertheless, the UK does not recognise a formal administrative review procedure within a contracting authority. The UK does, however, recognise informal procedures where in practice they are called 'consultation'. An aggrieved bidder may consult the contracting authority as to why he has been unsuccessful. It is, therefore, similar to debriefing, a mechanism to request a fuller debriefing from the contracting authority. The discussion on debriefing will also be explained in the section on transparency.

The UK does not have any administrative review procedure, which is conducted by an independent administrative body. The PCRs promulgate that a review is only available via the Courts. Therefore, two situations arise. On the downside, the unavailability of the objection and administrative review procedure at an independent administrative body means that an aggrieved bidder only has one option: a judicial review.⁸²⁰

Although it has not been prominently shown, criticism of the unavailability of an administrative review procedure can be sensed. However, based on the information given by the interviewees, it seems that the public do have trust in the contracting authority, and therefore this unavailability has not been considered to be an issue. The above conditions mean that the principle of equal treatment in the UK is protected; however, since access to protection is only provided by the judiciary, it may be questioned whether this principle has been optimally protected.

6.3.2. Provisional findings

The similarity which can be concluded on this matter with respect to the three countries compared is that all regulations have described their contracting authorities to treat bidding participants equally. This legal obligation gives rise to the principle of equal treatment. Logically speaking, the obligation will also apply to the review procedure conducted by the administration.

Nonetheless, it is doubtful whether the principle of equal treatment has been optimally protected in Indonesia, as certain cases have revealed that the heads of procuring entities instruct their subordinates to engage in unequal treatment. These subordinates follow their orders. Consequently, aggrieved

⁸²⁰ However, as the process is directly tunnelled to the judiciary, the review procedure may be simpler and more effective. The procurement process may not be delayed for a long time, to wait the result of the review procedure which occurs in administrative review (in which this review may be continued on the judicial review).

bidders may distrust the administrative review procedure if it is dealt with within a contracting authority; the procedure may not, therefore, be impartial.

The above problem is not apparent in the Netherlands. If an aggrieved bidder detects partiality during an objection, he may submit a complaint to the Committee of Tendering Experts. Since the Committee is an independent administrative body, the advice given is considered to be more impartial. Returning to the discussion on the UK, it can be argued that although the UK does not have a formal mechanism for an administrative review procedure (both within the contracting authority or an independent administrative body), the partiality of a contracting authority has not been an issue. As has been mentioned earlier, the UK does have a consultation procedure where, in most cases, the issue can be clarified without a dispute arising.

6.4. The principle of transparency

This section analyses the implementation of the principle of transparency in the three compared countries. The core of this discussion will be on transparency in the phase of the award decision. Afterwards, the similarities and dissimilarities between these compared countries will be explained.

6.4.1. Comparative analysis

A discussion on the principle of transparency in the award decision procedure can be found in Section 3.4. In Indonesia, there are two different documents which can explain the decision of the procuring entity in awarding the contract. The first one is the award decision. The other is the so-called 'procurement process report'. Unlike the award decision, which may be publicly accessible, the procuring entity is not obliged to disclose the report publicly. However, the bidding participant can request the report, and the contracting authority is then required to provide it. This report contains more extensive information on the score given (and its general components) than the award decision. The report contains a list of all bidding participants and the scores obtained by them.

Although the report clarifies the award decision, it remains doubtful whether bidding participants understand the reasons as to why the contracting authority (the procurement committee) has awarded the contract to a certain bidder. The committee does not always comply with the minimum amount of information, which has to be published in the procurement process report. Besides this, it has been argued that the bidding participants may still not be able to

comprehend the report despite the fact it has fulfilled the minimum information required in the PR.

There are three reasons as to why an inability to understand the report would occur. First of all, the report provides an overall score without explaining how the sub-components are comprised. Also, the score is compiled based on numerical information without providing wording written description. Lastly, the PR is silent on the possibility for the bidding participants to seek further information relating to the score. These situations, arguably, show a violation of the principle of transparency.

The violation of the principle of transparency as described above also occurs in the Netherlands. However, the problem is not as pronounced as in Indonesia. It is possible for the aggrieved bidder to question the procuring entity's decision. Section 4.4 has shown that the DPPA requires the contracting authority to provide sufficient information on the award decision, and this shall be sent to the bidding participant. Each unsuccessful bidder receives a letter regarding the award decision. This letter contains the comparative scores of the proposals and the score of the award winner. Also, a description of the relative weight of the score is also given. On receiving this information, an unsuccessful bidder may understand why he has lost and why the winner has been awarded the contract; he can therefore evaluate the objectivity of the award decision.

Providing the comparative scores including their written descriptions is in line with the obligations laid down in the GALA. This Act promulgates that the administration must be transparent by providing sufficient reasoning (Article 3:47). Also, this means that the decision (and its reasoning) must be based on sound grounds (Article 3:46).

Moreover, if an unsuccessful bidder does not understand or needs further information, he may request a debriefing. Whenever the contracting authority does not comply with the above, the aggrieved bidder may request the Dutch Committee of Tendering Experts to give its advice (Article 4:27 of the DPPA) or he may directly lodge a complaint with the Courts. Having said all this, arguably, the principle of transparency concerning this matter is protected in the Netherlands.

Reference will now be made to the principle of transparency in the UK (Section 4.5). It has been stressed that the principle of transparency is intertwined with the duty to provide reasons. The regulation requires a contracting authority to provide sufficient information related to the award decision to each bidding participant.

'Sufficient' here refers to the availability of the comparative score and a description of the relative weight as to why a bidder, who has received the letter,

has been unsuccessful and why the winner has been awarded the contract. For clarity, an example of an award decision letter issued by the Municipality of Westminster is provided in Section 4.5. In essence, the letter complies with the obligation as required above.

In the non-procurement context, the necessity to provide reasons can be seen in the ruling *Padfield v. Minister of Agriculture, Fisheries, and Food*.⁸²¹ The court pointed out that if the administration does not provide any reasons for its decision, it may therefore conclude that the administration does not have a good reason for reaching that conclusion.

If the losing bidder requires further clarification, he can request a fuller debriefing. This matter has been clarified in the guidance on the standstill period. The fuller debriefing can be a 'consultation' as has been explained in the section on the principle of equal treatment. Also, it is possible that an aggrieved bidder may request that access be given to additional information containing sensitive information. Depending on the merits of the case, the court may or may not issue an order to the contracting authority to disclose this information. Having said all this, arguably, the principle of transparency concerning this issue is protected in the UK.

6.4.2. Provisional findings

The similarity in this matter is that all countries compared have obliged their contracting authorities to inform the bidding participants regarding the award decision. However, the principle of transparency concerning the award decision is not well applied in Indonesia, particularly due to the less sufficient legal norms in regulating the matter. This problematic situation is also intertwined with the problem explained in the principle of accountability; there is lack of clarity to challenge the decision reviewed by an independent body and/or the court. The opposite situation occurs in the Netherlands and the UK. The contracting authorities in these countries have certain legal norms, which these institutions must adhere to. The principle of transparency in this context is protected in the Netherlands and the UK.

As has been mentioned, although unsuccessful bidding participants in Indonesia obtain the 'procurement process report', they may still not understand why they have not succeeded. Moreover, debriefing is not recognised in the PR. Sadly, no general regulations can throw light on the matter. This is not the case in

⁸²¹ R v Minister of Agriculture and Fisheries ex p. Padfield [1968] UKHL 1, available at: <http://www.bailii.org/uk/cases/UKHL/1968/1.html>, last visited 12 July 2016.

the Netherlands and the UK. The contracting authority is required to provide a clear reason for the award decision. A request to have a fuller debriefing is also recognised. The implementation of the principle of transparency in these two countries is guided by the DPPA and the PCRs (including guidance on the standstill period), respectively. Arguably, the principle of transparency in this phase is underpinned by the duty to provide reasons. In the Netherlands, the necessity to provide reasons has been codified in the GALA; in the UK the duty to provide reasons can be derived from the case law.

6.5. The principle of accountability (clarity concerning the legal accountability forum)

This section aims to compare how the principle of accountability has been implemented in the three selected countries. The focus of the discussion will be on the clarity of the legal accountability forum. Afterwards, the likenesses and dissimilarities in those countries will be considered.

6.5.1. Comparative analysis

Section 3.5 has revealed a pessimistic situation within the Indonesian judiciary. It has demonstrated the inconsistency in the Indonesian Supreme Court decisions, as well as other courts decisions, regarding the question as to which court has jurisdiction to hear a procurement dispute. Sometimes the court has considered that the case must be heard by the civil courts. The court adheres to the stipulation in the Indonesian Administrative Court Acts: “all government decisions made in a private law action cannot be classified as an administrative decision.” Sometimes the court has considered that the case shall be heard by the administrative courts, and sometimes that it must first be dealt with by the KPPU whose decision is then reviewable by the civil courts.

KPPU is an independent administrative body that has the power to supervise the market and to promote fair competition. The commissioners of the KPPU consider that their institution has the competence to review a decision related to public procurement issued by a procuring entity by referring to the Indonesian Act on Banning Monopolistic Practices and Unfair Business Competition. Article 22 of this Act concerns the prohibition on entrepreneurs conspiring with other parties to arrange and determine the winner of a tender and causing unfair business competition. The KPPU has interpreted that public procurement processes are business activities, and an entrepreneur refers not only to bidders but also to civil

servants. The Indonesian Supreme Court's Chamber of special private law has agreed with this interpretation.

It is worth stressing that the discussion on the KPPU is also relevant to the section on the principle of equal treatment concerning the administrative review procedure. However, it was decided to discuss the matter in the section of accountability in order to highlight the problem of the Indonesian judiciary in determining the accountability forum. This problem may be due to the judiciary's lack of competence. This may also be underpinned by the silence of the PR. As a regulation issued by an executive authority, the PR cannot regulate an issue that relates to the judiciary. Unfortunately, the general regulations are also unclear on the matter. All these situations amount to a violation of the principle of accountability.⁸²²

This confusion with regard to the legal accountability forum which can deal with a public procurement dispute does not occur in the Netherlands. This was discussed in Section 4.5. Interestingly, this happens even though the DPPA is silent on the matter. The judiciary has consistently decided that a public procurement dispute lies within the competence of the civil courts. The judiciary has made this interpretation based on the GALA. However, it is important to underline that the civil courts may employ legal sources from public law whenever this may be relevant.⁸²³

The Dutch competition authority or the *Autoriteit Consument en Markt* ("ACM") does not take a position as an independent body which can review a decision issued by the contracting authority. The ACM's role concerns advising the contracting authority to prevent bid rigging. There are some occasions where the ACM has dealt with public procurement cases. However, this has occurred when the ACM has found an indication that the bidding participants have engaged in conducting bid rigging or tender collusion. The ACM's supervisory action means

⁸²² It has been worried that this situation will trigger an undesired domino effect; aggrieved bidders may submit a case to all of the forums outside the procuring entity. If this should occur, what if all the accountability forums reject the case by arguing that it should be dealt with by another forum? Alternatively, what if all the forums decide to deal with the case; which decision should then be followed?

⁸²³ This argument is supported by evidence which has been demonstrated in chapter 4. There are some cases where the Committee of Tendering Experts and the Courts have used the public law argument in delivering the advice and the ruling, respectively. The argument is also underpinned by Article 3:14 of the Dutch Civil Code which states "a right or power that someone has by virtue of civil law may not be exercised in defiance of written or unwritten rules of public law." This article can mean the following. Whenever the Civil Courts hear a private law case and the case is related to public law (a violation of public law), the Courts shall then examine the case by also considering public law.

that supervision is directed towards economic operators, and not towards reviewing the decision issued by the contracting authorities.

Thus, it can be said that confusion as to the competence of the accountability forum is not an issue in the Netherlands. Consequently, it can be concluded that there is no violation of the principle of accountability as to clarity with regard to the legal accountability forum in the Netherlands.

As discussed in Section 5.5, the confusion as to which legal accountability forum has to deal with a public procurement dispute does not occur in the UK. The situation is slightly different to that in the Netherlands; the PCRs implicitly explain that the High Court has the competence to deal with a procurement dispute. The High Court contains three divisions. According to some of the literature and referring to the Civil Procedural Rules (CPRs), a public procurement dispute is dealt with by the Queen's Bench Division. This division contains five courts. Public procurement is heard before (i) the Administrative Court (Article 54.1), as well as (ii) the Technology and Construction Court (Article 60.1).

Similar to the situation in the Netherlands, there is no indication that the Competition Authority in the UK has adopted the role of an independent administrative body, which can review a procurement dispute. Having said this, confusion as to the competence of the accountability forum is not an issue in the UK. This means that the principle of accountability with regard to clarity concerning the legal accountability forum is protected in the UK.

6.5.2. Provisional findings

All the compared countries share a common ground in relation to the principle of accountability; the aggrieved bidders in these countries have access to the courts. Therefore, the aggrieved bidders can request a review of the legality of an action/decision conducted by the contracting authorities. Another similarity is that none of these countries has clearly stipulated in their regulations which court has jurisdiction to hear a public procurement dispute.⁸²⁴

Nevertheless, confusion regarding which court has competence neither occurs in the UK nor in the Netherlands, but only in Indonesia. Moreover, a situation where the competition authority adopts the role of a body to review the decision

⁸²⁴ Indonesia and the Netherlands do not stipulate in their regulations which court applies when a public procurement dispute arises. The UK's PCRs only state that the dispute shall be heard before the High Court which contains three divisions and within each division there are certain Courts. Therefore, one may confuse which court has the competence to handle the matter in the UK.

issued by the contracting authority only occurs in Indonesia, and neither in the Netherlands nor the UK.

Logically speaking, the confusion as to the legal accountability forum has also influenced the uncertainty about which law must be applied in Indonesia: public law or private law. This problem is not apparent in the Netherlands. The civil courts may exercise both public and private law. In the UK, the Administrative Court and the Technology and Construction Court exercise heavily private law. Although it may not be strongly evident, public law argumentation has been considered by the UK courts.⁸²⁵ Presumably, this happens because both the Netherlands and the UK have to apply the principle of effective judicial protection in any event; it does not regard whether it is provided by the public law or private law.⁸²⁶

6.6. The principle of accountability (the availability of (effective) remedies)

This section aims to show the implementation of the principle of accountability in the three selected countries. The point of the discussion will be on the availability of (effective) remedies. Afterwards, the discussion will continue by describing the resemblance and difference of what has been implemented in those countries.

6.6.1. Comparative analysis

It has been argued in Section 3.6 that the public procurement system in Indonesia fails to provide (effective) remedies for public procurement disputes. There is no mechanism for (i) interim relief, (ii) an effective procedure to obtain a final ruling in procurement disputes, and (iii) damages (compensation).

There are three explanations as to why this may occur. First of all, the PR is silent on the matter. The PR does explain the suspension procedure (one of the elements of interim relief), which shall apply when an administrative review (the objection and administrative appeal) occurs. The PR, however, is silent as to

⁸²⁵ It is predicted that public law may have a greater influence on the procurement dispute in the UK judiciary. The PCRs have promulgated a certain remedy, namely a declaration of ineffectiveness. This means that a procurement contract can be annulled or shortened if the judiciary is satisfied that the contracting authority has seriously breached the procurement procedure. The annulment or shortening of the contract may be something new in English law which has always respected the sanctity of contracts. A Court has delivered a ruling on the matter (*Lightways (Contractors) Ltd v Inverclyde Council* [2015] ScotCS CSOH 169). This is a Scottish Court, however; therefore, it is not a jurisdiction which has been the focus of this research. It is still unknown whether England and Wales or Northern Ireland will follow the Scottish Court in granting this declaration in the future.

⁸²⁶ See the discussion on the section 2.5, especially in the part of the principle of accountability.

whether the suspension procedure can be implemented during a judicial review. The PR is also silent on the other issues pertaining to remedies. Presumably, this happens because the PR is merely a Regulation issued by the President. In order to respect the principle of the independence of the judiciary, the PR does not and shall not regulate issues related to the judiciary, but only as far as there is a legal basis in a parliamentary Act.

Secondly, within Indonesian general law it is not always possible to clarify the issue of remedies. This problem is also intertwined with the situation described in the earlier section; the Indonesian judiciary is confused as to which court is competent and which law has to be applied. The issue of remedies has indeed been dealt with in the Administrative Court Act. It is a relatively new and updated Act as the Act was first created in 1986. It was then revised twice in 2004 and 2009. Nevertheless, it is questioned whether interim relief has been laid down in the Indonesian Civil Code and the Indonesian Code of Civil Procedure.⁸²⁷ These codes are also silent when it comes to clarifying the relevant procedure for obtaining an effective ruling. The Indonesian Civil Code only recognises damages. Presumably, the unavailability of interim relief and the relevant procedure are due to the outdated nature of these two Codes. They are a heritage from the Dutch colonial era.

Lastly, the situation is exacerbated by the under-performance of the judiciary, which fails to provide for a legal solution. All these situations indicate a violation of the principle of accountability.

A description of the remedies issue in the Netherlands has been provided in Section 4.6. This section has shown that the DPPA is not always clear when it comes to explaining the availability of remedies in public procurement. Nevertheless, the public in general and lawyers in particular are guided by EU Directives and general regulations, such as the Dutch Civil Code and the Dutch Civil Procedure Act. The EU Directives stipulate four types of remedies: interim relief (suspension and interim orders), setting aside, damages and a declaration of ineffectiveness. However, the public procurement system in the Netherlands only recognises two types of remedies, namely interim relief and a request for damages. According to the literature, a decision to set aside is embraced by interim orders whereas the declaration of ineffectiveness is included within a request for damages. For the sake of relevance and to prevent redundancy, it is unnecessary to discuss the issues of

⁸²⁷ Interlocutory decision in Indonesia is used to block the transfer of ownership of tangible goods and in a purely private case. Therefore, it is questioned that the issue of intangible goods like the aggrieved bidder's interest which occurs in public procurement cases has been accommodated by the interlocutory decision. See: the discussion in 3.6.1.

setting aside and a declaration of ineffectiveness here; these two issues will be discussed in a later section.

In the Netherlands, aggrieved bidders may request interim relief (suspension and an interim order) before the civil courts. In a situation when time is considered to be of the essence, the issue of interim relief can be dealt with in summary (quick) proceedings. According to the literature and the case law, the ruling can be delivered in weeks. Disputing parties tend to respect rulings in summary proceedings. Therefore, a request for an appeal to the appeal court is rarely made. In addition, aggrieved bidders can also request damages, which will be heard in normal proceedings. Due to the availability of these remedies, aggrieved bidders have legal procedures to correct the administration's mistakes in an effective way and can obtain compensation for such a mistake. However, it is relevant to emphasise that the courts rarely award compensation (damages). This situation occurs because of the difficulty in convincing the court to award damages. The availability of (effective) remedies for aggrieved bidders means that the principle of accountability is protected in the Netherlands.

Section 5.6 has demonstrated that the UK has transposed the four types of remedies mentioned in the EU Directives in the PCRs 2015, namely: interim relief (suspension and interim orders), setting aside, damages and a declaration of ineffectiveness. It has also been discussed that all types of remedies are not new in the UK legal system. Interim relief was firstly recognised in the *American Cyanamid* case. In addition, interim relief and setting aside have long been recognised in the UK legal system as *prohibition*, *certiorari*, and *mandamus*. Damages have long been recognised under tort law. A declaration of ineffectiveness can be argued as being a combination of setting aside and damages; this may also mean that this declaration is not 'alien' to the UK legal system.

It is worth emphasising that parties to a dispute tend to respect rulings issued by the High Court as a court of the first instance. There are two possibilities as to why this may be so. First of all, litigation costs are high. Also, a party that requests an appeal will be faced with a screening procedure. This procedure will determine whether the party has a sufficient argument to request that the case be heard before the Court of Appeal. Since the parties tend to respect rulings issued by a court of first instance, the possibility of a delay in the procurement procedure is not an issue in the UK. The availability of these forms of legal redress which can be effectively delivered means that the principle of accountability concerning the availability of (effective) remedies has been protected in the UK.

6.6.2. Provisional findings

The similarity in this issue is that all compared countries have recognised the principle of accountability concerning the availability of (effective) remedies. However, the further implementation differs.

This principle has been protected in the Netherlands and the UK. However, this principle has not been sufficiently protected in Indonesia. These situations occur because the substances of the law and legal procedures in the Netherlands and the UK have recognised remedies whereas it is questioned whether a similar substance and procedure are recognised in Indonesia.

