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To cite this article: Edwin Buitelaar, Martijn van den Hurk, Ed Nozeman & Christine Oude Veldhuis (2022) Public Entrepreneurship in Private Land Markets: Contracting Dilemmas around Selling Amsterdam's Major Prison, Planning Theory & Practice, 23:2, 248-264, DOI: [10.1080/14649357.2022.2034923](https://doi.org/10.1080/14649357.2022.2034923)

To link to this article: <https://doi.org/10.1080/14649357.2022.2034923>



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Published online: 02 Mar 2022.



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Public Entrepreneurship in Private Land Markets: Contracting Dilemmas around Selling Amsterdam’s Major Prison

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ABSTRACT

Most planning theories are based on the assumption that there is a homogenous public interest. However, planning agencies are driven by multiple and conflicting interests in practice. This article conceptualises and empirically investigates these interests in an “extreme case” of active public land policy: the Dutch state selling Amsterdam’s *Bijlmer* prison. Three types of dilemmas or conflicting interests that arose in the Bijlmer prison case are examined: prioritising price or social value, organizing a private transaction or a public tender, and choosing flexibility or certainty. Although these are matters of principle, subjective, pragmatic and context-specific choices determine the ultimate balance.

ARTICLE HISTORY

Received 28 September 2020
Accepted 4 January 2022

KEYWORDS

Public entrepreneurship;
land markets; contracting;
public choice

Introduction

Governments in many countries – local authorities in particular – perform as market “regulators” and participate in the land market as “merchants”. While in some countries, such as the Netherlands and Israel, governments do this frequently, in most other Western countries they do this only occasionally. Although governments use private law when acting as private parties, their role is not identical to that of private actors. Governments remain public entities and therefore continue to bear social responsibilities and deal with restrictions under public law. In other words, they assume a *hybrid* role in the land market and have to perform a balancing act between public and private interests. For these governments, land ownership is a means of capturing value (i.e. land rents) and guiding urban development, usually beyond what is possible through public planning powers.

Most planning theories implicitly assume some form of public interest that legitimises public planning, particularly normative theories that prescribe how and under which conditions planning agencies ought to act (e.g. Alexander, 2002). By contrast, a small branch of literature argues that a positive planning theory should consider that planners and politicians act in their

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own interests. Public choice theories take this alternative approach to planning, analogous to economic actors in markets (e.g. Pennington, 2002). What most theories have in common, whether they start from the idea of public interest or self-interested behaviour, is that they treat the underlying interest rather homogeneously. However, in practice, we observe governments trying to serve and balance various interests simultaneously, whether public or private. These interests and objectives are fragmented and not always consistent, so tensions and conflicts exist between them. We aim to conceptualise and empirically investigate the heterogeneity of interests and the disputes that might arise between them.

In doing this, we seek to contribute to the literature on governments transacting or contracting with private actors in urban and infrastructure development. Until now, the focus has been on other elements such as the institutions around land transactions (Needham et al., 2011), the transaction costs (Alexander, 1992), learning in contracts (Van der Veen & Korthals, 2012), relations within public-private partnerships (Adams & Tiesdell, 2010), the performance of contracts (Klijn & Koppenjan, 2016), risk transfer through contracts (Siemiatycki & Farooqi, 2012), and the interaction between public participation and contracts (Stapper, 2021).

We examine dilemmas between public and private interests, or sub-interests,¹ that governments intend to serve while contracting with private actors – and how governments deal with these interests. Three dilemmas are discussed: prioritising the sale of land and real estate at optimal prices or prioritising the achievement of social value; choosing between a private transaction and a public tender for the sale of state-owned land and real estate; aiming for creative solutions (embracing flexibility and offering leeway to developers) versus seeking certainty (through strict process rules and output specifications).

We investigate the conceptual identification of the dilemmas empirically by reporting on an in-depth single-case study of the disposal of Amsterdam's major prison, the *Bijlmerbajes* [hereafter: Bijlmer prison], by the Dutch central government. We consider this an extreme case of public entrepreneurship in private land markets in the Netherlands, a country that is already atypical due to its widespread practice of active public land policy (mainly by local authorities) (Lefcoe, 1978; Needham, 1997). What makes the Bijlmer prison even more atypical is that the Dutch central government took an unusual approach to balance financial interests and social-spatial impact by *simultaneously* and *equally* weighing the financial bid and the quality of the urban design. Even for a country like the Netherlands, where governments already tend to intervene actively on land markets, the Bijlmer prison is an exceptional case. Being explicitly implemented as an experiment by the Dutch central government with the obligation to be evaluated *ex-post*, the case contains significant learning potential.