Remedies can be laid down in two options: public procurement regulations or in the general regulation. The UK adheres to the first option. Remedies are stipulated in the PCRs. The Netherlands adheres to the second option. The Dutch courts grant remedies based on the Dutch Civil Code and the Dutch Code of Civil Procedure. The Dutch judiciary, therefore, needs to exercise the general regulation into public procurement cases.

6.7. Conclusion related to the comparative analysis

Subsection 6.1.1 explained the substantial point of the normative framework. In this section, I would like to implement that framework into five provisional findings, which have been provided in five subsections 6.2.2 to 6.6.2. Also, I will qualify, based on each principle, which country provides the best protection; which country provides sufficient protection; and which country should give better protection to the principles of good public procurement.

I will begin with the *principle of equal opportunity*. The context of the discussion is in the phase of preparation of the procurement document. In my opinion, to protect this principle, regulations should not only contain the substantive norms, but also the legal procedure to ensure the protection of these norms. Norms in this context refers to the prohibition on creating unjustified requirements in the procurement document. To ensure the implementation of these norms, interested bidding participants who feel aggrieved should be entitled to request the administration and judiciary to review the legality of the procurement document. For the sake of clarity, this legal procedure should be stipulated clearly in a procurement regulation. However, if this matter is embodied in the general regulations, the judiciary should exercise the regulations and give a consistent interpretation to protect this principle.

In this situation, the UK has given the best protection to the principle of equal opportunity in this context, because the legal procedure in the UK has been clearly stipulated in the PCRs. In addition, case law has confirmed this protection.

The Netherlands has protected this principle as good as the UK. The legal procedure in this matter is stipulated in the GALA. Moreover, the judiciary has confirmed the protection of this principle and provides a ruling which is in line with the Remedies Directive. However, I consider the Netherlands to be in the second place, because it could be clearer if this legal procedure was stipulated in the procurement law. Differing from these countries, Indonesia should provide better protection to this principle. The legal procedure (and legal standing of the interested bidding participant) has not been recognised in the PR. It is questioned whether the general law can clarify the matter. Moreover, it may be noteworthy to underline that no court decision has been available on the matter.

I will turn to the implementation of *the principle of equal treatment*. The context of the discussion is on the phase of the administrative review procedure. In my view, the principle of equal treatment in the administrative review procedure phase is intertwined with the principle of impartiality. A contracting authority should handle the administrative review (objection and appeal) impartially. Whenever it is doubted that the contracting authority cannot review this impartially, and the situation happens frequently (it does not happen incidentally); then a country may establish an independent review body. Due to its independent position, this body may provide impartial assessment and may, therefore, reflect or adhere to the principle of equal treatment. However, the necessity to establish this review body is subject to certain contexts. If establishing an independent body is not considered value for money, or if the problem can be tunnelled directly to the judiciary, then the establishment of the independent review body may not be necessary.

In this context, the Netherlands has provided the best protection to the principle of equal treatment, as the Netherlands has the Dutch Commission of Tendering Experts. This is a body inside of the administration - under the auspices of the Ministry of Economic Affairs - but has certain independency from the contracting authorities. The UK has also provided good protection on this principle, but not to the same extent as the Netherlands, because the UK does not have a formal mechanism for an independent administrative review procedure. Therefore, the protection relies heavily on the informal dispute mechanism and the judicial review. It is doubtful whether this situation is ideal because the aggrieved bidders may not be keen on defending their interests. This situation can be described by the idiom 'don't bite the hand that feed you'. Moreover, litigation fees in the UK are high, so that it may reduce the accessibility of the aggrieved bidders (particularly the small and medium enterprises). Indonesia should give better protection to this principle. Some cases have shown that the heads of contracting authorities instruct their subordinates to conduct unequal treatment, and their subordinates follow their orders. It is questioned whether Indonesia has an independent review body

on the matter. It may be true that the judiciary has been engaged in this issue; however, the engagement is still limited to the very serious violation cases, such as corruption.

Concerning the *principle of transparency* on explaining the award decision, it can be concluded as follows. Clarifying the award decision can be issued by providing sufficient reasons in a letter or notice of award decision which is sent to each bidding participant. Also, it can be conducted by providing a debriefing mechanism. The award decision letter should enable each participant to understand why the contracting authority has not selected him and has instead decided to award the contract to the winner. In doing so, the award decision letter should contain comparative information between these two tenderers. This information should not only contain the scores, but should also explain how the scores have been made up from its sub scores. Moreover, a written description should be provided to clarify the meaning of the scores and their subcomponents. This information should be available both for the score of the unsuccessful bidder who has obtained the letter and the award winner.

In this context, both the Netherlands and the UK have provided the same quality of protection to the principle of transparency. The contracting authorities in both countries have implemented this principle both in the context of giving sufficient reason and debriefing. If the bidding participants regard that the contracting authorities in these countries have infringed the principle, they may seek legal redress to the court. On the contrary, Indonesia should give better protection to the principle of transparency, because the PR has a lower standard in instructing the contracting authority to provide sufficient reasoning such as those mentioned above. The PR also does not recognise debriefing. Conceptually speaking, the bidding participants may request the court to give protection on the matter; however, it is doubtful that any court decision has been available on this issue.

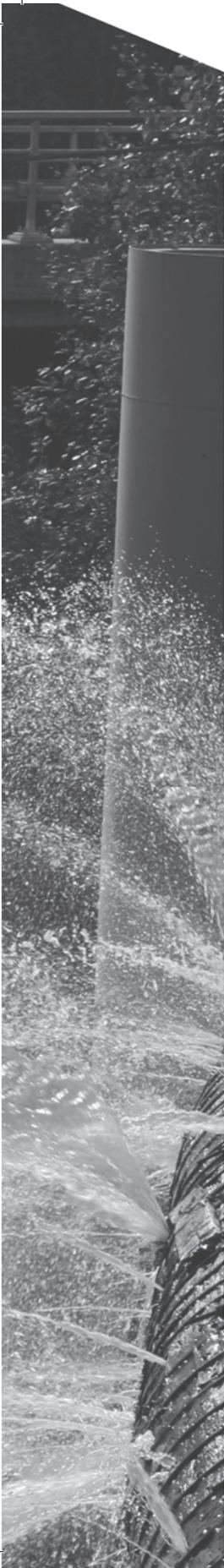
I will continue the discussion on the implementation of *the principle of accountability regarding the clarity of accountability forum*. To my mind, a procurement regulation should explicitly declare which court has the competence on handling the procurement dispute. If this does not occur, then the judiciary should conduct consistent interpretation based on the general regulation.

In this circumstance, both the Netherlands and the UK have given the same quality of protection to this principle. The judiciary in the Netherlands has conducted a consistent interpretation that the civil courts should handle public procurement disputes. This interpretation is based on the general law (the GALA). Similar to this, the judiciary in the UK has also interpreted the general law consistently (the Civil Procedural Rules). The public procurement dispute is dealt

with the Administrative Court and the Technology and Construction Court. Unfortunately, Indonesia has not yet provided similar protection in this respect. It has been noted from some court decisions that the judiciary is not anonymous when it comes to determining the competence to deal with the procurement dispute.

I will turn to the implementation of *the principle of accountability concerning the availability of the effective remedies*. In my opinion, the remedies should contain the following elements: (i) the possibility to suspend the procurement procedure, (ii) the possibility to correct a wrongful decision or action, (iii) the possibility to obtain compensation, and (iv) whenever necessary, the possibility to modify the contract. Moreover, especially for criteria (i) and (ii), the remedies should be delivered promptly. In my view, remedies should be stipulated clearly in a procurement regulation. However, if this matter is embodied in the general regulations, the judiciary should exercise the law and give a consistent interpretation to provide the remedies. If, for example, the general regulations are also silent or less clear on elucidating the issue, the judiciary still should conduct legal finding to protect the principle of accountability.

In this condition, the UK has provided the best protection to the principle of accountability concerning the availability of the effective remedies. This is due to the fact that the four points mentioned above are clearly stipulated in the PCRs. Moreover, case law has confirmed the effective implementation of these remedies. The Netherlands has also done well in protecting this principle. Although the legal procedure is not clearly stipulated in the DPPA, the Remedies Directive, the Dutch Civil Code and the Dutch Civil Procedure Code have been used as the source to provide remedies. The case law has also asserted the effective implementation of the remedies. The UK proves to be in the best position of the three because the remedies are clearly stipulated in the procurement regulations (the PCRs). Differing from these countries, Indonesia should strengthen its protection on this principle. The remedies are not codified in the PR. Conceptually speaking, the judiciary should give protection on the matter; however, it is questioned that any court decision has been found on this issue.



Chapter 7

Conclusions and recommendations

This chapter aims to provide an answer to the research question: how should the Indonesian Government deal with the five fundamental problems which occur in a pre-contractual phase of the public procurement procedure? Two sub-research questions have been used in order to answer the question: (i) what is the appropriate approach to address the fundamental problems, and (ii) how do the other selected countries deal with these fundamental problems? To provide the answers to these questions, this chapter is divided into three sections. The first two sections (Sections 7.1 and 7.2) will provide the answer to the two sub-research questions. The last section (Section 7.3) will contain a final answer to the main research question.

7.1. The development of a good public procurement approach

As it has been discussed briefly in Chapter 1 and subsequently elaborated upon in further detail in Chapter 3, five problems have occurred in Indonesian public procurement law. Those should be seen as fundamental problems. Therefore, they should be addressed by a fundamental approach, namely via a good public procurement approach.

Addressing the problems via a fundamental approach

These problems can be considered as fundamental because they seriously harm the rule of law, democracy, and good governance.⁸²⁸ Moreover, the problems occur systematically or frequently which mean they are not incidental. Therefore, the approach to address them shall also be fundamental. To do so, the five ‘concrete’ problems in Indonesia have been generalised and conceptualised. These problems have then been viewed from a principle perspective. This refers to the utilisation of the principles of GG to enshrine the fundamental problems of public procurement law in Indonesia.

The situations in the compared countries are also analysed in the same way. It has been investigated whether similar legal problems occur in the Netherlands and the UK. Each concrete situation in the compared countries has been generalised and conceptualised, and then seen from the principled perspective. Afterwards, each result of the generalisation and conceptualisation founded in the three countries is compared.

⁸²⁸ See the discussion on the rule of law, democracy, and good governance in section 2.2.1.

Good public procurement as a fundamental approach

GPP approach concerns the normative utilisation of GG to elucidate the problems in public procurement law. In Chapter 2, it has been explained that good governance, in this research, refers to concepts and legal principles. The discussion provided in this research focuses on the legal principles.

This approach is tightly linked with administrative law due to two considerations. The problems discussed in this research are related to the issue of administrative law.⁸²⁹ Moreover, the general principle of administrative law is connected to the principle of good governance. As discussed in Section 1.3, the general principle in administrative law was firstly denoted as the principle of proper administration which then was developed to be the principle of good administration. In a further development, the terminology of the principle of good governance is utilised, and this may apply to the narrow context (the administration) and the broader context (all the state branches).

Three principles of GG have been used in the research: the principle of equality, the principle of transparency and the principle of accountability.⁸³⁰ These have been selected based on three main considerations. First of all, the three are considered as the most relevant GPP principles to elucidate the legal problems. Also, the three principles are regarded as the most important principles under the umbrella of the concept of GG.⁸³¹ The final consideration centres on the fact that these three form the cornerstones of the modern state: the rule of law, democracy and good governance. Conceptually speaking, each principle is specifically linked to one of the three cornerstones mentioned above.⁸³²

An essential element in the rule of law is the principle of equality. This can be seen in the necessity to ensure equality before the law. An important element in democracy is the principle of transparency. Transparency underpins democracy because it is an instrument to control the governors by the governed and facilitates public decision-making. A pivotal element in GG is the principle of accountability, such as the obligation to explain and justify specific conduct.

Before continuing the elaboration, it is pertinent to briefly reiterate the legal character of the principle.⁸³³ The principle has *prima facie* legal force; it provides an

⁸²⁹ See the elaboration on section 1.2.

⁸³⁰ The discussion is provided in sections 2.3.2

⁸³¹ It is also confirmed from their historical roots happen in both eastern and western civilisations. The discussion has been provided in section 2.1.1 and 2.2.2.

⁸³² See the discussion in section 2.2.1.

⁸³³ See the discussion in [section 2.3.1](#).

adequate argument to establish a fact or raise a presumption except when this can be disproved or rebutted. The written principle provides a clear direction to the legal norms. Differing slightly, due to its unwritten form, the unwritten principle does not prescribe precisely the legal outcomes, but it will inspire the decision in a particular case.

After conducting the examination, it was then found that public procurement law has its principles.⁸³⁴ These principles are similar to the principles of GG. Therefore, these principles can be referred to as the GPP principles.

Considering the above, the purpose of this 'detour' to the subject of principles of GG may be questioned. The principles of GPP could have been directly discussed. However, academically speaking, it is useful to check whether the principles of equality, transparency and accountability under the umbrella of the principles of GG have the same meaning and function in public procurement law. As it will be reiterated briefly in the paragraphs below, those principles share the same meaning and function. However, these principles can be further distinguished in the public procurement context; the three principles of GG can be distinguished as five principles of GPP.⁸³⁵ These five are used to shed light on the regulations related to public procurement and their implementations in three selected countries.⁸³⁶ However, it does not necessarily mean that GPP only contains five principles. These five have been selected as they are considered to be the most pivotal principles and the most relevant principles to be discussed in this research.

The specification of good public procurement principles

The principle of equality (under the umbrella of the principle of GG) is distinguished into the two GPP principles, equal opportunity and equal treatment. The principle of 'equal opportunity' refers to the widest opportunity for economic operators to compete in a public tender with certain legitimate restrictions. Whenever such restrictions are laid down, this should be legally justified and should not aim to distort competition. When the potential bidding participant feels aggrieved with the restriction, a procedure should be available enabling one to review the legality of the action conducted by the contracting authority. Besides, the principle of 'equal treatment' refers to the obligation for the procuring entity to treat the economic operators that have submitted their bidding proposals on an equal basis, so that the 'level playing field' is preserved, and fair competition can

⁸³⁴ See the discussion on section 2.5.

⁸³⁵ As has been discussed in section 2.4.2.

⁸³⁶ See the discussion in 2.6.

take place. The first mentioned principle is implemented more intensely during the early phases of the procurement procedure, whereas the principle of equal treatment often applies after the submission of the bidding proposals until before the contract is concluded. Therefore, the principle of equal treatment embraces the review procedure phase. However, the review procedure here focuses on the administrative review procedure whereas the elaboration on the judicial review procedure is included in the principle of accountability.

Unlike what has been stated above, the principle of transparency in GG is, in essence, not specified differently in the principle of GPP. In public procurement, one may request that information and the document be made available. When it comes to explaining the award decision, the contracting authority must edit the information; the information must be simplified in accessible language and is intended to protect confidential information contained in the bidding proposals submitted by the bidders.

The principle of accountability is specified in the two principles of GPP: the principle of accountability concerning clarity with regard to the legal accountability forum (court competence) and the principle of accountability concerning the availability of effective remedies. In this research, the principle of accountability focuses on the protection provided by the judiciary.

Furthermore, this research illustrates that the five good public procurement principles mentioned above are intertwined with other relevant principles, as illustrated below. The *principle of equal opportunity*, which is exercised in the phase of preparing the procurement document, is intertwined with the principle of proportionality, the principle of carefulness and the principle of reasonableness. The *principle of equal treatment*, which is exercised in the phase of the administrative review procedure, is closely related to the necessity to comply with the principle of impartiality. A contracting authority should handle the administrative review (objection and appeal) impartially. Whenever it is doubted that the contracting authority cannot review this impartially - as frequently occurs - a country may subsequently establish an independent review body. Due to its independent position, this body may provide an impartial assessment and, therefore, may reflect or adhere to the principle of equal treatment. It may be argued that the discussion on the independent review body is coupled with the principle of independence. In a case where the principle of impartiality cannot be protected, the protection can be given by implementing the principle of independence. The *principle of transparency*, which is exercised in the phase of explaining the award decision, is interrelated with the duty to provide reasons and the principle of confidentiality. The *two principles of accountability* are influenced by the principle of effective judicial protection.

In this regard, it may be questioned what should be done when joint compliance is impossible because the principles point in different directions. For instance, the obligation imposed by the duty to provide reasons may contradict the principle of confidentiality. Whenever conflicting principles have been embodied in positive norms, the legislature may have expressed its intention in regulation; this intention may be examined in order to determine which principle shall be prioritised. In addition, positive norms usually explicitly state which norm shall be applied to prevent the impossibility of joint compliance. Nonetheless, whenever positive norms are silent, the following standards can be utilised to come to a determination.⁸³⁷ A later law repeals a prior one; a special law repeals a general law; a later general law does not repeal a prior special law; the law from a higher hierarchy repeals a lower one. I would like to stress the latter standard. This standard means that a principle laid down in an Act will repeal a principle laid down in administration guidance. It is also deemed relevant to mention that a principle developed by the administration 'usually' has general binding force in contrast to a principle developed by the judiciary, because case law is relevant to, and therefore binds, a specific context. The word 'usually' is stressed in this paragraph because of two reasons: (i) this standard is mostly recognised in continental legal systems; the Anglo-American legal system has a significant tendency to refer to case law; (ii) even in continental legal systems, a principle laid down in the case law may, later on, have a general binding effect. This may occur when the courts are consistent in deciding on a matter and, by doing so, the legislature or the administration will adopt the principle and lay it down in the law or administration guidelines.

Accordingly, the following conclusion can be reached, which will be provided in this section. The good public procurement approach is a suitable and unique approach to addressing the fundamental problems in Indonesian public procurement law. This approach uses five good public procurement principles. Each of these principles may be intertwined with other principles where each principle normally supports the others. Nonetheless, when the opposite situation occurs, the standard discussed above can be exercised to determine which direction should be followed.

⁸³⁷ Aarnio, A. 1987. *The Rational as Reasonable: A Treatise on legal Justification*, Dordrecht, D. Reidel Publishing, p. 98.

7.2. General conclusions relating to the comparison between Indonesia, the Netherlands and the UK

This section aims to provide general conclusions on how the countries compared deal with the five fundamental problems. This section is different from Section 6.7. In that section, the findings are classified in accordance with the five good public procurement principles. In this section, the findings will be specified into the desired structure in order to answer the main research question of this investigation. The presentation is based on a comparison of how each state branch - the legislature, the administration, and the judiciary - in three different countries deals with the five fundamental problems.

Therefore, this section will be divided into three subsections. Subsection 7.2.1 will provide the concluding findings on the comparative codifications of GPP principles enacted by the legislature. Afterwards, Subsection 7.2.2 will highlight the concluding findings on the comparative application of GPP principles by the administration. Lastly, Subsection 7.2.3 will underline the conclusions on the comparative development of the case law related to GPP principles by the judiciary. Each subsection will be structured starting with comparative information and ending with the concluding findings. It is relevant to underline that the situations in each country are not always identical to one another. However, arguably, each situation is comparable because it has been generalised and conceptualised from the principled perspective.

7.2.1. Comparing the codifications of good public procurement principles by the legislature

Before entering into the main discussion, it is relevant to stress that codification here focuses on public procurement regulations, but it does not necessarily mean that general (non-public procurement) regulations have no binding effect on the public procurement procedure. As has been discussed in Chapters 3, 4, and 5, and as will be seen (particularly) in the part of the judiciary, many other general regulations are utilised to operate the public procurement system. Whenever it is deemed necessary, I will recall the findings related to the general regulation in a footnote. At the end of this section, concluding findings on the codifications compared will be provided.

The five GPP principles above have been codified in the regulations of three different jurisdictions, subject to certain differences. The regulations here may refer to regulations enacted solely by the executive, such as a Presidential Regulation (the PR) in Indonesia. It may refer to a parliamentary Act such as the Dutch Public Procurement Act (the DPPA). It may also refer to Public Contract Regulations (the

PCRs) in the UK which are statutory instruments; a form of legislation which allows the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. The following information will demonstrate such codification. The structure will be based on the five principles of good public procurement.

The principle of equal opportunity

The obligation to protect the principle of equal opportunity has been codified in the three countries compared. In Indonesia, this principle is described, among other things, as the prohibition on 'setting discriminatory criteria, requirements or procedure' (Article 24(3)(d) PR 54/2010). There is also a prohibition on determining specifications, which can distort fair competition, e.g. by mentioning a particular product (except for spare parts) or by creating additional illegitimate requirements (Article 81(1)(b) PR No. 70/2012).⁸³⁸

The codification of the principle of equal opportunity in the Netherlands can be found in the following Articles. Article 2.75 of the DPPA promulgates that the technical specifications should create equal access by tenderers and should not create unnecessary obstacles. In the explanatory memorandum on this article, it is explained that whenever the contracting authority refers to certain technical specifications, the provision should always be accompanied by the words "or equivalent." Articles 1.10 and 2.76(1) of the DPPA also compel the contracting authority to create balanced, objective and reasonable requirements. This principle is also intertwined with other principles, such as the principle of proportionality, which can be seen in the General Administrative Law Act (GALA) and the Proportionality Guide.⁸³⁹

In the UK, some examples of the codification of the principle of equal opportunity can be found in the following Articles. Article 18(2) and (3) of the PCRs 2015 explains that the procurement document should not create unnecessary restrictions which can artificially narrow competition and unduly favour or disadvantage certain economic operators. The stipulation in Article 42(10) and (14) also compels the contracting authority to lay down "technical specifications which shall afford equal access to economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition"; in order to do so, the designing of

⁸³⁸ See the discussion in 3.2.1.

⁸³⁹ See the discussion in 4.2.1. The principle of proportionality is embodied in Article 3:4 (2) of the GALA.

specifications shall be based on functions and solutions (and not based on technicalities).

Nevertheless, there is a substantial difference between Indonesia and the other two compared countries. Stemming from Article 81(1) PR 70/2012, an interested bidding participant who feels aggrieved in Indonesia does not have legal standing to challenge the contracting authority by arguing that the procurement document has violated the law. The PR only recognises the review for the award decision and not the procurement document.⁸⁴⁰ This situation is different from in the Netherlands and the UK; here an interested bidding participant has legal standing to challenge the action or decision made by the contracting authority. Guided by the Remedies Directives and the GALA, an interested bidding participant can challenge the procurement document prepared by the Dutch contracting authorities.⁸⁴¹ A similar situation also occurs in the UK, guided by the Remedies Directives and the PCRs, an interested bidding participant can challenge the UK contracting authorities on the matter.⁸⁴² The availability or possibility of a challenge by an interested bidding participant protects the implementation of the principle of equal opportunity in these two countries.

The principle of equal treatment

The obligation to protect the principle of equal treatment has been codified in the three compared countries. This research has focused on the implementation of this principle in the administrative review procedure. This is a procedure which occurs after the award decision but before the contract has been concluded. Therefore, this review procedure is still in the pre-contractual phase. The review may be conducted by the administration (administrative review), but also by the judiciary (judicial review). The findings provided here have focused on the administrative review phase.

In Indonesia, the contracting authority is obliged “to provide equal treatment to the bidding participants” (Article 5(f) PR 54/2010). The contracting authority is also prohibited from “providing favourable treatment to a certain

⁸⁴⁰ Those who have the legal standing to review the award decision are the bidding participants.

⁸⁴¹ In 4.2.1, it has been argued that the procurement document can be considered as an administrative decision as it fulfils the qualifications of Article 1:3 of the GALA. In relation to the first decision (the procurement document), it is relevant to underline the provision of Article 6:3 of the GALA. It stipulates that a decision can be challenged if it concerns the procedure for preparing another decision which can directly affect the interest of an interested party independently from the decision to be prepared.

⁸⁴² See the discussion in 5.2.1.

bidding participant (...).” The PR does not provide any additional information on the principle of equal treatment in the administrative review procedure. However, logically speaking, the obligation to engage in equal treatment also embraces the administrative review procedure.⁸⁴³ It is relevant to note that, according to Article 60(1)(i), an aggrieved bidder may lodge an objection and an administrative appeal within the contracting authority.

The codification of the principle of equal treatment in the Netherlands can be seen in Articles 1.8 and 1.12 of the DPPA 2012, which instruct the contracting authority to treat economic operators in the same manner.⁸⁴⁴ The DPPA does not specifically explain how this principle should be exercised in the administrative review procedure. Logically, the obligation to engage in equal treatment also includes the administrative review procedure. It has been explained that an aggrieved bidder may lodge an objection within the contracting authority. If he still feels aggrieved, he may go to the Dutch Committee of Tendering Experts as an alternative option besides directly lodging the complaint to the court. The Committee is established by Article 4.27; an independent review body should be established to hear complaints related to public procurement. Therefore, the Netherlands has an administrative review procedure both within and outside the contracting authority.⁸⁴⁵

The codification of the principle of equal treatment in the UK can be found in the provisions of Article 18(1) of the PCRs. It is explained that “the contracting authorities shall treat economic operators equally and without discrimination (...).” In addition, procurement officials shall disclose personal interests and not take part in making a decision where there is a risk of bias (Article 24(1)). There is no administrative review procedure in the UK; the PCRs give a direct route to seek legal redress by means of judicial review. However, the administration has issued guidance, which requires the contracting authority to provide for the possibility of consultation.⁸⁴⁶

⁸⁴³ See the discussion in 3.3.1.

⁸⁴⁴ It is relevant to underline that the first Article of the Constitution of the Netherlands promulgates a norm containing the principle of equality: “All persons in the Netherlands shall be treated equally in equal circumstances...”

⁸⁴⁵ See the discussion in 4.3.1.

⁸⁴⁶ See the discussion in 5.3.1.

The principle of transparency

The obligation to protect the principle of transparency has been codified in the three countries compared. However, the way in which the principle has been framed differs between the countries. The context of the principle of transparency here refers to explaining the award decision; the explanation of the award decision can be clarified by sending a notice or letter, and conducting a debriefing, as will be seen in the detailed conclusion below.

According to the appendix of the PR, the contracting authority in Indonesia has two documents for explaining the assessment result of the procurement (the award decision).⁸⁴⁷ The first is the notice of the award decision, and the other is the 'procurement evaluation report'. The notice of the award decision should be announced publicly without any request. Slightly different, the procurement evaluation report can only be requested after the award decision has been announced. It is silent as to who may request the report. Presumably, only the bidding participants may request it. Nonetheless, some procurement evaluation reports are published online. It seems that the PR does not distinguish between transparency for citizens, for economic operators in general, and for individuals (in this context: each bidding participant). As the report contains a more informative explanation, this research has decided to analyse the report. According to Appendix IV-A, there are 11 items of information which should be made available in the report as follows: (i) a list of the economic operators that passed the first screening, (ii) a list of the economic operators that passed the second screening, (iii) the evaluation result relating to the administration and qualification criteria, (iv) the price offered, (v) the combination scores on the qualification and price, (vi) the result of any negotiations, (vii) the budget ceiling; (viii) the elements which were evaluated, (ix) formulae which were applied, (x) additional relevant information, and (xi) the date of the report. It is necessary to explain that the PR does not recognise the debriefing procedure, so that a bidder cannot request a fuller debriefing pertaining to the award decision issued by the contracting authorities.

The principle of transparency on the matter has been codified in the DPPA. The contracting authority has to inform each bidding participant by means of the award decision letter/notice. There are two types of notice. The first type is sent to the winner. The other is sent to each of the unsuccessful bidders (therefore each unsuccessful bidder will receive a different letter from the contracting authority). According to Article 2.130(1) of the DPPA, the latter (i.e. the notice) should provide sufficient reasoning as to why the authority has not awarded the contract to that

⁸⁴⁷ See the discussion in 3.4.1.

particular bidding participant.⁸⁴⁸ It is also promulgated that the decision must contain relevant reasoning for having made this decision; for instance, that the bidding proposal does not meet the functional and performance requirements (Article 2.103). It is explained that the intention is to enable each bidding participant to understand why he has been unsuccessful as well as to enable him to assess the potential success of the available legal remedies. The award decision letter does not contain a list of the participants and merely compares the addressee's offer with the winner's offer. Presumably, this occurs as a means to prevent bid rigging, because disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement which may also promote bid rigging. It is relevant to underline that the DPPA does recognise the debriefing mechanism where a bidder may request a fuller debriefing about the award decision issued by the contracting authorities.

The situation in the UK concerning this matter is similar to the situation in the Netherlands. There are two types of notices; one is sent to the winner, and another is sent to each unsuccessful bidder.⁸⁴⁹ According to Article 86(2) of the PCRs, the latter notice shall provide the reasons for the decision and shall include the characteristics and relative advantages of the tenderer who receives the notice and the successful tender. Also, Article 86(3) further explains that the reasons should be made clear, mentioning why the candidate has been unsuccessful and the reasons for any decision by the contracting authority to the effect that the economic operator did not meet the technical specifications. It is essential to note that the guidance on the standstill period does recognise the debriefing mechanism, so that a bidder may request a fuller debriefing on the award decision issued by the contracting authorities in the UK.

The principle of accountability concerning clarity with regard to the accountability forum

Turning to the findings on the stipulation of the principle of accountability concerning the legal accountability forum, my findings show that the public procurement regulations in the three countries compared are silent when it comes to determining which legal accountability forum shall have competence when dealing with a procurement dispute. The judiciary in the three countries shall

⁸⁴⁸ This issue is also related to Articles 3:7 and 3:46 of the GALA which stress that in order to minimise the possibility of an arbitrary decision, the administration must be transparent by providing sufficient reasoning (Article 3:7) and the decision (and its reasoning) must be based on sound justifications (Article 3:46). See the discussion in 4.4.1.

⁸⁴⁹ A detailed discussion is provided in 5.4.1.

interpret the matter according to other general regulations. Therefore, the findings on this issue will be provided later, in the section on the judiciary. This presentation is intended to underline the capability of the judiciary in the compared countries in order to conduct legal finding based on the general laws.

The principle of accountability concerning the availability of (effective) remedies

Public procurement regulations in Indonesia and the Netherlands are silent on the availability of remedies. However, this does not necessarily mean that the remedies are not explained by other (non-public procurement) regulations. The judiciary in these countries may make 'legal findings' to provide such remedies. As this issue concerns the law as exercised by the judiciary, the findings on these matters will not be delivered here, but in the section on the judiciary. There, it will be discerned how the judiciary utilises the general laws such as Dutch Civil Code and Dutch Civil Procedure Code to address the issue. The intention of this is to discuss the matter in that section in order to highlight the capability of the judiciary in compared countries to conduct legal finding based on the general laws.

In the following, the findings hereunder concern the codification in the PCRs. The PCRs provide for the availability of remedies. Four types of remedies are available. First of all, Article 95(1) of the PCRs 2015 recognises interim relief which further contains a suspension mechanism and interim orders. A suspension occurs automatically when aggrieved bidders submit a case to the Courts. This suspension can be lifted at the contracting authority's request and when the Court is satisfied with that argument. According to Article 96(1), interim orders are orders, which can be issued by the Courts so as to restore or to modify the requirement, to suspend the procedure, and to suspend the implementation of any decision or action conducted by the contracting authority. Secondly, Article 97(1) and (2)(a) and (b) clarifies the authority of the courts to set aside the decision or action and to order the contracting authority to amend any document. Thirdly, referring to Articles 97(2)(c) and 98(c), whenever the contracting authority breaches the regulations, damages can be awarded by the Court either before or after the contract has been concluded. The last type of remedy is called a declaration of ineffectiveness. This declaration is given whenever the contracting authority has engaged in a very serious breach of regulation, for instance: awarding the contract without prior publication (Article 99(2)) or hurrying to conclude the contract (by breaching the standstill period or the suspension mechanism or an interim order) (Article 99(3)). Referring to Article 102(3), this declaration can result in the two following consequences: (a) the duration of the contract is shortened based on a court order, or (b) the contracting authority must pay a civil financial penalty, the amount of

which is specified in the order. However, the court may not order ineffectiveness where the general interest requires the contract to be maintained.

Concluding findings on the compared codifications of good public procurement principles by the legislators

All three countries compared have codified the *principle of equal opportunity* in a certain context. However, it is questionable whether Indonesia has established the legal procedure to protect this principle. Also, all countries compared have codified the *principle of equal treatment*, and this has been codified on a similar basis. The obligation for the contracting authorities to comply with the *principle of transparency* has been codified in the three countries compared, albeit with certain differences. However, the stipulation of the required application on the principle of transparency in Indonesia is lower than in the compared countries. The discussion on the duty to provide reasons, the clarity of the award decision or the debriefing are rarely founded. As the procurement regulations in three countries are silent on the issue of *accountability forum*, this issue is handled by the interpretation of the judiciary. Therefore, the discussion of this matter is located in the section of the judiciary. Some discussion on the principle of accountability concerning the *availability of remedies* in public procurement will also be given in the discussion on the judiciary. Except for the remedies issue in the UK, the codification of the two principles of accountability is based on general regulations; so that, how the judiciary exercises their powers to clarify the matter will be examined in that section.

7.2.2. Comparing the application of good public procurement principles by the administration

The following findings show that good public procurement principles have been applied in a different way and to a different degree with regard to compliance by the administration in the three different countries. The sequence of the structure will be similar to the above; it will begin with the principle of equal opportunity, and it will end with the principle of transparency. The findings on the two principles of accountability will not be provided here as they do not concern the implementation of these two principles by the administration but by the judiciary. At the end of this subsection, the concluding findings on the compared application of these principles will be provided.

The principle of equal opportunity

The findings below demonstrate that the implementation of the principle of equal opportunity by the administration differs among the three countries. It has been reported that some contracting authorities in Indonesia have violated this principle. In the construction work to build the great mosque in West Bandung Regency, the contracting authority required certain (high) qualifications to participate in the tender. However, it is questionable whether building a mosque can be classified as a complex construction. In procurement for the scanner machines in Jakarta Province, the contracting authority implemented some irrelevant requirements, one of these being an impact analysis certification concerning the environment. In another context, a representative of a contracting authority admitted that he had designed specifications and qualifications, which favoured an economic operator who would submit a tender. He did so because he was instructed to do this by his superior in order to favour that operator.

It is reported that, in general, the contracting authorities in the Netherlands and the UK comply with the principle of equal opportunity. This compliance may be underpinned by the fact that the administrations in these countries have issued certain guidelines, which can help the contracting authorities to prevent violation of legal principles. Compliance may also occur because the administration realises that whenever the procurement document is not correctly determined then that procurement document is reviewable. From the perspective of the contracting authority, such a review is undesirable, as it will influence the timeline of the procurement.

The principle of equal treatment

The findings below describe that the implementation of the principle of equal treatment by the administration varies among the three countries. The principle of equal treatment here occurs during the administrative review phase.

It has been reported that some contracting authorities in Indonesia have violated this principle. Cases of three different contracting authorities have been shown, namely: the Directorate of Traffic Affairs of the National Police Department, the Ministry of Social Affairs and the Ministry of Youth and Sports Affairs. In the first case, the Director was found guilty because he had instructed his subordinates to ensure that a certain bidding participant would be given the contract. In the second case, the Minister was found guilty because he had illegally instructed his subordinates to directly award the contract to a certain economic operator. In the last case, the Minister was found guilty because he had allowed his brother to manipulate the procurement procedure so that it would favour a certain bidding

participant. Departing from these cases, it is doubted that the administrative review procedure within the contracting authority will adhere to the principle of equal treatment; the review procedure will not be impartial. This occurs especially because the official who evaluates the administrative appeal is the same person who has instructed that favourable treatment be extended. It may be true that this situation may not occur in every contracting authority, but these cases may have reduced the trust of aggrieved bidders towards the review procedure within the contracting authority.

It has been reported that, in general, the contracting authorities in the Netherlands implement the principle of equal treatment. The administrative review procedure can be conducted both within and outside of the contracting authority. An aggrieved bidder may raise a question with the contracting authority. If the issue escalates, he may lodge an objection. If he still feels aggrieved, he may submit his complaint to the Dutch Committee of Tendering Experts. The Committee cannot issue a binding decision; it gives advice. It is considered that the advice has the influential power. The advice is also perceived as being more impartial, because it is given by an independent body outside the contracting authority. One relevant piece of advice prepared by the Committee is as follows. In the construction and operation of an energy source in a swimming pool, an economic operator complained about the very high demand (twelve times more than usual) for turnover requested by the contracting authority. The Committee considered that the contracting authority had not sufficiently explained the reason for requiring such a high demand. Also, according to the Guide to Proportionality, the maximum turnover that can be requested is 300%. The Committee concluded that anything above this is not only disproportionate, but is also not permitted under the law.

It has been reported that the administration in the UK complies with the principle of equal treatment. Uniquely, compliance occurs although the UK does not have an administrative review procedure either 'within' or 'outside' of the contracting authority. The UK has an informal administrative review procedure 'within' the contracting authority. In practice, this informal procedure is called 'consultation'. This procedure is explained in the 'guidance on the standstill period' issued by the Crown Commercial Service. This procedure is similar to debriefing (which will be shown later in the findings on the principle of transparency). However, in debriefing, the economic operator may request the document – something that may not happen in the consultation procedure.

The principle of transparency

The following findings illustrate that the implementation of the principle of transparency by the administration differs among the three countries. The principle of transparency here occurs during the phase of explaining the award decision.

It has been reported that some contracting authorities in Indonesia have complied with this principle. Nonetheless, even though a contracting authority fulfils the transparency obligation determined by the regulation, a bidding participant may still not understand the reasons for the award decision. These reasons are explained in a procurement process report. However, the report provides an overall score without explaining how the score has been made up by its sub-components. Also, the score is compiled based on numerical information without providing wording description. Moreover, an unsuccessful bidding participant is not entitled to request debriefing because this procedure is not recognised in the regulation. A representative of a contracting authority explained that an unsuccessful bidder may lodge an objection, and by so doing he will obtain the information he requires. However, I have expressed my doubts as to this line of thinking. Debriefing shall occur first to ensure that the request for a review is based on merit. The main function of the review shall be to challenge and not to seek information.

Generally speaking, it is reported that the contracting authorities in the Netherlands and the UK comply with the principle of transparency. Presumably, the officials in the contracting authorities implement this principle because they realise it is their obligation to explain the award decision in a certain manner, to sufficiently give reasons, and to provide the debriefing. Also, the officials may realise that if they do not perform these obligations correctly, the bidding participants may seek legal redress. In the Netherlands, the bidders can conduct objection or lodge complaint to the Committee of Tendering Experts. As has been previously underlined, the aggrieved bidders may also seek redress directly to the Court. In the UK, the aggrieved bidders can complain directly to the Court.

Concluding findings on the compared application of good public procurement principles by the administration

Some contracting authorities (the 'administration') in Indonesia have violated the *principle of equal opportunity*. This differs from the situation in the Netherlands and the UK. In general, the administrations in these countries have been reported in order to comply with this principle. Moreover, it has been shown that some contracting authorities in Indonesia have violated the *principle of equal treatment*. Stemming from this situation, it has been doubted that the

administrative review procedure in Indonesia can be considered impartial. This contradicts the situation in the Netherlands and the UK. Similar to the situation in the above paragraph, generally speaking, the contracting authorities in these countries adhere to the principle of equal treatment. Coming to the issue on the *principle of transparency*, the administrations in the three compared countries have applied this principle as it is stipulated in their laws. However, the implementation by Indonesian contracting authorities is less progressive than in the two compared countries. This may occur as the obligation to conduct transparency in Indonesia is more lenient than in the Netherlands and the UK.

7.2.3. Comparing the development of the case law related to good public procurement principles by the judiciary

The following findings show whether the good public procurement principles have been exercised, protected and developed by the judiciary. However, the pattern is different across the jurisdictions. This difference may occur due to certain circumstances that may prevail in these countries. First of all, the quality performance of the judiciary may be different. In Indonesia, for instance, the judiciary rarely conducts 'legal findings'. In addition, the accessibility of court decisions is still an issue. Secondly, the availability of cases may be different across the jurisdictions. In the UK, for instance, the judiciary rarely deals with procurement cases, presumably because the issues can be solved in an informal way.

This section will start with the principle of equal opportunity, and will conclude with the principle of accountability concerning the availability of effective remedies. However, the findings concerning the principle of equal treatment will not be provided here because, in this research context, the principle of equal treatment focuses on the administrative review phase. At the end of this subsection, the concluding findings for this subsection will be provided.