The article is structured as follows: First, we explain the literature gap that this study responds to, addressing the hybrid contracting roles of governments on land markets. Second, based on a brief review of the relevant planning literature, we present three dilemmas of governments engaging in hybrid or double roles. Third, we describe how we analysed the case of the Bijlmer prison and provide a brief overview of the facts and figures of the case. Fourth, we illustrate how and where the three dilemmas unfolded in practice. Finally, the conclusion summarises the empirical findings and elaborates on the theoretical implications of the research.

Public Choice, Planning and Contracts

Most planning theories – whether synoptic, incremental, collaborative, radical theories, or otherwise – assume that planning agencies act or should act in the “public interest”. What that public

interest entails is subject to debate. Some scholars have referred to a utilitarian idea of the public interest by focusing on maximum or Pareto optimal welfare (e.g. Klosterman, 1985), while others have opposed such notions (Campbell & Marshall, 2002; Moroni, 2004).

Whatever the conceptualisation of the public interest, the potency and competence of government planning in serving this interest has been questioned many times, ranging from the most disastrous examples of failure (Hall, 1982) to the more day-to-day struggles (Forester, 1989). Some scholars have criticised the asymmetric treatment of market and government fallacies, arguing that the latter (i.e. non-market, government, or planning failures) should receive more attention, both generally in public policy (Wolf, 1987) and specifically in urban planning (Pennington, 2002). Even those who endorse a Hayekian critique of planning and design focus more on the state's competence than on its intentions; they mention the government's "knowledge problems" concerning individual preferences (Moroni, 2007). However, scholars have rarely challenged the general concept of the public interest and a benevolent government pursuing that interest.

Against this backdrop, public choice theories question the very behavioural assumptions behind policy and planning. They break the boundary between economic and political analysis by endorsing the neo-classical economic assumption of self-interested behaviour and applying it to democracy (Downs, 1957) and bureaucracy (Niskanen, 1971). Moreover, analogous to an economic market, public choice theories portray a political market where voters, politicians and bureaucrats trade. Rather than being driven by some form of public interest, public officers and politicians are as driven by special-interest capture and selfishness as economic actors. A small branch of planning theory applies public choice theory to planning (most notably: Pennington, 2002; Poulton, 1991; Webster, 1998).

Both public choice theories (Healey, 1998) and theories based on some form of public interest seem to assume that a government bureaucracy or planning agency serves a homogenous, one-directional and internally consistent interest. However, especially where governments fulfil hybrid contracting roles on land markets, they serve various interests and pursue various objectives. Tensions and conflicts are bound to evolve in these settings. Nevertheless, scholarly attention has remained scarce regarding public-private transactions and contracts and how particular interests are prioritised at the cost of other interests. To some extent, this *has* been the subject of urban regime theory, as initially developed by Clarence Stone in 1989 and further developed by others. However, some of its prominent representatives (e.g. Smith, 2019) argue that the concept of an urban regime should be reserved exclusively to indicate long-term stable informal coalitions in a particular era of American urban politics (i.e. the end of the twentieth century) – not to refer to one-off formal transactions or contracts in a different political-economic context. Still, urban regime theory is relevant in our context since it helps to acknowledge the reliance on private investment and development and their impact on public decision making.

Dilemmas of Public Contracting

Selling land and real estate requires governments to make several complex decisions, for instance, on what (public or private) values to prioritise and how the sale process is to be structured. We distinguish among three dilemmas that we came across in our evaluation of Amsterdam's Bijlmer prison sale and link these to the literature. In other words, we derived these three dilemmas neither deductively nor inductively, but *abductively*: We empirically

observed them before we conceptually grounded them. This conceptual framework is subsequently used to guide and structure the empirical analysis.

Highest Price or Social Value?

Governments might face a choice between the highest land price on the one hand and the highest social quality (including spatial quality) on the other: i.e. between financial gain and social gain. These two values are not necessarily compatible.