The principle of equal opportunity

It is uncertain whether any court decision is available concerning the principle of equal opportunity on this issue in Indonesia. Seemingly, this may be due to the redaction of the article promulgated in the PR. As has been explained earlier, those entitled to challenge the contracting authority's decision or action is limited to the bidding participants (and not interested bidding participants). Therefore, it is doubted that the judiciary will consider that the interested bidding participants have a legal standing to complaint before the court.

The principle of equal opportunity has been exercised, protected and developed by the Dutch judiciary. A relevant ruling that highlights this issue concerns Zeeland BV. Zeeland BV was considered ineligible to participate in a tender by the Municipality of Rotterdam. Zeeland BV did not meet the competency requirements set by the municipality. The company challenged this authority. However, the court was satisfied with the argument put forward by the contracting authority. If the contracting authority allows a technical reference which is owned by the plaintiff, the procurement will lead to a different result. This means that although the court delivered a favourable ruling for the contracting authority, the legality of the decision related to the principle of equal opportunity is reviewable.

The principle of equal opportunity has been exercised, protected and developed by the UK judiciary. In *Blackpool (Blackpool and Flyde Aero Club v. BC)* if a company submits a tender before the deadline, the contracting authority is obliged to consider the tender. The reason behind this is that the company has an expectation as a matter of contractual right. This case can be considered as protecting the principle of equal opportunity based on private law doctrine (implied contract and commercial expectations). Another case is *Edenred (Edenred (UK Group) Ltd v. HM Treasury and others)*. Edenred brought an action regarding an award, which had been directly made by HM Treasury to a private company whereby it claimed that it was unlawful as it constituted an illegal direct award. The court granted interim relief (in this context an automatic suspension) so that it could scrutinise the case. Although the court later ruled that the claim by Endered was unsuccessful, this case explains that an interested bidding participant who feels aggrieved may seek legal redress at the courts to ensure his interest (to ensure the protection of the principle of equal opportunity).

The principle of transparency

It is unclear whether any court decision is available regarding the principle of transparency on this issue in Indonesia. The reasoning for this may be the same as has been previously explained in Section 3.1.⁸⁵⁰ It is also possible that the bidding participants do not realise that they are entitled to obtain further information about the reasons for the award decision.

The principle of transparency has been exercised, protected and developed by the Dutch judiciary. A relevant ruling on the matter is the case of the procurement of parking management conducted by the Municipality of Zoetermeer. One of the tenderers ('Inpublic') felt aggrieved, as the award decision

⁸⁵⁰ In section 3.1, the lack of accessibility of the court decision in Indonesia has been explained.

had been given to another tenderer ('P1'). In public argued that the municipality had wrongly assessed the criteria of P1. The court considered that the complaint had been triggered by an insufficiently reasoned decision. The court explained that, among other things, it is important for the contracting authority (i) to clarify to the prospective bidder what is expected from him, (ii) to explain how the bids are assessed on the basis of an objective system, and (iii) to provide sufficient reasons for the contract award and thus to enable unsuccessful tenderers to examine (the objectivity) of the assessment. This ruling means that the judiciary has clarified and developed the principle of transparency in the matter.

The principle of transparency has been exercised, protected and developed by the UK judiciary. The UK judiciary adheres to a similar line of thinking as above. The UK judiciary stresses the necessity to provide detailed scores along with an explanation of the score. A ruling by the High Court in *Alstom Transport v. Eurostar International Ltd* explained that the bidding participants ought to be provided essential information promptly and documents relating to the evaluation process. Therefore, the legality and the fairness of the award decision can be reviewed. The matter is obviously subject to proportionality and confidentiality. A non-procurement ruling, *Padfield v. Minister of Agriculture, Fisheries, and Food*, explains the necessity for the administration to provide sufficient reasons. Otherwise, the Court may conclude that the administration does not have a good reason to reach such a conclusion.

The principle of accountability concerning clarity with regard to the legal accountability forum

It has been argued that the Indonesian judiciary is not unanimous when it comes to determining which court has the competence to deal with a procurement dispute. A certain case was submitted to the administrative court, but the judges ruled that this has to be reviewed by the civil court. There was another similar procurement case where the aggrieved bidder submitted the case to the civil court, but the judges considered that the case fell within the competence of the administrative court. While these situations remain unclear, the court has made a ruling to the effect that the competition authority should be the first to review (the KPPU), and then it will be reviewable by the civil courts.

The confusion as to the legal accountability forum that should deal with a public procurement dispute does not occur in the Netherlands. This occurs even though the DPPA is silent when it comes to clarifying the matter. The Dutch judiciary has consistently decided that the competent courts to deal with a public

procurement dispute are the civil courts.⁸⁵¹ This interpretation is based on the GALA. However, it is important to underline that the civil courts may make use of legal sources from public law whenever this is relevant.

Confusion as to the legal accountability forum that should deal with a public procurement dispute does not occur in the UK. The PCRs explain that the High Court has competence in dealing with a procurement dispute, but the High Court contains three divisions where each division contains numerous Courts. The PCRs are silent when it comes to explaining which court shall have competence. This matter is clarified by the Civil Procedural Rules (CPRs) that, depending on nature of the case, a public procurement dispute is heard before (i) the Administrative Court, or (ii) the Technology and Construction Court which are both part of the Queen's Bench Division.

The principle of accountability concerning the availability of (effective) remedies

Based on the electronic identity card (e-KTP) case, it has been concluded that aggrieved bidders and the Indonesia judiciary are not always aware that there should be a possibility to request remedies and the necessity thereof. The E-KTP case concerned a contracting authority, which had rushed to conclude a contract while aggrieved bidders were still in the process of conducting *sangguh banding* (an administrative appeal within the contracting authority). The aggrieved bidders then sought legal redress from the KPPU and then from the civil court. While the court was examining the legality of the contract, the procurement procedure was not suspended. As a consequence, the award winner carried out the procurement contract based on the award decision which was questioned as to its legality. This situation confirms the indication that interim relief is not recognised in Indonesia. Presumably, this is because the procurement regulation is silent on this issue and the Indonesian judiciary is not accustomed to making 'legal findings'. This situation may lead to the assumption of the unavailability of any other type of remedy.

Differing from the situation in Indonesia, the Dutch judiciary has been able to provide remedies. A relevant case concerned the procurement to acquire trains by the *Nederlandse Spoorwegen* (NS), a Dutch state-owned company that operates the public train network. An unsuccessful bidding participant felt aggrieved and argued that the award decision was based on an unclear criterion (it was not transparent and it could not be verifiable). The aggrieved bidder then requested the court to prevent NS from concluding the contract and instead requested that they

⁸⁵¹ Although, on certain occasions the Administrative Court has competence to handle certain public contract cases. See the discussion in subsection 4.5.1.

select the aggrieved bidder as the preferred bidder. The court delivered a favourable ruling when it came to the first request. The court ordered that NS should restart the tender and again clarify the award criteria so that bidders could determine whether they were being treated equally. However, the court rejected the aggrieved bidder's second request. It is relevant to underline that the issue of remedies is not stipulated in the DPPA. The Dutch judiciary has to find the law in general regulations like the Dutch Civil Code, as well as the Dutch Code of Civil Procedure. The judiciary, however, shall interpret the laws so that they are coherent with the Remedies Directives.

The above situation in Indonesia is also not apparent in the UK. The judiciary not only refers to the PCRs, but also to the relevant (non-public procurement) case, *American Cynamid*. The following is a relevant case on the matter. In *Letting International*, Letting argued that the London Borough of Newham (LBN) had awarded a contract based on sub-weighting criteria, which had not been disclosed earlier. As this case was lodged with the Court, the suspension mechanism automatically applied. However, the High Court lifted the suspension. According to the court, although the case was arguable, the merits of the case were not sufficiently strong. Nonetheless, the Court of Appeal overturned that decision: the suspension was to continue. According to the Court of Appeal, insufficient knowledge of the weighting could have affected Letting in preparing its tender. This meant that Letting could demonstrate that it had lost the opportunity to compete and this reason was sufficient for the Court to prevent LBN from entering into any contract. This case means that a remedy (in this context a suspension) is available and exercised by the courts.

Concluding findings on comparing the development of the case law related to good public procurement principles by the judiciary

It is unknown whether the judiciary in Indonesia has been able to protect *the principle of equal opportunity* and *the principle of transparency*; it is unclear whether there is any court decision available regarding the matter. Contradictory situations occur both in the Netherlands and the UK. These two principles have been protected, clarified, and even developed by the judiciary. Related to *the principle of accountability* (clarity on the legal accountability forum) the Indonesian judiciary has not succeeded in determining which legal accountability forum shall have the competence to deal with a procurement dispute: the civil court or the administrative court. This problem is not considered to be an issue in either the Netherlands or the UK. In the Netherlands, such a dispute is heard before the civil courts whereas in the UK it is heard before the Queen's Bench Division's Administrative Court and Technology and Construction Court. Also, it is doubtful that the Indonesian judiciary

has been sufficiently protecting *the principle of accountability* (the availability of remedies). This differs from the situation that occurs in the Netherlands. Although the public procurement law is silent on the matter, the judiciary exercises its power to find the law in the general regulations to protect the matter. Similar protection can also be seen on the judiciary in the UK.

7.3. Specific conclusions regarding recommendations for each state branch in Indonesia

This section aims to provide a final answer to the main research question, which was highlighted at the beginning of this chapter: how should Indonesia deal with some fundamental problems which occur in the pre-contractual phase of its public procurement procedure? The answer is that Indonesia should adopt a fundamental approach to dealing with the five problems mentioned earlier, namely a good public procurement approach. As has been argued earlier, this approach has been discussed academically and comparatively. To operationalise this suggestion, each state branch in Indonesia - the legislature, the administration, and the judiciary - should adopt a specific role in dealing with the problems by following up the recommendations below.

7.3.1. Recommendations for the legislature

A general recommendation, which can be offered to the legislature, is the creation of a Public Procurement Act. The current presidential regulation cannot be revised to accommodate some of the following detailed suggestions. Some suggestions embrace the issue of judicial authority. Regulating this power should be based on a Parliamentary Act to protect the principle of the independence of the judiciary. Besides the general recommendation, there are five specific recommendations, which can be provided below.

To protect the *principle of equal opportunity*, the legislature should not only include the legal substance of the obligation to protect the principle of equal opportunity, but it should also provide for the availability of a legal procedure to ensure the protection of the principle of equal opportunity. The procurement document should be reviewable. The potential or interested bidding participant who feels aggrieved must be entitled to challenge the procurement document.

The two following options can be recommended to the legislature in order to respond to violations of the *principle of equal treatment* during the administrative review process (especially during an administrative appeal). The first option is that the contracting authority should only have the power to hear the objection, but not

the administrative appeal. The appeal should be heard by an independent administrative body. The second option is that the contracting authority should hear the objection, but the appeal should be lodged directly with the courts. In my opinion, the second option is more promising. This matter will be explained in the recommendations for the judiciary. In any case, the legislature should consider enacted a statute to include the desired review mechanism. Besides this, they may also consider embracing the following matter: whenever an official has a conflict of interest, he shall be obliged to disclose this and shall be prevented from having a role in making the final decision.

The legislature should lay down the obligation for the contracting authority to adhere to the duty to provide reasons. By doing so, the *principle of transparency* can be protected. The legislature should clearly stipulate that this duty here refers to communicating the award decision by a separate notice or letter, which shall be sent to each bidding participant. The notice would enable the addressee to understand why the contracting authority has not selected him and has instead decided to select the award winner. The legislature should also lay down the debriefing procedure. Therefore, an unsuccessful bidder may request to have a fuller debrief.

The legislature should explicitly stipulate in the regulation which court has competence to deal with a procurement dispute. This can help to protect the *principle of accountability* especially on the *clarity of the legal accountability forum*. In addition, Indonesia may consider regarding the law applied in the civil courts in the Netherlands. The competence to deal with a procurement dispute is given to the civil courts; however, the civil courts may exercise the regulation and the principles stemming from public law.

To protect the *principle of accountability* concerning the *availability of remedies*, the legislators should clearly stipulate the remedy options, which are available. The promulgation should also explain in which situation the remedy will be granted and what the consequences will be. Referring to the UK PCRs, the availability of remedies that may be considered are: (i) interim relief, (ii) setting aside, (iii) damages, and (iv) a declaration of ineffectiveness.

7.3.2. Recommendations for the administration

A general recommendation that can be made to the administration is the suggestion to provide the contracting authority with guidelines. The guidelines should be able to illuminate the contracting authority so that it can exercise its discretion without violating the law. The guidelines may be based on good

practices, rulings by the judiciary, etc. Besides the general recommendation, there are five specific recommendations that are provided below.

The administration may consider issuing a guideline, which can assist in protecting the *principle of equal opportunity*. This guide may also embrace the principle of proportionality; how to balance the weight between the opening and the restricting of competition by imposing certain restrictions in the procurement document. The guideline may be based on the good practices described earlier.

The Indonesian administration may consider establishing an independent administrative review body to protect the *principle of equal treatment* during the administrative review phase. Having an independent body to review the dispute will lead to (the protection of) impartiality. The decision issued by this body should be reviewable by the courts. However, in my opinion, this option is less desirable. An appeal should be dealt with directly by the judiciary. This will be explained in the section on the judiciary.

The administration may consider issuing a manual, which contains guidance in protecting the *principle of transparency*. This guidance can further explain the general obligations which have been embodied in the law, such as the detailed mechanism to provide the notice or letter communicating the award decision. The notice shall provide comparative information concerning the unsuccessful bidder (i.e. the addressee of the letter) and the award winner. The notice shall contain the score, an explanation of how the score has been calculated, and a written description to clarify the meaning of the score and its subcomponents. The guidance should also prohibit the contracting authority from disclosing a list of all bidding participants as this may promote the possibility of bid-rigging.

The following is the recommendation concerning the *principle of accountability*, especially the *clarity of the legal accountability forum*. The independent administrative body (in this context: the competition authority (the KPPU)) should not continue to take the initiative as an oversight body for the contracting authority. The KPPU should focus on supervising the market and economic operators. The review should be dealt with directly by the judiciary. By adhering to this, the KPPU will prevent public confusion regarding the accountability forum.

The administration should compile court decisions regarding remedies. The decisions shall be analysed and used as teaching sources. The decisions may also be used as guidance for the contracting authorities and to prevent the 'dos and don'ts' in the public procurement procedure, as the infringement is reviewable by the courts.

7.3.3. Recommendations for the judiciary

Two general recommendations can be suggested for the Indonesian judiciary. Whenever the judiciary deals with a public procurement case, it should not only focus on 'applying the law concerned' (in this context: the public procurement regulations (the PR)) in a concrete case. Whenever the law is silent, the judiciary should exercise its power to 'find the law' in other related regulations, the case law and legal principles. Also, the judiciary should ensure the consistency of court decisions. This consistency will not be achieved if the public, legal scholars, and even judges are faced with difficulties in accessing court decisions. It may be true that the judiciary has shown a positive trend by uploading court decisions to publically accessible databases. However, the system needs to be improved in order to ensure that one can find a relevant case law easily. Currently, this is not the case; my experience has demonstrated that finding a relevant case for this research is like finding 'a needle in a haystack'. Besides these general recommendations, there are five specific recommendations, which are provided below.

The judiciary should play a role in protecting the *principle of equal opportunity*. The protection can be ensured, for example, by instructing the procuring entity to revise its procurement document, such as: to not burden irrelevant restrictions and to not distort competition.

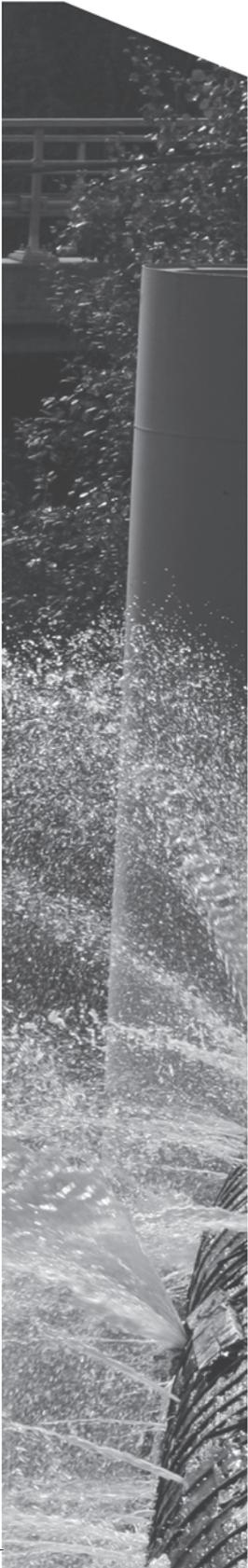
The judiciary should play a better role in protecting the *principle of equal treatment* in the review phase than the independent administrative body. For aggrieved bidders, it would be easier to seek legal redress by channelling the review phase directly towards the civil courts as these are available in all cities and regencies throughout Indonesia. In addition, it is pivotal to underline that the judiciary should exercise its power to deliver rulings in an effective manner.

The judiciary should play a role in protecting the *principle of transparency*. The protection can be ensured by, for instance, but not limited to - instructing the contracting authority to clarify or announce the award criteria, to clarify the reason for the award decision, to disclose specific documents, etc. In so doing, however, the judiciary should bear in mind that the principle of transparency is also subject to the principle of confidentiality.

To protect the *principle of accountability* especially concerning the *clarity of the legal accountability forum*, the judiciary should ensure the consistency of court decisions. A procurement dispute should be heard by the civil court. However, the court may use public law arguments in its reasoning. The Indonesian Supreme Court should no longer endorse the administrative court as a procurement dispute forum. Also, the Indonesian Supreme Court should stop supporting the KPPU as the independent administrative review body which reviews the correctness and legality

of decisions issued by the contracting authorities. The judiciary should persuade the KPPU to focus on overseeing the market and economic operators.

The judiciary should exercise its power to protect the *principle of accountability* especially concerning the granting of *remedies* to economic operators. The judiciary should ensure that the ruling can be delivered promptly. Moreover, it is essential for the judiciary to ensure that the ruling delivered by the district court is respected by the disputing parties so that they will not continue to challenge the case in the higher courts, as this would obstruct the procurement process. This can be done by ensuring that the ruling delivered by the lower court is of sufficient quality so that this ruling will not be appealed before the higher courts. This can also be done by developing some restrictions to appeal (i.e. by engaging in screening to assess whether the request to appeal has strong grounds). If this could be made consistent, parties would reconsider before submitting their case to a higher court.



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International

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Universal Declaration of Human Rights

Statute of the International Court of Justice

General Assembly Res. No. 66/228 concerning the Administration of Justice at the United Nations

General Assembly resolutions No. 55/258 concerning on the Office of the Ombudsman

General Assembly resolutions No. 56/253 concerning on appointment and terms of reference of the Ombudsman

Multinational

Treaty on European Union

Treaty on the Functioning of the European Union

Directive 2014/24/EU

Directive 2007/66/EC

Directive 89/665/EEC

European Convention on Human Rights

Council Directive 2000/43/EC of 29 June 2000 on Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin.

B

Indonesia

Constitution of the Republic of Indonesia

Law No. 30/2014 concerning on Government Administration

Law No. 12/2011 concerning on Creating Regulations

Law No. 14/2008 concerning on Public Information

Law No. 7/2006 on the Ratification of the UNCAC

Law No. 05/1999 concerning on Banning Monopolistic Practices and Unfair Business Competition.