When disposing of land and real estate, governments neither want to give it away nor sell it at sub-market prices because that would not be in the interest of the public purse. By contrast, governments may want to create social value: that is, move away from price as the key performance indicator of a transaction. Welfare economics predicts that when markets function perfectly, market prices reflect the maximum social welfare. Under these conditions, there is no difference between financial and social value. However, markets are rarely perfect. Market failures, such as the presence of external effects, monopolies, public goods, and coordination problems, withhold the market from functioning perfectly and creating optimal social welfare (Klosterman, 1985). For instance, external effects, which appear as the unpriced negative and positive effects of one person's actions upon another, are omnipresent. Two examples are the adverse effects of air pollution and the positive effects of listed heritage. In these cases, what contributes to social welfare is either not or insufficiently reflected by market prices. When governments are the sellers of land and real estate, they must decide between optimal cash flow or optimal social welfare, which is a choice between direct financial gain and indirect social gain. The spectrum between these choices sets a stage for dilemmas, particularly when governments seek to balance price on the one hand and plan quality on the other. The consequences of the decisions made will have socioeconomic and physical consequences for a city and its communities.

Private Transaction or Public Tender?

A second, yet related, dilemma is treating land and real estate disposal as "just" another transaction or a government contract requiring public European tendering. This is both a legal and moral dilemma. Public procurement law in Europe, and more specifically in EU member states, prescribes that the conditions that governments impose to control development in both space and time could go as far as to formally constitute a government contract rather than a transaction. However, as European tenders have the image of being lengthy and complex legal procedures, government agencies are inclined to avoid them.

According to Directive 2014/24/EU (2014), governments are obliged to put contracts out to tender if a prospective contractual agreement can be considered a public contract and exceeds 5,350,000 euros (price level 2019). What a public contract is has been further specified in Dutch public procurement law. The law prescribes that transactions qualify as public contracts when three criteria are met: there has to be a written agreement, for pecuniary interest, for the execution (and design, if applicable) of works that meet the requirements of the contracting authority (Government of the Netherlands, 2019). The Dutch Ministry of the Interior and Kingdom Relations further specified this definition in a 2011 guiding policy document, which considers public procurement a requirement when the contracting authority has a direct economic interest. An obligation to build is imposed on the concessionaire, and conditions are imposed

through private law that would not have been possible through public law (Ministry of the Interior and Kingdom Relations, 2011, p. 73; see also Luteijn, 2011).

Certainty or Flexibility?

Much literature in planning theory considers dilemmas at the root of every planning system: legal certainty versus flexibility (Booth, 1996; Moroni, 2007), and the balance between rule-based development-control decisions on the one hand and development-led development-control decisions on the other. The advantage of the former over the latter is that they lead to more predictable decision-making (i.e. greater legal certainty); a disadvantage is that they may not enable desired unanticipated developments, making them more inflexible.² Certainty and flexibility can be both *material* and *procedural* (Van Damme et al., 1997; Van den Hoek et al., 2020). Material certainty or flexibility concerns “normative rules like the maximum building height, building sizes, maximum sound production or the allowed maximum traffic generation” (Van den Hoek et al., 2020, p. 2; see also Buitelaar & Sorel, 2010). Material flexibility refers to the room *within* the rules to change: how much room is there to undertake alternative developments? For instance, Savini (2016) shows how the City of Amsterdam often reduces zoning details in land-use plans, thereby increasing material flexibility. Procedural certainty and flexibility refer to the room to *change* the rules themselves (e.g. through exemptions or revisions). For instance, “[a] long-lasting, participation-filled process with considerable legal protection provides more procedural certainty than a short process with almost no objections and appeal possibilities” (Van den Hoek et al., 2020, p. 2).

The public contracting process contains similar discussions about certainty versus flexibility. By making and signing contracts for the construction and operation of, for instance, infrastructure assets and services, contracting authorities and concessionaires create a mutual protection mechanism against each other’s opportunistic behaviour. Contracts specify what is allowed and inflict penalties for inappropriate behaviour or poor performance (Faems et al., 2008; Vincent-Jones, 2006). They develop a sense of certainty among the actors involved (Williamson, 1979). However, if contracts are to be adaptive and resilient, contingency plans are required (Luo, 2002). A degree of openness in contractual arrangements is crucial to remain receptive to innovations and changing circumstances. Contracts are always incomplete, as it is impossible to have complete information about the future (Brown et al., 2010; Campbell & Harris, 1993). Although the tensions between the alleged rigidity and desired flexibility of public contracting have been addressed through empirical research, scholars have zoomed in on public infrastructure development rather than urban development. For instance, Athias and Saussier (2018) and Vassallo (2010) focused on the adaptiveness of transport concession contracts, and Cruz and Marques (2013) assessed and evaluated a flexible contract for the provision of a hospital.