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Indonesian Civil Code

HIR (Herzien Inlandsch Reglement); Civil Code Procedure applied in Java and Madura Islands

Rbg (Rechtreglement voor de Buitengewesten); Civil Code Procedure applied in any islands beyond Java and Madura

Government Regulation 43/1991 concerning Compensation and its Implementation in the Administrative Courts

Presidential Decree (PD) No. 80/2003

Presidential Regulation (PR) No. 55/2012

Presidential Regulation (PR) No. 04/2015

Presidential Regulation (PR) No. 32/2005

Presidential Regulations (PR) No. 54/2010

Presidential Regulations (PR) No. 70/2012

Supreme Court Regulation No. 3/2005

Decision of the Head of the Supreme Court Chief No. 214/KMA/SK/XII/2014

The Netherlands

The Constitution of the Kingdom of the Netherlands

Dutch Civil Code

General Administrative Law Act (GALA)

Aanbestedingsreglement Werken 2012 (ARW)

The Dutch Public Procurement Act (DPPA)

The Act Concerning Public Access to Government Information 1991

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The UK

Civil Procedural Rules (CPRs)

Public Contracts Regulations (PCRs)

Courts decisions, decisions issued by independent administrative bodies

Indonesia

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Supreme Court Decision No.55 K/Pdt.Sus-KPPU/2014

Supreme Court Decision No. 542 K/TUN/2013

Supreme Court Decision No. 3102 K/PDT/2012

Supreme Court Decision No. 390 K/PDT.SUS/2012

Supreme Court Decision No. 247 K/Pdt.Sus/2012

Supreme Court Decision No. 796 K/Pdt.Sus/2010

Appeal Court Decision No 22/Pid.B/TPK/2011/PT.DKI

Appeal Court Decision No. 36/PID/TPK/2013/PT.DKI

Administrative Court Decision No. 111 K/TUN/2008

Administrative Court Decision No. 15/G.PLW/2011/PTUN-BKL

District Court Decision 48/PID.SUS/TPK/2013/PN.Jkt.Pst

District Court Decision No. 12/Pdt.G/2012/PN.SPG

Decisions issued by the KPPU

Decision No. 03/KPPU-L/2012

Decision No. 24/KPPU-L/2007

Decision No. 03/KPPU-L/2011

The Netherlands

ECLI: NL: HR: 2016: 503

ECLI:NL:HR:2014:1078

ECLI: NL: RVS: 2016: 1421

ECLI:NL:RBROT:2016:1205

ECLI:NL:RBNHO:2015:3801

ECLI: NL: RBAMS: 2014: 2540

ECLI: NL: RBDHA: 2013 :18433

ECLI: NL: RBSGR: 2012: BW9894

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ACM Decision, "Boete rekenvergoeding Boko, Consolidated, Erdo, Strijland en Swindak aanbesteding AMC", available at: <https://www.acm.nl/nl/publicaties/publicatie/1133/AMC/>, last visited 17 March 2015

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Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1

Blackpool and Fylde Aero Club Ltd. v Blackpool Borough Council [1990] EWCA Civ 13

British Telecommunications v Common Service Agency [2014] CSOH 44

Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9

Edenred (UK Group) Ltd v Her Majesty's Treasury & Ors (Rev 1) [2015] EWCA Civ 326

Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons [1999] EWHC Technology 199

Letting International Ltd v London Borough of Newham [2008] EWHC 1583 (QB)
 Lightways (Contractors) Ltd v Inverclyde Council [2015] ScotCS CSOH 169

R v Minister of Agriculture and Fisheries ex p. Padfield [1968] UKHL 1

R (on the application of All About Rights Law Practice) v Legal Services Commission - [2011] EWHC 964

Case in the ECJ

Case T 57/09 (Alfastar Benelux SA v. Council of the European Union)

C-450/06 (Varec SA ('Varec') and the Belgian State)

Case T 183/00 (Strabag Benelux case)

Case C-513/99 (Concordia Bus Finland case)

Case C-81/98 (Alcatel Austria AG and Others v Bundesministerium für Wissenschaft und Verkehr)

Case C 243/89 (Storebaelt case)

Interviews:

Indonesia *)

Interview with a representative of an independent administrative body which is located in Jakarta; however, I met this officer in the Netherlands on 30 May 2013 and 24 April 2016

Interview with a representative from the Ministry of the National Development Plan, 12 October 2015 and 21 September 2015 (by phone and electronic means)

Interview with a representative from a company supplying health equipment which is located in Sumatera Island; however, I met this informant in the Netherlands on 12 October 2015

Interview with a representative from the Ministry of Religious Affairs, 16-18 September 2015 (by electronic means)

Interview with a representative officer from the procurement service unit of a 'central' government institution situated in East Java Province, 18 September and 20 December 2013

Interview with a legal scholar in East Java Province, East Java, 15 April 2013

Interviews with three officers from the procurement service unit of a 'local' government in East Java province, 15 April 2013

Interview with an aggrieved bidder, Yogyakarta, 13 April 2013

Interview conducted with Mr. AK, ex commitment officials at a procuring entity located in East Java province, conducted by electronic means on 22 October 2016

*) to protect my informants, their names are not published. Also, I do not explicitly explain the city of the meetings which were conducted. However, I may disclose their information after obtaining their approval

The Netherlands

Interview with Professor Chris Janssen, vice chairman of the Committee of Tendering Experts and a Professor of Public Procurement Law at VU Amsterdam, Amsterdam, 15 April 2015

Interview with Mr. Henk Wijnen a representative from the PIANOO (Dutch Public Procurement Expertise Centre), The Hague, 30 April 2015

The UK

Interview with Mr. Andrew Shorter, Head of Category Management - Housing & Construction, Westminster City Council, London, on 15 and 19 November 2015

Interview with Dr. Albert Sanchez-Graells, Bristol Law School, 30 October 2015

Interview with Professor Anne Davies, Oxford Law School, 15 October 2015

Interview with Professor Martin Trybus, Birmingham Law School, 4 November 2015

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BBC, "EU Referendum", available at: <http://www.bbc.com/news/live/uk-politics-36570120>, last visited 24 June 2016

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Others: sources of procurement evaluation report

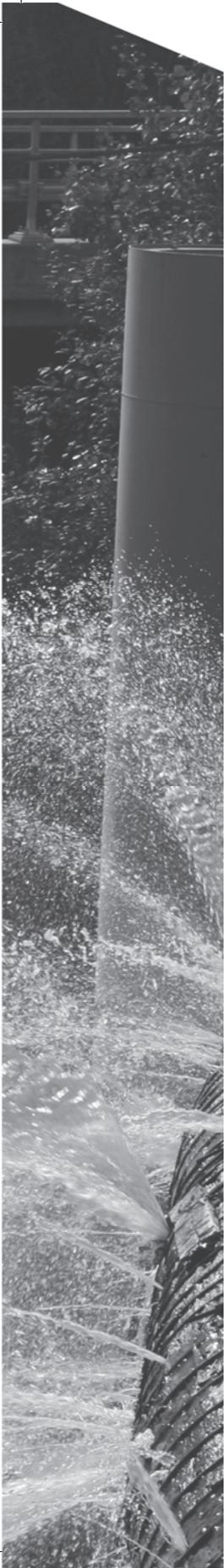
Available from:

<http://lpse.kkp.go.id/eproc/publicberitadetail.filedownload:download/313434373237383231383b33?t:ac=3251218>, last visited 22 September 2015.

Available from:

<http://lpse.riau.go.id/eproc/publicberitadetail/3459039;jsessionid=E26F7E295A0CDCDA823266DC99FC20E0>, last visited 22 September 2015

Procurement Evaluation Report No. 116/ULP/Pokja/III/2015. Available at: <http://www.lpse.depkes.go.id/eproc/publicberitadetail.filedownload:download/313830323935353034373b31?t:ac=5624047>, last visited 16 Sept 2015



Appendix

- A. The following is a scan of a procurement document contained over restrictive requirements. Although it was a tender to construct a general building, the contracting authority asked various specialise qualifications to economic operators who wished to participate on the tender. The translation of the document is also accompanied below.

| Informasi Lelang | | | |
|----------------------------|---|--------------------|---|
| Kode Lelang | 17438014 | | |
| Nama Lelang (Lelang Ulang) | Pembangunan Mesjid Agung Kabupaten Bandung Barat Tahap I | | |
| Keterangan | Pengumuman Pascakualifikasi Download Dokumen Pengadaan | | |
| Tahap Lelang Saat ini | Agency Kabupaten Bandung Barat | | |
| Agency | Dinas Cipta Karya dan Tata Ruang Kabupaten Bandung Barat | | |
| Satuan Kerja | Pekerjaan Konstruksi | | |
| Kategori | e-Lelang Umum | Metode Kualifikasi | Pasca Kualifikasi |
| Metode Pengadaan | Satu File | Metode Evaluasi | Sistem Gugur |
| Metode Dokumen | | | |
| Anggaran | | | |
| Nilai Pagu Paket | Rp 7.334.000.000,00 | Nilai HPS Paket | Rp 7.333.686.000,00 |
| Jenis Kontrak | Cara Pembayaran | | Harga Satuan |
| | Pembebanan Tahun Anggaran | | Tahun Tunggal |
| | Sumber Pendanaan | | Pengadaan Tunggal |
| Kualifikasi Usaha | Perusahaan Non Kecil | | |
| Lokasi Pekerjaan | Kecamatan Ngamprah Kabupaten Bandung Barat | | |
| | * Ijin Usaha | | |
| | Ijin Usaha | Klasifikasi | |
| | IUJK | null | |
| | SBU | | Sertifikat Badan Usaha (SBU) yang masih berlaku, dikeluarkan oleh Lembaga Pengembangan Jasa Konstruksi (LPJK) dengan klasifikasi : 1) Bidang Arsitektural; a. Bangunan-bangunan Non Perumahan Lainnya (21005) 2) Bidang Sipil; a. Pekerjaan Pemancangan (22201) b. Pekerjaan Pelaksanaan Pondasi (22202) c. Pekerjaan Kerangka Konstruksi Atap (22203) d. Pekerjaan Pembetonan (22205) e. Pekerjaan Konstruksi Baja (22206) f. Pekerjaan Pemasangan Perancah Pembetonan (22207) |

2,5 M → mlc
 zang / Pemasangan
 mpa subkandang
 i.a. m. s. u.

Prd.

| | | | |
|---------------------------|--|--|--------------------|
| Procurement information | | | |
| Procurement code | 17438014 | | |
| Subject of procurement | Building the Great Mosque of West Bandung Regency phase 1 | | |
| Explanation | | | |
| Current procurement phase | Announcement for post-qualification Download procurement document | | |
| Agency | Agency of West Bandung Regency | | |
| Working unit | Infrastructure and spatial office, West Bandung Regency | | |
| Category | Construction works | | |
| Procurement method | e-general procurement | qualification method | post qualification |
| Document method | one file | evaluation method | knock-out |
| Budget | | | |
| The maximum budget | Rp. 7.334.000.000 | owner estimate value | Rp. 7.333.686.000 |
| Type of contract | Mechanism to pay | | Unit price |
| | Amount of state fiscal year | | Single |
| | Source of budget | | Single procurement |
| Qualification work | Non small enterprises | | |
| Location of work | Sub district Ngamprah, West Bandung Regency | | |
| | *) business license | | |
| | business license | qualification | |
| | working construction license | null | |
| | SBU (Certificate of business entity) | a valid SBU issued by LPJK (institution for working construction development), based on classification: 1) Architectural design; a. to build non other types of housing (21105); 2) Construction scope; a. stake work foundation (22201); b. ground foundation work (22202); c. frame of roof construction work (22203); d. concreting work (22204); e. steeling work (22205); f. steel construction work (22206); installation of scaffolding for steeling work (22206) | |

- B. Three examples of procurement evaluation report from different contracting authorities in Indonesia. This research utilises the report instead of the award notice as the report contained more detail information than the notice. Each report only provides numerical information and its percentage. It does not supply wording information about the meaning of the numbers and percentage (and why the contracting authority gives that number to the bidding participants). Consequently, the document is not self-explanatory in providing information why the winner gets the contract and why others lose. The English translation is provided below each decision.

1. The following is a part of a procurement evaluation report to select a consultant company to construct a national brain hospital.⁸⁵² This procurement was conducted by the Ministry of Health in 2015.

⁸⁵² Available from: <http://www.lpse.depkes.go.id/eproc/publicberitadetail.filedownload:download/313830323935353034373b317?ac=5624047>, last visited 16 Sept 2015

| No. | Nama Perusahaan | Nilai Teknis | Nilai Harga | BOBOT | | Bobot Akhir | Peringkat |
|-----|------------------|--------------|-------------|------------|-----------|-------------|-----------|
| | | | | Teknis 80% | Harga 20% | | |
| 1 | PT. GRIKSA CIPTA | 73.009 | 89 | 58.4 | 17.8 | 76.21 | V |
| 2 | PT. ARKONIN | 84.551 | 98 | 67.6 | 19.6 | 87.24 | I |
| 3 | PT. ARTEFAK | 77.660 | 96 | 62.1 | 19.2 | 81.33 | IV |
| 4 | PT.INDAH KARYA | 81.150 | 100 | 64.9 | 20.0 | 84.92 | II |
| 5 | PT.PANDU PERSADA | 80.100 | 98 | 64.1 | 19.6 | 83.68 | III |

English translation:

| No | Company | Technical mark | Price mark | Technical value 80% | Price value 20% | Final mark | Ranking |
|----|-----------------|----------------|------------|---------------------|-----------------|------------|---------|
| 1 | PT GRIKSA CIPTA | 73.009 | 89 | 58.4 | 17.8 | 76.21 | V |
| 2 | PT ARKONIN | 84.551 | 98 | 67.6 | 19.6 | 87.24 | I |
| 3 | PT ARTEFAK | 77.660 | 96 | 62.1 | 19.2 | 81.33 | IV |
| 4 | PT INDAH KARYA | 81.150 | 100 | 64.9 | 20.0 | 84.92 | II |
| 5 | PT PANDU PERSA | 80.100 | 98 | 64.1 | 19.6 | 83.68 | III |

- The following is a part of a procurement evaluation report to select a consultant company to provide suggestion to increase the economy of the villagers in the rural area.⁸⁵³ This procurement was conducted by a local government of Riau Province in 2013.

⁸⁵³

Available

from:

<http://lpse.riau.go.id/eproc/publicberitadetail/3459039;jsessionid=E26F7E295A0CDCDA823266DC99FC20E0>, last visited 22 September 2015

| No | Nama Perusahaan | Nilai Akhir (NUTxBT)+(NUBxBB) | Peringkat nilai akhir |
|----|---------------------------------|---|--------------------------|
| 1 | PT. KREASI POLA UTAMA | $(91.53 \times 80\%) + (93.62 \times 20\%)$ $73.22 + 18.72 = \mathbf{91.95}$ | I |
| 2 | PT. AULIA SAKTI INTERNASIONAL | $(86.92 \times 80\%) + (94.66 \times 20\%)$ $69.54 + 18.93 = \mathbf{88.47}$ | II |
| 3 | PT. AZEVEDOPRATAMA CONSULTAN | $(84.31 \times 80\%) + (96.04 \times 20\%)$ $67.45 + 19.21 = \mathbf{86.66}$ | III |
| 4 | PT. SHIDDIQ SARANA MULYA | $(83.04 \times 80\%) + (100 \times 20\%)$ $66.43 + 20.00 = \mathbf{86.43}$ | IV |

English translation:

| No | Company | Final mark: (Technical mark x 80 %) + (Price mark x 20%) | Ranking |
|----|---------------------------------|---|---------|
| 1 | PT KREASI POLA UTAMA | $(91.53 \times 80\%) + (93.62 \times 20\%) = 73.22 +$ $18.72 = \mathbf{91.95}$ | I |
| 2 | PT AULIA SAKTI INTERNASIONAL | $(86.92 \times 80\%) + (94.66 \times 20\%) = 69.54$ $+18.93 = \mathbf{88.47}$ | II |
| 3 | PT AZEVEDOPRA CONSULTANT | $(84.31 \times 80\%) + (96.04 \times 20\%) = 67.45$ $+19.21 = \mathbf{86.66}$ | III |
| 4 | PT SHIDDIQ SARANA MULYA | $(83.04 \times 80\%) + (100 \times 20\%) = 66.43 + 20.00$ $= \mathbf{86.43}$ | IV |

3. The following is a part of a procurement evaluation report to select a consultant to conduct a feasibility study, business plan, and detail engineering design for tourism in Padaido Islands.⁸⁵⁴ This procurement was carried out by a directorate general under the Ministry of Sea and Fishery Affairs in 2015.

⁸⁵⁴

Available

from:

<http://lpse.kkp.go.id/eproc/publicberitadetail.filedownload:download/313434373237383231383b33?t:ac=3251218>, last visited 31 December 2016. The last example is different with the previous two examples. The last example provides information on the comparative price submitted by the bidders. It may help each bidder to evaluate their score. Nevertheless, similar to the previous examples, the bidders may not be able to validate their score related to the technical document; the numerical information is not self explanatory.

| NO | PERUSAHAAN | DOKUMEN TEKNIS | | | DOKUMEN BIAYA | | | | SCORE AKHIR |
|-----|------------------------------------|----------------|------------------------|-------|----------------|-------------------------|-----------------------|-------|-------------|
| | | NILAI | NILAI BOBOT TEKNIS (%) | SCORE | PENAWARAN (Rp) | PENAWARAN TERENDAH (Rp) | NILAI BOBOT BIAYA (%) | SCORE | |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) | (i) | |
| 1 | PT. Transima Citra Indo Consultant | 70.24 | 80 | 56.19 | 1,594,993,000 | 1,594,993,000 | 20 | 20.00 | 76.19 |
| 2 | PT. Padmaduta Cipta | 70.11 | 80 | 56.09 | 1,608,550,000 | 1,594,993,000 | 20 | 19.83 | 75.92 |
| 3 | PT. Aulia Sakti Internasional | 70.04 | 80 | 56.03 | 1,660,515,000 | 1,594,993,000 | 20 | 19.21 | 75.24 |

English translation:

| No | Company | Technical document | | | Price document | | | | Final score |
|----|----------------|--------------------|----|-------|----------------|---------------|----|-------|-------------|
| | | Mark | % | Score | Price offer | Lowest offer | % | Score | |
| 1 | PT Transima | 70.24 | 80 | 56.19 | 1,594,993,000 | 1,594,993,000 | 20 | 20.00 | 76.19 |
| 2 | PT Padmaduta | 70.11 | 80 | 56.09 | 1,608,550,000 | 1,594,993,000 | 20 | 19.83 | 75.92 |
| 3 | PT Aulia Sakti | 70.04 | 80 | 56.03 | 1,660,515,000 | 1,594,993,000 | 20 | 19.21 | 75.24 |

- C. The following are two examples of award notice from a contracting authority in the UK (Westminster City Council). The procurement was carried out in 2014. These notices provide numerical information and its percentage, wording information about the meaning of the numbers and percentage (why the contracting authority gives that number to the bidding participants). Also, it provides comparative data between the bidder who receives the letter and the award winner. Therefore, these notices are understandable. Referring to the regulation and the cases, award notices in the Netherlands also employ the similar structure; the notices shall be self-explanatory.