The Case of Amsterdam’s Bijlmer Prison: Methods and Introduction

Methods

The empirical research was conducted in the Netherlands in 2018 and involved a case study evaluating the sale of the Bijlmer prison in Amsterdam.³ The in-depth analysis of a single case contributes to theory-building about the tensions that come with public entrepreneurship in private land markets, an area of research that has remained unexplored and, because of that, explicitly requires rich, qualitative empirical accounts (Lijphart, 1971).

We selected the Bijlmer prison for study because it qualifies as an extreme case that can lead to relevant theoretical implications (Flyvbjerg, 2006). From 2016 to 2018, the Central Government Real Estate Agency (Rijksvastgoedbedrijf in Dutch [RVB]), which owned the prison, coordinated selling both land and structures on 7.5 hectares to a private market actor. RVB had a tradition of aiming for the highest price: i.e. getting the highest direct return for the taxpayer. This conventional practice came under scrutiny publicly by agencies demanding that RVB focus more on the local spatial and social impact of the development of government land (Netherlands Court of Audit, 2015; Council for the Environment and Infrastructure, 2014). It was common for RVB to select the highest financial bid in a phased process *after* shortlisting competitors that had submitted the plans with the highest spatial quality. To give greater weight to the dimension of quality, the sale of Amsterdam's prison deviated from the common practice. Selling the Bijlmer prison became the first central-government-initiated procedure in which incoming proposals from market actors were valued, based on a *simultaneous* and *equally weighted* assessment of the quality of the design and the financial bid. The sale of the Bijlmer prison has been a pilot for RVB in its attempt to grant aspects of quality a more significant role in selling land and real estate that has become redundant over time. Being an early example of a radically different approach to selling public real estate (and perhaps the first of its kind in the Netherlands), the Bijlmer prison was expected to provide a rich demonstration of the concomitant dilemmas.

For data collection, we used two methods: desk research and interviews. First, we gathered and reviewed documents from the Dutch national government and Amsterdam's local government, that were directly related to the sale of the Bijlmer prison. This information included project documentation, including the bid book (RVB, 2016), internal memos by RVB and the City of Amsterdam, legal advice reports, the land-use plan for the area where the prison was based (City of Amsterdam, 2017), and secondary sources to contextualise the sale of the Bijlmer prison. The information retrieved enabled us to build a timeline of the prison sale and unveil several critical decisions and events.

Second, we talked to 33 interviewees in 25 semi-structured interviews to dive deeper into how the process went and how and why decisions were made. To uncover the minute details of this process and these decisions, we focused on including interviewees *directly* involved in the sale of the Bijlmer prison (31 interviewees). In addition, we interviewed two external experts in procurement law to shed light on legal aspects of the case. Table 1 provides an aggregated list of our informants and their professional profiles. The interviewees have been anonymised to guarantee the privacy of personal and sensitive data. The interviews lasted between 45 and 90 min, were digitally recorded, and were processed into extensive summaries.

Table 1. Overview of interviewees.

Affiliation	Number of interviewees (code names)
Central Government Real Estate Company (RVB)	7 (G1-7)
City of Amsterdam	3 (A1-3)
Market actors (i.e. developers that were involved in the competitive bidding process)	14 (M1-14)
Selection committee (which assessed incoming bids and selected a winner)	5 (S1-5)
Consultants (who advised the selection committee on sustainability aspects)	2 (C1-2)
Legal experts	2 (L1-2)
Total	33

An Introduction to Amsterdam's Bijlmer Prison

The sale of the Bijlmer prison is part of a strategy of RVB to dispose of real estate that has become redundant. The public agency can choose between several procedures to sell assets, such as organising a public procurement process (with or without pre-selection) or hiring a real estate agent to mediate a market transaction (RVB, 2016). These procedures provide sales transactions with a test of market conformity, as the actor who makes the highest financial bid will become the property's new owner. Aspects of quality sometimes play a role in assessing bids, but the financial part has remained decisive. However, in the case of the Bijlmer prison, RVB piloted a procedure that considered the qualitative merits and financial bids of incoming proposals simultaneously and with equal weighting. Before we proceed to an empirical analysis of contracting dilemmas around the prison sale, we present a brief chronology of the process.