1. The first example

Annex A ITT Evaluation Results

Headline scores:

| Tier 1 Criteria | Score for XXXXX | Score for successful tenderer |
|-----------------------------------|-----------------|-------------------------------|
| Price (60%) | 41.48% | 52.05% |
| Quality (40%) | 24.00% | 30.80% |
| Total overall score (100%) | 65.48% | 82.85 % |

| Quality (40%) | XXXXXX Score 0 – 5 (Bravo Score 0-100) | XXXXX Score 0 -5 | Reasons why you were unsuccessful and the characteristics and relative advantages of the successful tender in cases where you scored less than XXXXXX |
|--|--|---------------------|---|
| Method statement 1 Supporting the Council's customer strategy (10%) | 4 (80) | 3 (60) | <p>Your bid: Your response addressed the required elements but had some minor concerns. There were good suggestions of how you would encourage first call resolution through working in partnership with the Council. But there were no details of how XXXXXX would support WCC to empower customers and maximise channel shift to digital services. Also, continuous improvement lacked specific reference to Westminster and there was little demonstration of how XXXXXX would achieve WCC's requirements.</p> <p>Characteristics and relative advantages of the successful tender: The winning bid addressed all the required elements and there were no concerns. The proposal provided confidence that delivery of the outcomes will be to a good standard. There was a good understanding of the relevance of the Customer Strategy Function (CSF), and how they would work with and enhance this function. A good response to encouraging first contact resolution using training, MI, failure demand and staff insights. A good response to social media requirements. There was clear evidence of encouraging channel</p> |

| | | | |
|--|---------------|---------------|---|
| | | | shift and supporting customers to do so. There was reference to specific tools that would support this. |
| Method Statement 2 Relationship Management (10%) | 4 (80) | 4 (80) | Your response to this statement scored the same as the winning bidder. |
| Method Statement 3 People Requirement (15%) | 4 (80) | 3 (60) | <p>Your bid: Your response addressed the required elements but there were some minor concerns. There was a lack of substantive evidence and tailoring of response to WCC. The commitment to Equality and Diversity was not compelling. Although Diversity Champions were mentioned, the overall impression was one of meeting statutory requirements rather than a deeper corporate commitment.</p> <p>Characteristics and relative advantages of the successful tender: The winning bid responded clearly and addressed all the required elements and there were no concerns. Good evidence supporting staff recruitment and ratios of staff retained after interview. Induction specifically relating to WCC. Training cycle provided good evidence and how it incorporated train the trainer needs. Trainers programme will be engaged with Westminster and ensures that all business processes, service knowledge is understood, captured and accurate.</p> |
| Method Statement 4 IT Provision (5%) | 3 (60) | 2 (40) | <p>Your bid: Your response did not address all of the elements and there were concerns. There was some detail regarding connectivity to Westminster systems but little thought as to how systems will be accessed. Concerns that XXXXXX had also stated that should the Council desire an external audit by a QSA this would be possible upon service commencement but this could be at a cost to the Council.</p> <p>Characteristics and relative advantages of the successful tender: The winning bid addressed the required elements but had some minor concerns. Appropriate detail regarding both connectivity to Westminster</p> |

| | | | |
|---|------------|-----------|--|
| | | | systems and thought as to how systems will be accessed including licensing requirement. The bid was compliant with the requirements set out in the ITT and provided appropriate evidence that once the final system had been built, it was capable of operational use. |
| Method Statement 5 Resource Planning (5%) | 4 (80) | 3 (60) | Your bid: Your response addressed the required elements but there were some minor concerns around multi-channel scheduling, which appeared to be manual. The proposal does provide confidence that delivery of the outcomes will be to a satisfactory standard Characteristics and relative advantages of the successful tender: The winning bid clearly addressed all the required elements of the question and there were no concerns. Good evidence of ability to adapt to changes in resource requirement quickly and efficiently. The proposal provided confidence in their ability to provide the outcomes to a good standard. |
| Method Statement 6 Transition (15%) | 3 (60) | 2 (40) | Your bid: Your response did not address all of the elements and there were concerns. Key concerns include the approach that dual running will not be necessary and that the transition plan states that second phase will be in November. Poor description of governance and project team structure with minimal roles identified. Characteristics and relative advantages of the successful tender: The winning bid addressed the required elements but had some minor concerns. Full and detailed transition plan provided. Strong commitment to stakeholder analysis and engagement. Sound approach to knowledge transfer. |
| Method Statement 7 Management Information (10%) | 4 (80) | 3 (60) | Your bid: Your response addressed the required elements but there were some minor concerns. Information and evidence provided was lacking in substance. Lack of creativity and innovation and modern reporting tools that could be tailored to WCC. Satisfactory response on the availability of real-time and historic transactional data but no mention how real-time information will be presented and be made available. Characteristics and relative advantages of the successful tender: |
| | | | The winning bid clearly addressed all the required elements of the question and there were no concerns. Good range of data available for performance reporting. Good proposal for customer satisfaction and reference to improvement plans where required. |
| Method Statement 8 Quality Framework (5%) | 5 (100) | 3 (60) | Your bid: Your response addressed the required elements but had some minor concerns. Response weak on specific details of quality framework, agent performance quality, process adherence and customer satisfaction - focused on contact quality monitoring. Characteristics and relative advantages of the successful tender: The winning bid addressed and exceeded all the required elements. Quality Framework focused on CCA Global Standard 5. Also have ISO9001:2008 and include a commitment to achieve CCA standard for WCC contract within first year following transition. Compliance audits carried out annually by independent external assessors. Contract quality monitoring will align with Westminster standards/values. Excellent process for capturing staff feedback and encouraging creative thinking. |
| Method Statement 9 Ongoing Operational Delivery (15%) | 4 (80) | 3 (60) | Your bid: Your response addressed the required elements but had some minor concerns around level of detail on how service rewards would work. Lack of clarity on how technology will be embedded and limited information on business process improvement. Critical success factors listed but not related/tailored or explained in the context of WCC's needs. Characteristics and relative advantages of the successful tender : The winning bid addressed all the required elements and there were no concerns. Evidence of high performing culture, staff development and positive working environment. Evidence of good processes in place and very detailed response in how effective service delivery would be achieved. Good understanding of direction of Council services and good mix of factors with reference to important areas such as partnership working and reference to self service. |

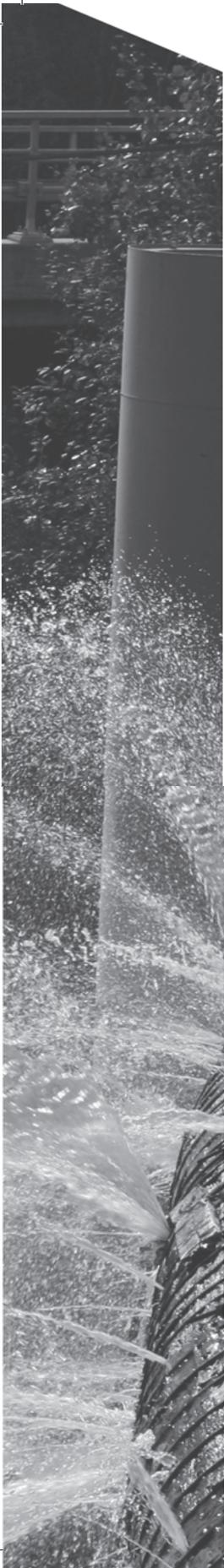
2. The second example

Headline scores:

| Tier 1 Criteria | Score for XXXXXX | Score for successful tenderer |
|-----------------------------------|------------------|-------------------------------|
| Price (60%) | 55.10% | 52.05% |
| Quality (40%) | 27.20% | 30.80% |
| Total overall score (100%) | 82.30% | 82.85 % |

| Quality (40%) | XXXXX Score 0 – 5 (Bravo Score 0-100) | XXXXX Score 0 -5 | Reasons why you were unsuccessful and the characteristics and relative advantages of the successful tender in cases where you scored less than XXXXXXX |
|--|---|---------------------|--|
| Method statement 1 Supporting the Council's customer strategy (10%) | 4 (80) | 3 (60) | <i>Your bid:</i> Your response addressed the required elements but we had some minor concerns. There were adequate details provided on social media. However, you did not provide clear details on how you would enhance our strategy and vision. There was a proactive approach to channel shift including a list of issues that might impact a channel shift strategy but a lack of detail on how this would be achieved. <i>Characteristics and relative advantages of the successful tender:</i> The winning bid addressed all the required elements and there were no concerns. Their proposal provided confidence that delivery of the outcomes will be to a good standard. There was a good understanding of the relevance of the Customer Strategy Function (CSF), and how they would work with and enhance this function. The bidder gave a good response to encouraging first contact resolution using training, MI, failure demand and staff insights. A good response to social media requirements. There was clear evidence of encouraging channel shift and supporting customers to do so. There was reference to specific tools that would support this. |

| | | | |
|--|---------------|----------------|--|
| Method Statement 2 Relationship Management (10%) | 4 (80) | 2 (40) | <i>Your bid:</i> Your response did not address all of the elements of the question and there were concerns. There was little information given on gain share mechanism. The response set out how you will work with the Customer Strategy Function (CSF) but lacks detail with only a few practical examples. Structure did not show Board level representation. Levels of seniority a concern. Governance structure weak in CIP. Very linear and does not seem to allow for rapid change through innovation. There was insufficient evidence illustrating how your theories had been applied in real life scenarios. The statements given lacked substance. <i>Characteristics and relative advantages of the successful tender:</i> The winning bid clearly addressed all the required elements of the question and there were no concerns. The bid included good evidence in all areas including a relationship charter that will be developed and tailored to the City Council way of working. The bidder had provided good detail of structures on transition. |
| Method Statement 3 People Requirement (15%) | 4 (80) | 4 (80) | Your response to this method statement scored the same as the winning bidders. |
| Method Statement 4 IT Provision (5%) | 3 (60) | 3 (60) | Your response to this method statement scored the same as the winning bidders. |
| Method Statement 5 Resource Planning (5%) | 4 (80) | 4 (80) | Your response to this method statement scored the same as the winning bidders. |
| Method Statement 6 Transition (15%) | 3 (60) | 3 (60) | Your response to this method statement scored the same as the winning bidders. |
| Method Statement 7 Management Information (10%) | 4 (80) | 5 (100) | Your response to this method statement scored higher than the winning bid. |



Summary

Samenvatting

Summary

The Indonesian Government has attempted to reform its public procurement system, and the results are positive. Nonetheless, some problems remain and public procurement is still perceived as corrupt. It has been detected that five fundamental problems commonly occur in the pre-contractual phase of the public procurement procedure. Firstly, the procurement document may be prepared in a way that favours certain bidders, but it is questionable whether legal procedure to review the procurement document is available. Secondly, corruption may occur within procuring entities which may, in turn, lead to distrust towards the entities regarding its impartiality in relation to the handling of the administrative appeal. Thirdly, the reasons for awarding the contract may not be transparent. Fourthly, the procedures for seeking redress are erratic. Finally, the availability of remedies is uncertain. Although the last two problems concern access to the court, these are still classified as problems related to the pre-contractual phase, as the contract may only be concluded when the award decision is not revoked by a court.

Arguably, the abovementioned problems are related to administrative law, i.e. the law concerning relations between the administration ('contracting authorities') and private individuals (bidding participants, including the potential bidders). It also concerns the right of an individual to access the court with regard to the decision-making process.

This research intends to answer the following question: how should the Indonesian Government deal with these fundamental problems? Derived from this research question, two sub-research questions have been used as guidelines: (i) what is the appropriate approach to address the fundamental problems? and (ii) how do the other selected countries deal with these fundamental problems?

To answer the question, this research utilises the good public procurement (GPP) approach in order to shed light on the regulations and implementations of public procurement. Moreover, a comparison with selected countries is also conducted to analyse how two countries from different legal systems - the Netherlands and the UK - cope with the five problems mentioned above.

The good public procurement approach is explained in Chapter 2. The Chapter commences providing an explanation of the concept of good governance (GG), and how this has been practised in Eastern and Western civilizations far before the term GG was first coined by the World Bank in the early 1990s. Thereafter, the concept of GG is presented as provided for by leading international organisations.

It is known that GG contains various components; three of the most important are equality, transparency, and accountability; the components have been discussed and practised for a long time both civilizations.

The Chapter moves further from the 'concept' of GG to the 'principle' of GG. The nature of discussion on the concept is interdisciplinary while the discussion on the principle focuses more on legal aspects. The principle of GG can be meant as the norms for the government and the rights of the citizens. Similar to the concept of GG, as an 'umbrella term', the principle of GG comprises various principles, including the principles of equality, transparency, and accountability. This research focuses on these three (Section 2.3.2), due to (i) their long and central position in the history; (ii) the relevancy to elucidate the problems (Section 2.1.1 and 2.2.2); (iii) conceptual argument that these three concepts underpin three cornerstones of the modern State, namely the rule of law, democracy, and good governance, respectively (Section 2.2.1).

Focus then shifts to embrace the discussion of the concept of public procurement. After assessing a number of public procurement laws in international, multinational and national contexts, it is found that public procurement law has legal principles which are similar to three principles under the principle of good governance. Therefore, the principles in public procurement can be called as the principles of GPP.

The three principles of GG can be elucidated as the five principles of GPP. The *principle of equal opportunity* instructs the contracting authority to set reasonable, proportional, justified requirements which shall not distort the competition. In addition, the bidders are entitled to equal protection whenever the authorities infringe the principle. The *principle of equal treatment* requires the contracting authorities to treat and evaluate the bidding proposals equally. The contracting authority shall also impartially review the objection and/or the administrative appeal lodged by the aggrieved bidders.

The *principle of transparency* urges the contracting authority to provide simple and accessible language of the award notice. The notice should not only contain the numerical information, but also be accompanied by the wording explanation. If the notice is sent to a losing bidder, it should provide comparative information on the evaluation of the award winner. The debriefing shall also be provided.

The principle of *accountability concerning the clarity of legal accountability forum* highlights the necessity of the aggrieved bidders (including the legal enforcers themselves) to know which court has the competence to deal with a public procurement case. The principle of *accountability concerning the availability*

of effective remedies stresses that the court must have remedies, which are appropriate to address the violations, and that the ruling shall be delivered promptly.

Chapter 3 describes violations of the five good public procurement principles in Indonesia. The principle of equal opportunity is infringed not only because the procurement document may be prepared in a way that favours certain bidders, but also because the interested bidders who feel aggrieved do not have legal standing to challenge the matter (Section 3.2). The principle of equal treatment is violated whenever the head of a contracting authority instructed the procurement committee to favour a certain bidding participant and obtain private gain in return. It may be true that the aggrieved bidder is able to lodge an objection to the committee and an appeal to the head of the procuring entity; however, the above situation may have created distrust regarding the objectivity of the procuring entity on handling the administrative review (Section 3.3).

It is questionable whether the bidding participants are able to understand the reasons as to why the procurement committee has awarded the contract to a certain bidder (Section 3.4). This is due to the fact that the committee does not always comply with the minimum information that has to be published. However, when it does comply, it remains doubtful whether the bidders can understand the reasons. The regulations do not require the procuring entity to explain how the sub-components of the score have been constructed nor provide for a description for each given score. Furthermore, it does not provide a mechanism for debriefing. Therefore, the principle of transparency is infringed.

The Indonesian judiciary is not in agreement as to which forum should have jurisdiction to deal with a procurement review outside the procuring entity. Sometimes, the Indonesian Supreme Court is of the opinion that the case must be dealt with by the civil courts (at ordinary private chamber), while at other times it is of the opinion that it should be dealt with by the administrative courts. On other occasions, the Indonesian Supreme Court has been satisfied with the KPPU (Komisi Pengawas Persaingan Usaha (Business Competition and Supervisory Commission)) dealing with a procurement review at first instance in which the KPPU decision is reviewable by the civil courts under its special private chamber. The inconsistency of the court decisions may also be caused by the silence of the procurement regulations and the lack of clarity in the general regulations. The condition amounts to a violation of the principle of accountability regarding the clarity of legal accountability forum (Section 3.5).

It is questionable whether the Indonesian judiciary can provide effective remedies when disputes occur. Effective remedies in this context refer to: (i) a

suspension mechanism, (ii) an effective procedure to obtain a ruling on the dispute, and (iii) damages. This problem is underpinned by the silence of both the procurement and general regulations. It is uncertain whether the Civil Procedure Code recognises the first and second type of remedies. However, the Civil Code acknowledges the third type of remedies. The Administrative Court Act does recognise all three types of remedies. However, as explained in the previous paragraph, it is unclear which court has competence to deal with such disputes. Hence, the principle of accountability concerning effective remedies is violated.

The first three problems in Indonesian public procurement also occur in the Netherlands. However, the problems are far less evident than in Indonesia (Chapter 4). The last two problems do not occur. Public law, such as the GALA, influences the substantive component related to the legal obligation that should be adhered by the contracting authorities. Private law, such as Civil Code and Civil Procedure Code, is applied as the procedural law used to review the decision made in public procurement.

The Dutch contracting authority shall comply with the principle of equal opportunity and the principle of proportionality in preparing the procurement document. According to the proportionality, the requirements shall not be disproportionate by amounting to unnecessary burden that can distort competition. Whenever it is infringed, an interested bidding participant who feels aggrieved has the possibility to review the procurement document (to seek 'interim relief'). Therefore, the principle of equal opportunity is protected because the legal substance and the legal procedure are available to ensure its protection (Section 4.2).

The principle of equal treatment is protected in the administrative review procedure (Section 4.3). It is perceived that the contracting authority in the Netherlands has assessed the objection impartially. If the bidding party still feels aggrieved, they may seek non-binding advice from the influential Committee of Tendering Experts. As the advice is provided by a body outside of the contracting authority, it is considered more objective and impartial. Accordingly, the principle of equal treatment is more protected in the Netherlands.

The Dutch Public Procurement Act 2012 (the DPPA) dictates that public bodies must provide sufficient information in order to enable the bidders to evaluate their positions and decide whether to seek legal remedies. This occurs by sending the decision letter to each bidding participant. The letter provides not only the weighted score for each component, but also the reasons for the score awarded. If the letter is intended for the losing bidder, it must provide a comparative description of why the winner obtained higher marks in certain components than the losing bidder. Furthermore, the DPPA also grants an opportunity for bidders to

make use of the so-called debriefing; a procedure to seek clarification for the evaluation of the bidding proposal made by the requester. Therefore, the principle of transparency in this matter is protected in the Netherlands (Section 4.4).

The DPPA is silent with regard to clarification as to which legal accountability forum shall be competent if a dispute occurs. However, the GALA implicitly explains that the Civil Courts shall review a procurement dispute. This is supported in academic literature and case law, and there would appear to be no confusion in practice regarding the court's competence; therefore, the principle of accountability concerning the clarity of the accountability forum is not violated (Section 4.5).

The public procurement system in the Netherlands provides two types of remedies: interim relief and the award of damages (Section 4.6). The availability of these remedies is not explained by the DPPA, but instead by the EU Directive 2007/66/EC, and is included in the Dutch Civil Code and Dutch Code of Civil Procedure. The Directive provides a legal basis for making use of interim relief; the procurement process can be suspended and the decision set aside. The Directive suitably matches with the stipulation in the Dutch Civil Code. Therefore, the Dutch Civil Code can be used as a legal basis to provide relief. The Dutch Code of Civil Procedure recognises a summary procedure ('quick procedure') and with this the aggrieved bidders may obtain prompt relief. Interestingly, although the decision in the summary proceedings can be challenged, the parties show great respect by generally accepting the decision. These practices support the effectiveness of delivering the dispute result. The DPPA is also silent on damages, but the Dutch Civil Code can be used as a legal basis. As aggrieved bidders have access to legal mechanisms to effectively correct (and may even obtain compensation) due to the administration's mistake, it can be concluded that the principle of accountability in terms of the availability of remedies is protected in the Netherlands.

The first three problems in Indonesian public procurement also occur in the UK, but these are far less distinct than in Indonesia. In addition, the two last problems do not occur in the UK (chapter 5).

The Public Contract Regulations 2015 (PCRs) have prohibited the contracting authority from distorting the competition via an unjustifiable set of requirements in the procurement document. By referring to the EU Directives and the PCRs, whenever the prohibition occurs, the interested bidders who feel aggrieved have a right to seek interim relief to challenge the procurement document. Due to the availability of the legal substance to adhere to the principle of equal opportunity (Article 18 and 42 of the PCRs) and the legal procedure to correct the violation (Article 95 and 96 of the PCRs), this principle of equal opportunity is protected in the UK (Section 5.2).

The UK does not recognise an administrative review within the contracting authority. However, it recognises consultation that may be regarded as debriefing. Furthermore, the UK does not have an independent administrative body to review a public procurement dispute. The PCRs determine that a review is only available via the Courts. Seemingly, the bidders still trust the authority. The situation leads to the conclusion that the principle of equal treatment is protected, but due to access to the protection only being provided by the judiciary while litigation costs are expensive, it is uncertain whether this principle has been protected optimally.

The PCRs and case law have shown that the contracting authority shall provide sufficient information relating to the award decision. Each losing bidder shall receive a letter explaining the score and description of the relative weight in each component as to why he has been unsuccessful and why the winner has been awarded the contract. Therefore, he can evaluate the objectivity of the decision made by the contracting authority. Debriefing can be requested should he require further clarification. When he believes that the authority has infringed the principle of transparency, he may seek the protection of the court. Therefore, it can be concluded that the principle of transparency is protected (Section 5.4).

The PCRs 2015 declare the High Court to be competent in dealing with a procurement dispute. The Civil Procedure Rules clarify implicitly that, depending on the substance of the matter, the procurement case can be handled by the chamber of the Administrative Court and the Technology and Construction Court. Seemingly, confusion as to the competence of the accountability forum does not occur in the UK. It can be said that the principle of accountability concerning clarity with regard to the legal accountability forum is protected.

The PCRs 2015 stipulate four types of remedies that are consistent with the EU Directive, namely (a) interim relief (suspension and interim orders), (b) setting aside, (c) damages, and (d) a declaration of ineffectiveness. All the remedies have long been recognised in UK case law and doctrine. The disputing parties tend to respect the ruling of the courts at the first instance. Also, the Court has a mechanism to screen whether the case can be re-examined in the higher court. Consequently, the possibility of a delay in the procurement procedure is not an issue. Hence, the principle of accountability concerning the availability of effective remedies is protected (Section 5.6).

A comparative assessment is provided in Chapter 6. It is qualified which country has provided the best protection, which country has provided sufficient protection, and which country should provide better protection to each principle of good public procurement (Section 6.3). The UK has offered the best protection to *the principle of equal opportunity*, because the legal procedure to protect this principle has been clearly stipulated in the PCRs. The Netherlands has protected this

principle as competently as has the UK. The legal procedure is stipulated in general regulation (the Code of Civil Procedure). The Dutch judiciary has shown that the protection of this principle and the ruling has been in line with the Remedies Directive. However, the Netherlands is placed in second position, as it would be clearer if this legal procedure would be clarified in Dutch procurement law. Indonesia should offer better protection of this principle. The legal procedure to protect this principle (and legal standing of the interested bidding participant) is uncertain. It is questioned whether the general law and court decision can clarify the matter.

The Netherlands offers the best protection to *the principle of equal treatment*, as it has the Commission of Tendering Experts. The UK has also provided good protection with regard to this principle, but it may not be considered as good as the Netherlands, as the UK does not have a formal mechanism for an independent administrative review procedure. Therefore, the protection relies heavily on the informal dispute mechanism and the judicial review. It is doubtful whether the UK situation is ideal as the aggrieved bidders may not be keen to defend their interests. As the litigation fee in the UK is expensive, this may reduce the accessibility of the aggrieved bidders, especially small and medium enterprises. Indonesia should provide better protection of this principle, as some cases show that the heads of contracting authorities instruct their subordinates to conduct unequal treatment, and their subordinates follow their orders. Consequently, the trust towards the objectivity of the administrative review procedure is questioned.

The Netherlands and the UK have provided the same quality of protection to *the principle of transparency*. The contracting authorities in both countries have implemented this principle both in the context of supplying sufficient reasoning as to the award decision and debriefing. If the bidders regard that the contracting authorities have infringed the principle, they may seek the legal redress of the court. On the contrary, Indonesia should provide better protection of this principle, because the Presidential Regulation (PR) has a lower standard in instructing the contracting authority to provide a reason. Moreover, it does not recognise debriefing.

The Netherlands and the UK have provided equivalent protection of the *principle of accountability concerning on the clarity of legal accountability forum*. In the Netherlands, the clarity is the result of the consistent court decisions on interpreting the GALA: the civil courts handle public procurement disputes. In the UK, clarity is based on a consistent interpretation of the British Civil Procedure Rules: the public procurement dispute is dealt with by the Administrative Court and the Technology and Construction Court. Unfortunately, the above situation has not

taken place in Indonesia; the judiciary are not unanimous when determining the competent court to handle disputes.

The UK has provided the best protection of the *principle of accountability concerning on the availability of the effective remedies*, because the PCRs have recognised four types of remedies. The case law also has confirmed the effective implementation of these remedies. The Netherlands has also done well in protecting this principle. The legal procedure is not clearly stipulated in the DPPA; however, the Remedies Directive, the Dutch Civil Code and the Dutch Code of Civil Procedure have been utilised to provide remedies. The case law has also asserted their effective implementation. On the other hand, Indonesia should strengthen the protection of this principle. The remedies are not codified in the PR and it is questionable whether the judiciary has clarified this issue.

To deal with the five fundamental problems mentioned earlier, the Indonesian Government should adopt a good public procurement approach (Chapter 7). A general recommendation to the *legislature* is to create a Public Procurement Act. The current PR cannot be revised to accommodate suggestions related to the issue of judiciary. Regulating this branch should be based on an act of parliament in order to protect the principle of the independence of the judiciary. Besides this, there are five specific recommendations that can be provided.

The legislature should not only provide the legal substance, but should also equip the legal procedure to protect the principle of equal opportunity. To prevent the violation of the principle of equal treatment during the administrative review process, the contracting authority should not have the power to hear the administrative appeal. Instead, the appeal should be heard by an independent institution outside the authority; the court. The legislature should lay down the review mechanism in the law.

The principle of transparency can be protected whenever the legislature lays down the obligation for the contracting authority to adhere to the duty to provide reasons. The reasons enable each losing bidder to understand why the contracting authority has not selected him and has decided to select the award winner. Accordingly, this would mean that debriefing would be permitted.

The legislature should explicitly stipulate in the regulation which court has competence to handle the procurement dispute. This can protect the principle of accountability concerning the clarity of the legal accountability forum. Indonesia may consider the practice in the Netherlands where the Civil Courts handle the dispute. This argument is coherent with the implicit stipulation in the Indonesian Administrative Court Act.

The legislature should clearly stipulate the options for remedies. Indonesia may consider the practice in the UK where the PCRs stipulate four types of remedies: interim relief, setting aside, damages, and a declaration of ineffectiveness.

A general recommendation to be made to the *administration* is to provide the contracting authority with guideline(s) to assist in the exercise of its discretion without violating the law. The guideline may be based on good practices, important rulings by the judiciary, etc. These guidelines may assist in protecting the principle of equal opportunity. The content may also embrace the principle of proportionality; how to balance the weight between the opening and the restricting of competition in the procurement document.

The administration may also consider preparing a guide on the principle of transparency. It may embrace the detailed mechanism to provide the notice/letter communicating the award decision. The notice shall provide comparative information concerning the unsuccessful bidder (the addressee of the letter) and the award winner. The notice shall contain the score, an explanation of how the score has been calculated, and a written description to clarify the meaning of the score and its subcomponents. The guide should also prohibit or at least warn the authority from disclosing a list of all bidding participants, as it may increase the possibility of bid-rigging.

The independent administrative body that supervises the competition (i.e. the KPPU) should not continue to take the initiative as an oversight body for the contracting authority. It should instead focus on supervising the market and economic operators. Conducting this may prevent public confusion regarding the accountability forum.

The following are recommendations for the *judiciary*. Applying the public procurement regulations should not be the sole focus of the judiciary; it should exercise its power to 'find the law' in other related regulations, the case law, and legal principles whenever the law is silent.

The judiciary should play a more active role in protecting the principle of equal opportunity and the principle of transparency. It can be done, for example, by instructing the procuring entity to revise its procurement document, which contains irrelevant restrictions that may distort competition, by instructing the entity to clarify the award criteria. It can also be conducted by clarifying the reason for the award decision, or disclosing specific documents, etc.

The judiciary should play a significant role in protecting the principle of equal treatment in the review phase. This role should be placed in the hands of the judiciary rather than an independent administrative body. It would be easier to seek

legal redress by channelling the review phase directly with the civil courts, as these are available in all cities and regencies throughout Indonesia.

In order to protect the principle of accountability concerning the clarity of the legal accountability forum, the judiciary should ensure the consistency of court decisions. A procurement dispute should be heard by the civil Court. The judiciary should no longer endorse the administrative court as a procurement dispute forum. Moreover, the judiciary should cease from supporting the KPPU as the independent administrative body charged with reviewing the correctness and legality of decisions issued by the contracting authorities. The consistency may also be enhanced if accessibility to the database system of the court decision could be improved.

The judiciary should ensure that effective remedies can be delivered promptly. It should be ensured that the ruling delivered by the district court is respected by the disputing parties, so that they will not repeatedly challenge the case in the higher courts. This may prevent any delay of the procurement process.

Samenvatting

De Indonesische regering heeft getracht om het systeem van publiek aanbesteden aldaar te hervormen, en heeft hierbij positieve resultaten geboekt. Desalniettemin blijven sommige problemen bestaan en worden publieke aanbestedingen nog steeds vaak gezien als corrupt. Vastgesteld is, dat vijf fundamentele problemen frequent voorkomen in de precontractuele fase van de publieke aanbestedingsprocedure. In de eerste plaats kunnen aanbestedingsstukken zodanig zijn opgesteld, dat bepaalde inschrijvers hierdoor worden bevoordeeld, maar het is onduidelijk of een herziening van de aanbestedingsstukken via een juridische procedure mogelijk is. In de tweede plaats kan de mogelijkheid van corruptie binnen aanbestedende diensten leiden tot een gebrek aan vertrouwen in de onpartijdigheid van de diensten bij de afhandeling van het administratieve beroep. Ten derde kunnen de redenen voor het gunnen van de opdracht niet transparant zijn. Ten vierde zijn de procedures ter verkrijging van herstel onduidelijk. Tot slot is onzeker, welke rechtsbescherming beschikbaar is. Ofschoon de laatste twee problemen betrekking hebben op de toegang tot de rechter, worden deze toch ingedeeld bij de problemen in de precontractuele fase, omdat er pas een overeenkomst kan worden gesloten indien de gunningsbeslissing niet door de rechter is herroepen.

De voornoemde problemen hebben betrekking op het bestuursrecht, d.w.z. in deze context het recht inzake de verhouding tussen het bestuur ('aangebestede diensten') en particulieren (inschrijvers, met inbegrip van de potentiële inschrijvers). Het omvat hier tevens het recht van een individu op toegang tot de rechter met betrekking tot het besluitvormingsproces.

Dit onderzoek beoogt een antwoord te geven op de volgende vraag: hoe dient de Indonesische overheid deze fundamentele problemen aan te pakken? Als richtsnoer gelden twee van deze onderzoeksvraag afgeleide subvragen: (i) welke is de juiste benadering om de fundamentele problemen aan te pakken? en (ii) hoe pakken de andere geselecteerde landen deze fundamentele problemen aan?

Ter beantwoording van de vragen wordt in dit onderzoek de benadering van *goed publiek aanbesteden* gehanteerd om klaarheid te brengen in de regelingen en toepassingen van het publiek aanbesteden. Ook wordt een vergelijking gemaakt met geselecteerde landen, om te analyseren hoe twee landen met verschillende rechtssystemen - Nederland en het Verenigd Koninkrijk - omgaan met de bovengenoemde vijf problemen.

In hoofdstuk 2 wordt de benadering van *goed publiek aanbesteden* uiteengezet. Het hoofdstuk begint met een uitleg van het concept van goed bestuur, en hoe dit in de praktijk werd gebracht in zowel oosterse als westerse samenlevingen, lang voordat de Wereldbank de term goed bestuur in de vroege negentiger jaren introduceerde. Hierna wordt het concept van goed bestuur, zoals dit wordt gehanteerd door vooraanstaande internationale organisaties, gepresenteerd. Het is algemeen bekend dat goed bestuur diverse componenten omvat, waarvan hier de drie belangrijkste gelijkheid, transparantie en verantwoording zijn; de componenten worden in beide typen samenlevingen al lange tijd besproken en toegepast.

Na het 'concept' van goed bestuur volgt een bespreking van het 'beginsel' van goed bestuur. De aard van de discussie over het concept is interdisciplinair, terwijl de discussie over het beginsel zich meer richt op juridische aspecten. Het beginsel van goed bestuur heeft betrekking op de normen voor het bestuur en de rechten van de burgers. Analoog aan het overkoepelende concept van goed bestuur, omvat het beginsel van goed bestuur diverse beginselen, zoals daar zijn de beginselen van gelijkheid, transparantie en verantwoording. Het onderzoek richt zich op deze drie beginselen (par. 2.3.2), vanwege (i) hun langdurige en centrale plaats in de geschiedenis; (ii) hun relevantie ter verduidelijking van de problemen (par. 2.1.1 en 2.2.2); (iii) het conceptuele argument dat deze drie beginselen de drie hoekstenen van de moderne staat vormen, te weten de rule of law, democratie, en goed bestuur, (par. 2.2.1).

Vervolgens verschuift de focus naar het concept van het publiek aanbesteden. Na de evaluatie van een aantal publieke aanbestedingswetten in internationale, multinationale en nationale contexten, wordt geconcludeerd dat de rechtsbeginselen van het publiek aanbestedingsrecht te vergelijken zijn met drie beginselen die vallen onder het beginsel van goed bestuur. Bijgevolg kunnen de beginselen in het publiek aanbesteden worden aangeduid als *de beginselen van goed publiek aanbesteden*.

De drie beginselen van goed bestuur kunnen worden uitgelegd als de vijf beginselen van goed publiek aanbesteden. Het *beginsel van gelijke kansen* draagt de aanbestedende dienst op om redelijke, proportionele en gerechtvaardigde eisen te stellen, die niet concurrentievervalsend zijn. Indien de autoriteiten dit beginsel schenden, hebben de inschrijvers bovendien recht op gelijke bescherming. Het *beginsel van gelijke behandeling* verplicht de aanbestedende diensten tot een gelijke behandeling en beoordeling van de inschrijvingen. De aanbestedende dienst dient tevens het door de zich benadeeld voelende inschrijvers ingediende bezwaar en/of administratieve beroep onpartijdig te herzien.

Het *transparantiebeginsel* stimuleert de aanbestedende dienst tot het gebruik van eenvoudige en toegankelijke taal in de mededeling van de gunningsbeslissing. De mededeling dient niet alleen getalsmatige informatie te bevatten, maar ook vergezeld te gaan van een tekstuele uitleg. Indien de mededeling naar een verliezende inschrijver wordt verzonden, dient deze vergelijkende informatie te bevatten over de beoordeling van de winnende inschrijver. Ook dient een debriefing te worden georganiseerd.

Het beginsel van *verantwoording inzake een duidelijk forum voor juridische verantwoording* onderstreept het belang van de zich benadeeld voelende inschrijvers (maar ook van rechters en andere rechtshandhavers) om te weten welke rechter bevoegd is een publieke aanbestedingszaak te behandelen. Het beginsel van *verantwoording inzake de beschikbaarheid van effectieve rechtsbescherming* benadrukt, dat de rechter dient te beschikken over adequate vormen van genoegdoening om te reageren op de schendingen, en dat deze snel tot een uitspraak dient te komen.

Hoofdstuk 3 beschrijft schendingen van de vijf beginselen van goed publiek aanbesteden in Indonesië. Op het beginsel van gelijke kansen wordt inbreuk gemaakt doordat de aanbestedingsstukken zodanig zijn opgesteld dat bepaalde inschrijvers worden bevoordeeld, maar ook doordat geïnteresseerde inschrijvers die afgewezen zijn geen procesbevoegdheid hebben om de zaak aan te vechten (par. 3.2). Het beginsel van gelijke behandeling wordt geschonden, indien het hoofd van een aanbestedende dienst de aanbestedende commissie opdraagt om een bepaalde inschrijver te bevoordelen en in ruil hiervoor persoonlijk voordeel geniet. Ook al is de afgewezen bieder in staat om een bezwaar in te dienen bij de commissie en een beroep bij het hoofd van de aanbestedende dienst, toch kan voornoemde situatie hebben geleid tot een gebrek aan vertrouwen inzake de objectiviteit van de aanbestedende dienst bij de afhandeling van de administratieve herziening (par. 3.3).

Het valt te betwijfelen of de inschrijvers kunnen begrijpen om welke redenen de aanbestedende commissie de overeenkomst aan een bepaalde inschrijver heeft gegund (par. 3.4). Dit komt doordat de commissie niet altijd de vereiste minimale informatie publiceert. Maar ook indien zij deze wel publiceert, blijft het twijfelachtig of de inschrijvers de redenen kunnen begrijpen. De regelingen vereisen niet dat de aanbestedende dienst uitlegt hoe de onderdelen van de score zijn samengesteld, of dat deze een beschrijving geeft bij elke verleende score. Voorts is er geen procedure van debriefing. Het beginsel van transparantie wordt daarom geschonden.

Binnen de rechterlijke macht in Indonesië bestaat geen overeenstemming over de vraag, welk forum rechtsmacht dient te hebben in het geval van herziening

van een aanbesteding buiten de aanbestedende dienst. De Supreme Court in Indonesië is nu eens van mening dat de zaak dient te worden behandeld door de civiele rechter (in een gewone civiele kamer), en dan weer dat deze dient te worden behandeld door de administratieve rechter. In andere gevallen was de Supreme Court van mening dat de Indonesische Commissie voor Mededingingstoezicht (*Komisi Pengawas Persaingan Usaha, KPPU*) de aanbesteding in eerste instantie kon herzien, waarna de beslissing van de KPPU zou kunnen worden herzien door een civiele rechter in een speciale civiele kamer. De inconsistentie van de rechterlijke beslissingen kan ook worden veroorzaakt doordat de aanbestedingsregelingen hierover zwijgen en door een gebrek aan helderheid in de algemene regelingen. De huidige situatie vormt een schending van het beginsel van verantwoording inzake een duidelijk forum voor juridische verantwoording (par. 3.5).

Het is de vraag of de rechterlijke macht in Indonesië in geval van een geschil kan voorzien in een effectieve genoegdoening. Onder een effectieve genoegdoening wordt in deze context verstaan: (i) een opschortingsmechanisme, (ii) een effectieve procedure ter verkrijging van een uitspraak over het geschil, en (iii) een schadevergoeding. Zowel de aanbestedings- als de algemene regelingen zwijgen over dit onderwerp. Het is onzeker of het -Indonesische- wetboek van burgerlijke rechtsvordering de eerste twee vormen van genoegdoening erkent. Het -Indonesische- burgerlijk wetboek erkent echter wel de derde vorm van genoegdoening. De -Indonesische- Wet op de Administratieve Rechtspraak erkent alle drie vormen van genoegdoening. Zoals echter in de vorige alinea werd uiteengezet is het niet duidelijk welke rechter bevoegd is om deze geschillen te behandelen. Derhalve is sprake van schending van het beginsel van verantwoording inzake effectieve rechtsbescherming.

De eerste drie problemen bij publieke aanbestedingen in Indonesië komen ook voor in Nederland. De problemen zijn echter veel minder uitgesproken dan in Indonesië (hoofdstuk 4). De laatste twee problemen komen er niet voor. Publiek recht, zoals de Algemene wet bestuursrecht, is van invloed op de inhoudelijke component van de juridische verplichting die de aanbestedende diensten dienen na te leven. Privaatrecht, zoals het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, wordt aangewend als het procesrecht voor het herzien van bij publieke aanbestedingen genomen beslissingen.

De Nederlandse aanbestedende dienst dient bij het opstellen van de aanbestedingsstukken zowel het beginsel van gelijke kansen als het proportionaliteitsbeginsel na te leven. Volgens het proportionaliteitsbeginsel mogen de vereisten niet disproportioneel zijn, waardoor deze een onnodige last vormen die concurrentievervalsend werkt. In geval van een inbreuk op dit beginsel, heeft een geïnteresseerde inschrijver die zich benadeeld voelt de mogelijkheid om

de aanbestedingsstukken te laten herzien (om een 'voorlopige voorziening' te vorderen). Het beginsel van gelijke kansen wordt dus beschermd, omdat het materiële recht en de juridische procedure ter bescherming ervan beschikbaar zijn (par. 4.2).

Het beginsel van gelijke behandeling wordt beschermd in een bestuursrechtelijke herzieningsprocedure (par. 4.3). De aanbestedende diensten in Nederland worden geacht bezwaren onpartijdig te beoordelen. Indien een inschrijver zich toch benadeeld voelt, kan deze een niet-bindend advies inwinnen bij de invloedrijke Commissie van Aanbestedingsexperts. Aangezien advies wordt gegeven door een orgaan van buiten de aanbestedende dienst, wordt dit geacht objectiever en onpartijdiger te zijn. Het beginsel van gelijke behandeling is daarom in Nederland beter beschermd.

De (gewijzigde) Aanbestedingswet 2012 schrijft voor, dat overheidsorganen voldoende informatie dienen te verschaffen, zodat de inschrijvers in staat zijn om hun positie te beoordelen en te beslissen, of zij juridisch verhaal zullen zoeken. Dit geschiedt door de brief met de gunningsbeslissing naar alle inschrijvers te sturen. De brief bevat niet alleen de gewogen score voor iedere component, maar ook de redenen voor het toekennen van de score. Indien de brief is bestemd voor de afgewezen inschrijver, dient deze vergelijkende informatie te bevatten, waarom de winnaar voor bepaalde componenten hogere cijfers kreeg dan de afgewezen inschrijver. De Aanbestedingswet verleent inschrijvers tevens de mogelijkheid om gebruik te maken van de zogenaamde debriefing; een procedure waarbij opheldering wordt gevraagd ten aanzien van de waardering van de inschrijving van de aanvrager. Het transparantiebeginsel wordt daarom in Nederland beschermd (par. 4.4).

De Aanbestedingswet laat zich niet uit over de vraag welk forum voor juridische verantwoording in geval van een geschil bevoegd zal zijn. De Algemene wet bestuursrecht bevat echter een impliciete verwijzing dat bij een aanbestedingsgeschil de civiele rechter bevoegdheid bezit. Dit vindt steun in de doctrine en in de jurisprudentie, en er lijkt in de praktijk geen verwarring over de bevoegdheid van de rechter; derhalve wordt het beginsel van verantwoording inzake een duidelijk forum voor aansprakelijkheid niet geschonden (par. 4.5).

Het systeem van publieke aanbestedingen in Nederland kent twee vormen van verhaal: de voorlopige voorziening en de toekenning van een schadevergoeding (par. 4.6). Deze vormen van verhaal zijn niet neergelegd in de Aanbestedingswet, maar in de EU Rechtsbeschermingsrichtlijn 2007/66/EC en zijn opgenomen in het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering. De Richtlijn voorziet in een juridische basis voor het gebruik van een voorlopige voorziening; de aanbestedingsprocedure kan worden opgeschort

en de beslissing kan buiten werking worden gesteld. De Richtlijn strookt met de bepaling in het Burgerlijk Wetboek. Daarom kan het Burgerlijk Wetboek worden gebruikt als juridische basis om genoegdoening te verschaffen. Het Wetboek van Burgerlijke Rechtsvordering kent een kort geding procedure ('snelle procedure') en dit biedt inschrijvers die zich benadeeld voelen een snelle verhaalsmogelijkheid. Het is interessant te zien dat, ofschoon men de beslissing in de kort geding procedure kan aanvechten, partijen groot respect tonen door de beslissing in het algemeen te accepteren. Deze praktijken versterken de effectiviteit van de uitkomst van het geschil. De Aanbestedingswet zwijgt ook over schadevergoeding, maar het Burgerlijk Wetboek kan wel dienen als juridische basis. Aangezien inschrijvers die zich benadeeld voelen toegang hebben tot juridische mechanismen om een fout van het bestuur effectief te corrigeren (en mogelijk zelfs een vergoeding te verkrijgen), kan worden geconcludeerd dat het beginsel van verantwoording inzake de beschikbaarheid van effectieve rechtsbescherming in Nederland wordt beschermd.

De eerste drie problemen bij publieke aanbestedingen in Indonesië komen eveneens voor in het Verenigd Koninkrijk, maar deze zijn hier veel minder uitgesproken dan in Indonesië. De twee laatste problemen komen niet voor in het Verenigd Koninkrijk (hoofdstuk 5).

De Engelse regelingen inzake overheidsopdrachten (*Public Contract Regulations 2015*, de *PCRs*), verbieden de aanbestedende dienst om de concurrentie te vervalsen door het opnemen van ongerechtvaardigde eisen in de aanbestedingsstukken. Indien dit geschiedt, zijn geïnteresseerde inschrijvers die zich benadeeld voelen, onder verwijzing naar de EU Richtlijnen en de *PCRs*, gerechtigd tot het vorderen van voorlopige voorzieningen om de aanbestedingsstukken aan te vechten. De beschikbaarheid van materieel recht dat het beginsel van gelijke kansen bevat (artikelen 18 en 42 van de *PCRs*) en van de juridische procedure om een schending te verhelpen (artikelen 95 en 96 van de *PCRs*), zorgt ervoor dat het beginsel van gelijke kansen in het Verenigd Koninkrijk wordt beschermd (par. 5.2).

Het Verenigd Koninkrijk kent geen bestuursrechtelijke herziening binnen de aanbestedende dienst. Men kent echter wel – zo is mij gebleken – een consultatie, die kan worden beschouwd als een vorm van debriefing. Bovendien kent het Verenigd Koninkrijk geen onafhankelijk bestuursorgaan voor het herzien van een geschil over een publieke aanbesteding. Conform de *PCRs* is een herziening enkel mogelijk via de rechter. Tijdens interviews is mij gebleken dat de inschrijvers nog steeds vertrouwen in de aanbestedende dienst hebben. De situatie leidt tot de conclusie dat het beginsel van gelijke behandeling wordt beschermd, maar omdat men enkel toegang tot deze bescherming verkrijgt via de rechterlijke macht, wat

hoge proceskosten met zich meebrengt, staat niet vast of dit beginsel optimaal wordt beschermd.

Uit de *PCRs* en de jurisprudentie blijkt, dat de aanbestedende dienst voldoende informatie dient te verschaffen omtrent de gunningsbeslissing. Elke afgewezen inschrijver dient een schrijven te ontvangen met een uitleg van de score en een beschrijving van het relatieve gewicht van iedere component, waaruit kan worden afgeleid waarom hij geen succes had en waarom de opdracht is gegund aan de winnaar. Hij kan zo de objectiviteit van de door de aanbestedende dienst genomen beslissing beoordelen. Mocht hij prijs stellen op meer uitleg, kan hij verzoeken om een debriefing. Als hij van mening is dat de dienst het transparantiebeginsel heeft geschonden, kan hij zich voor bescherming wenden tot de rechter. Er kan derhalve worden geconcludeerd dat het transparantiebeginsel wordt beschermd (par. 5.4).

Uit de *PCRs* 2015 volgt dat de Britse High Court bevoegd is om een aanbestedingsgeschil te behandelen. Uit de Britse regels van het burgerlijk procesrecht (*Civil Procedure Rules*) is af te leiden, dat een aanbestedingszaak kan worden behandeld door een kamer van de *Administrative Court of de Technology and Construction Court*, afhankelijk van het desbetreffende onderwerp. Klaarblijkelijk kent het Verenigd Koninkrijk geen verwarring omtrent de bevoegdheid van het forum voor verantwoording. Gezegd kan worden, dat het beginsel van verantwoording inzake een duidelijk forum voor juridische verantwoording wordt beschermd.

De *PCRs* 2015 vermelden vier vormen van verhaal die overeenkomen met de EU-Richtlijn, te weten (a) voorlopige voorzieningen (opschorting en voorlopige beslissingen), (b) vernietiging, (c) schadevergoeding, en (d) een verklaring van onverbindendheid. Al deze verhaalsmogelijkheden zijn reeds lang erkend in de jurisprudentie en doctrine van het Verenigd Koninkrijk. De partijen bij het geschil zijn geneigd om de uitspraak van de rechter in eerste instantie te respecteren. De rechter hanteert tevens een methode om te toetsen of de zaak bij een hogere rechter kan worden herzien. De mogelijkheid van vertraging van de aanbestedingsprocedure is derhalve niet aan de orde. Het beginsel van verantwoording inzake de beschikbaarheid van effectieve rechtsbescherming is daarom beschermd (par. 5.6).

Hoofdstuk 6 bevat een vergelijkende evaluatie. Per beginsel van goed publiek aanbesteden wordt aangegeven welk land de beste bescherming biedt, welk land voldoende bescherming biedt, en welk land een betere bescherming dient te bieden (par. 6.3). Het Verenigd Koninkrijk biedt de beste bescherming van *het beginsel van gelijke kansen*, omdat de juridische procedure ter bescherming van dit beginsel duidelijk is neergelegd in de Engelse regelingen inzake

overheidsopdrachten, de *PCRs*. Nederland biedt een met het Verenigd Koninkrijk vergelijkbare bescherming van dit beginsel. De juridische procedure is neergelegd in het algemene recht. De rechterlijke macht in Nederland heeft getoond dat bescherming van dit beginsel en hun uitspraken in overeenstemming zijn met de Rechtsbeschermingsrichtlijn. Toch komt Nederland op de tweede plaats, omdat het duidelijker zou zijn als deze juridische procedure zou zijn toegelicht in het Nederlandse aanbestedingsrecht. Indonesië dient een betere bescherming te bieden van dit beginsel. De juridische procedure ter bescherming van dit beginsel (en de juridische status van de geïnteresseerde inschrijver) is onzeker. Het is de vraag of het algemene recht en rechterlijke beslissingen de zaak kunnen verduidelijken.

Nederland biedt de beste bescherming van *het beginsel van gelijke behandeling*, vanwege het bestaan van de Commissie van Aanbestedingsexperts. Het Verenigd Koninkrijk biedt ook een goede bescherming van dit beginsel, al wordt deze geacht minder goed te zijn dan in Nederland, omdat het Verenigd Koninkrijk geen formeel mechanisme voor een onafhankelijke administratieve herzieningsprocedure kent. De bescherming berust daarom sterk op het mechanisme voor informele geschillen en op herziening door de rechter. Het valt te betwijfelen of de situatie in het Verenigd Koninkrijk ideaal is, omdat de afgewezen inschrijvers misschien niet staan te popelen om hun belangen te verdedigen. Aangezien de proceskosten in het Verenigd Koninkrijk hoog zijn, kan dit de toegankelijkheid voor afgewezen inschrijvers, m.n. kleine en middelgrote ondernemingen, beperken. Indonesië dient een betere bescherming te bieden van dit beginsel, aangezien is gebleken dat het hoofd van de aanbestedende dienst in sommige gevallen de ondergeschikten opdroeg om inschrijvers ongelijk te behandelen, en de ondergeschikten deze opdrachten ook uitvoerden. Dit zet vraagtekens bij het vertrouwen in de objectiviteit van de administratieve herzieningsprocedure.

Nederland en het Verenigd Koninkrijk bieden dezelfde mate van bescherming van *het transparantiebeginsel*. In beide landen passen de aanbestedende diensten dit beginsel toe bij het verstrekken van een toereikende motivering zowel bij de gunningsbeslissing als bij het debriefen. Als inschrijvers van mening zijn dat de aanbestedende diensten het beginsel hebben geschonden, kunnen deze bij de rechter juridisch verhaal halen. Indonesië daarentegen dient te zorgen voor een betere bescherming van dit beginsel, omdat de presidentiële regeling (*Presidential Regulation*), die de aanbestedende dienst verplicht tot het geven van een motivering, een lagere rang bezit. Debriefing wordt ook niet erkend.

Nederland en het Verenigd Koninkrijk bieden een gelijkwaardige bescherming van het *beginsel van verantwoording door de beschikbaarheid van een*

duidelijk forum voor juridische verantwoording. In Nederland is deze duidelijkheid het gevolg van consistente rechtspraak bij de interpretatie van de Algemene wet bestuursrecht terzake van de bevoegde rechter: de civiele rechter behandelt publieke aanbestedingsgeschillen. In het Verenigd Koninkrijk is de duidelijkheid gebaseerd op een consistente interpretatie van het Britse burgerlijk procesrecht: publieke aanbestedingsgeschillen worden behandeld door de *Administrative Court* en de *Technology and Construction Court*. Helaas is dit niet het geval in Indonesië; de rechterlijke macht is niet eensgezind bij het vaststellen van de competente rechter voor de behandeling van een geschil.

Het Verenigd Koninkrijk scoort het beste bij de bescherming van het *beginsel van verantwoording inzake de beschikbaarheid van effectieve rechtsbescherming*, omdat in de Engelse regelingen inzake overheidsopdrachten (de *PCRs*) vier vormen van genoegdoening worden erkend. De jurisprudentie laat zien dat deze rechtsbescherming daadwerkelijk wordt toegepast. Nederland doet het ook goed wat de bescherming van dit beginsel betreft. De juridische procedure wordt weliswaar niet expliciet vermeld in de Aanbestedingswet, maar er wordt een beroep gedaan op de Rechtsbeschermingsrichtlijn, het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering om rechtsbescherming te bieden. De jurisprudentie vormt een bevestiging van de daadwerkelijke toepassing van de rechtsbescherming. Indonesië daarentegen dient de bescherming van dit beginsel te versterken. De rechtsbescherming is niet gecodificeerd in de presidentiële regeling (*Presidential Regulation*) en het is onduidelijk of de rechterlijke macht dit onderwerp heeft opgehelderd.

Om de eerdergenoemde vijf fundamentele problemen aan te pakken, dient de Indonesische regering een benadering van goed publiek aanbesteden toe te passen (hoofdstuk 7). Een algemene aanbeveling aan de *wetgever* is het opstellen van een Publieke Aanbestedingswet. Het is niet mogelijk om de huidige presidentiële regeling zodanig te herzien, dat voorstellen met betrekking tot de rechterlijke macht hierin opgenomen kunnen worden. Een regeling voor deze branche dient te zijn gebaseerd op een parlementaire wet, ter bescherming van het beginsel van de onafhankelijkheid van de rechterlijke macht. Daarnaast zijn er vijf specifieke aanbevelingen.

De wetgever dient ter bescherming van het beginsel van gelijke kansen niet enkel te zorgen voor het scheppen van materieel recht, maar ook voor het vormgeven van de juridische procedure. Om schending van het beginsel van gelijke behandeling tijdens de administratieve herziening te voorkomen, mag de aanbestedende dienst niet bevoegd zijn om zelf het administratieve beroep te behandelen. Het beroep dient te worden behandeld door een onafhankelijke

instelling buiten de dienst, een rechterlijke instantie. De wetgever dient het herzieningsmechanisme in de wet vast te leggen.

Het transparantiebeginsel kan worden beschermd, indien de wetgever voorschrijft dat de aanbestedende dienst de verplichting tot motivering dient na te leven. De motivering stelt een afgewezen inschrijver in staat om te begrijpen waarom de aanbestedende dienst hem niet heeft gekozen en heeft besloten de aanbesteding aan de winnaar te gunnen. Dit betekent ook, dat debriefing is toegestaan.

De wetgever dient expliciet in de regeling te bepalen, welke rechter bevoegdheid heeft om het aanbestedingsgeschil te behandelen. Dit kan het beginsel van verantwoording inzake een duidelijk forum voor juridische verantwoording beschermen. Indonesië zou de praktijk in Nederland in overweging kunnen nemen, waar het geschil wordt behandeld door de civiele rechter. Dit argument strookt met de impliciete bepaling in de Indonesische Wet op de Administratieve Rechtspraak.

De wetgever dient de opties voor rechtsbescherming duidelijk te definiëren. Indonesië zou de praktijk in het Verenigd Koninkrijk in overweging kunnen nemen, waar de *PCRs* 4 vormen van genoegdoening definiëren: voorlopige voorziening, vernietiging, schadevergoeding en een verklaring van onverbindendheid.

Een algemene aanbeveling aan het *bestuur* is, om de aanbestedende dienst te voorzien van een gids of leidraad ter uitoefening van haar discretionaire bevoegdheid om aldus schending van het recht te voorkomen. Een dergelijke gids of handleiding kan zijn gebaseerd op good practices, belangrijke rechterlijke uitspraken, etc. en kunnen bijdragen aan de bescherming van het beginsel van gelijke kansen. De inhoud kan ook betrekking hebben op het proportionaliteitsbeginsel, te weten het afwegen van de belangen van concurrentieverruiming en van -beperking in de aanbestedingsstukken.

Het bestuur kan ook overwegen een gids of leidraad op te stellen met betrekking tot het transparantiebeginsel. Deze kan een gedetailleerd schema bevatten voor het opstellen van de kennisgeving/brief bij het communiceren over de gunningsbeslissing. De kennisgeving dient vergelijkende informatie over de afgewezen inschrijver (de geadresseerde van de brief) en de winnende inschrijver te bevatten. De kennisgeving moet de score te bevatten, een uitleg over de wijze waarop de score is berekend, en een beschrijving van de betekenis van de score en de subcomponenten ervan. De gids dient ook een verbod te bevatten tot publicatie door de dienst van een lijst met alle inschrijvers, of een waarschuwing dienaangaande, omdat dit de kans op afstemming van biedgedrag kan vergroten.

Het Indonesische onafhankelijke bestuursorgaan voor mededingingstoezicht (*KPPU*) dient de door haar geïnitieerde taak als toezichthoudend orgaan voor de aanbestedende dienst te beëindigen. In plaats daarvan moet dit orgaan zich richten op het toezicht op de markt en economische operatoren. Dit voorkomt verwarring bij het publiek over het forum voor verantwoording.

Hierna volgen aanbevelingen voor de *rechterlijke macht*. De rechterlijke macht zou zich niet enkel moeten richten op het toepassen van de publieke aanbestedingswetten en -regelingen, maar haar bevoegdheid ook dienen te gebruiken om 'recht te vinden' in andere gerelateerde wetten en regelingen, jurisprudentie en juridische beginselen, in al die gevallen waarin het recht zwijgt.

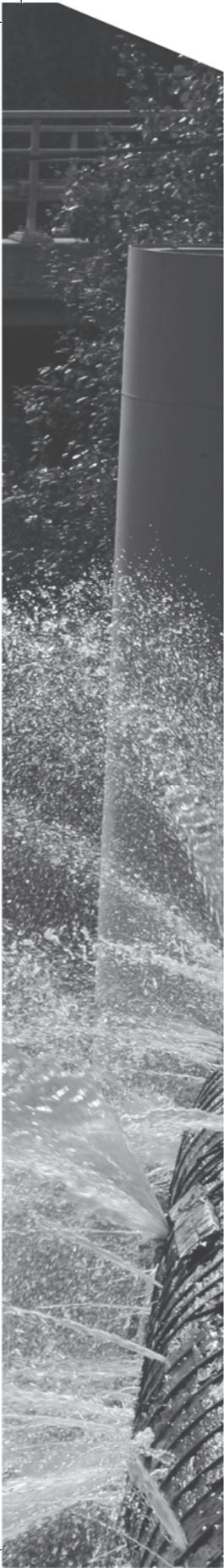
De rechterlijke macht dient een actievere rol te spelen bij de bescherming van het beginsel van gelijke kansen en bij het transparantiebeginsel. Dit kan bijv. geschieden door de aanbestedende dienst op te dragen om de aanbestedingsstukken, die irrelevante beperkingen bevatten en mogelijk concurrentievervalsend zijn, te herzien, of door de dienst op te dragen de gunningscriteria toe te lichten. Alternatieven zijn het verduidelijken van de reden voor de gunningsbeslissing, of de openbaarmaking van specifieke stukken, etc.

De rechterlijke macht dient een belangrijke rol te spelen bij de bescherming van het beginsel van gelijke behandeling in de herzieningsfase. Het verdient de voorkeur dat de rechterlijke macht deze rol toebedeeld krijgt, en niet een onafhankelijk bestuursorgaan. Het is eenvoudiger om juridisch verhaal te halen door de herzieningsfase direct bij de civiele rechter onder te brengen, aangezien deze in alle steden en regentschappen in heel Indonesië beschikbaar is.

Ter bescherming van het beginsel van verantwoording inzake een duidelijk forum voor juridische verantwoording, dient de rechterlijke macht zorg te dragen voor consistentie van de rechterlijke beslissingen. Een aanbestedingsgeschil dient te worden gehoord door de civiele rechter. De rechterlijke macht dient niet langer akkoord te gaan met de bestuursrechter als forum voor aanbestedingsgeschillen. Bovendien dient de rechterlijke macht de *KPPU*, als onafhankelijk bestuursorgaan belast met het herzien van de juistheid en wettigheid van door de aanbestedingsdiensten genomen beslissingen, niet langer te ondersteunen. Een grotere consistentie kan ook worden bereikt door de toegang tot de database met rechterlijke beslissingen te verbeteren.

De rechterlijke macht dient zorg te dragen voor een onverwijld, effectieve rechtsbescherming. Zij dient ervoor te zorgen, dat de partijen bij een geschil de door de rechtbank gedane uitspraak respecteren, zodat deze de zaak niet bij

herhaling aanvechten bij de hogere rechter. Dit kan vertraging bij het aanbestedingsproces voorkomen.



Curriculum Vitae

Curriculum vitae

Richo Andi Wibowo graduated from Regina Pacis Catholic Senior High School in 2002. He gained his Bachelor of Laws (SH) from Universitas Islam Indonesia in 2006 with a partial scholarship from that university. Richo obtained his Master of Laws (LL.M) from Utrecht University (2008) with a full scholarship from the Ministry of Communication and Information, the Republic of Indonesia. Since then, he has been serving as a lecturer at the Administrative Law Department, Faculty of Law, Universitas Gadjah Mada.

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Besides his academic activities, Richo has been involved in various social activities. He has been a member, staff, coordinator, or chairman in several student university organisations, both in Indonesia and the Netherlands. In addition, he was an advocate ('legal defender') in some legal aid and consultation institutes in Yogyakarta. He can be reached at [richo.wibowo\[at\]ugm.ac.id](mailto:richo.wibowo[at]ugm.ac.id)