The closure of the Bijlmer prison was announced in a 2013 master plan for the Custodial Justice Agency (Minister for Migration, 2013). In 2015, the Dutch central government and the Amsterdam local government agreed to sell the premises to a market actor for redevelopment – and housing construction in particular. RVB and the City of Amsterdam formalised the agreement in a covenant in April 2016, which included the arrangements for the selection process. In the summer of 2016, the last detainee left the prison, and the institution closed.⁴ Amsterdam's city council established a Set of Principles (*Nota van Uitgangspunten*) for the redevelopment of the premises of the Bijlmer prison and a bid book (*biedboek*) which set out procedural details. In October 2016, the sale process officially started. The process involved two phases. In the first phase, market actors were invited to express their interest in buying the prison, which resulted in eleven potential buyers who presented their ideas in vision documents. Five of these interested actors were then selected to submit full proposals in the second phase. A complete proposal included an urban design plan and a financial bid. In September 2017, the winning market actor was announced – less than a year after the sale process started. Two months later, the city council of Amsterdam accepted a new land-use plan for the area that fitted the winning plan. The developer signed a purchase agreement, and in March 2018 paid 84.25 million euros to RVB for the keys to the prison. Table 2 summarises this chronology and lists several technical specificities.

Table 2. Technical information about the Bijlmer prison redevelopment and summarised chronology of the sale process.

Technical information	
Location	Amsterdam
Area	7.5 hectares
Number of buildings	30
Floor space	86,870 m ²
Previous function	Prison
Envisioned function	Mixed-use area: housing, offices and workspace, public amenities
Process	
Covenant between Central Government Real Estate Company and City of Amsterdam	28 April 2016
Closure of the prison	1 July 2016
Set of Principles for redevelopment	14 July 2016
Start of sale process	4 October 2016
Announcement of winning bid	12 September 2017
Acceptance of new land-use plan	29 November 2017
Payment by developer in return for key to prison	1 March 2018

Adapted from Buitelaar et al. (2019).

Balancing between Highest Price and Social Value

Finding a better balance between price and social value was part of a broader balancing act around the design of the process of the sale of the Bijlmer prison. Interviewees G3, G5 and G6 (all at RVB) listed four critical objectives on the part of RVB: a fast sales procedure; a sales procedure without objections, appeals, and administrative hassle; a good-quality plan and program; and the highest-possible sales revenue. The City of Amsterdam considered the second and third objectives to be most important, which indicates unequal priorities. Moreover, we came across at least two different viewpoints *within* RVB. On the one hand, RVB's objective is to generate revenue for the national treasury and to ensure that municipalities have sufficient resources at their disposal to realise good-quality plans. Both interviewees within and external to RVB saw this as a primary objective of RVB (interviewees A1, A2, C2 and M14). Following the rationale of generating revenue, interviewees G1 and G7 argued that by choosing an alternative prioritisation of objectives for the sale of the prison, RVB missed out on higher sales revenues. On the other hand, there was an opposite line of thinking, prioritising local social value over national financial gain. Interviewees G2 and G7 favoured this alternative approach and suggested that given the quality requirements set, the revenue from the prison sale has been as high as possible.

The group of proponents for alternative assessment criteria got the upper hand in deciding which procedure to follow. This group convinced the deputy minister to design a sales procedure which was different from previous sales procedures: it would be "an experiment" and be evaluated before being used again, if ever. The assessment would weigh the quality of the plan and the financial bid simultaneously and equally, much to the delight of the City of Amsterdam, which considered quality a key determinant (interviewees A2, A3, G1, G3, G5, G6, M1, M2 and M14). However, the assessment turned out to be complicated in practice. Assessing and comparing *quality* is daring enough in and of itself; comparing quality with *price* adds to the challenge.

Table 3 indicates stark differences between the proposals, particularly when it comes to the amount of public space (i.e. space reserved for pavements, water, and parks or greenery); the proportions between different housing types and tenures; and the volume and degree of specificity regarding businesses and amenities. Our interviewees commented that the detailed specification of requirements established by RVB led the competitors to exert significant effort into making plans of good quality, putting together extensive teams of professionals, and investing in knowledge development. All interviewees found that the quality of the plans submitted was generally high.

The equal weighting of the urban design plan and the financial bid was designed as follows. A maximum score of 50 points was assigned to each of the two elements. A jury would score each urban design plan on five objectives using a 10-point scale. The best plan was awarded a total score of 50, and the other plans were scored to scale, i.e. relative to the plan with the highest score. A similar logic applied to the scoring of the financial bids: the highest financial offer was awarded 50 points, and the others were scored to scale. Table 4 provides an overview of the assessment criteria and calculations.

Although formally and on paper, the scoring was aimed at an equal weighing of quality and price, the interviews clarified that there was quite some discretion for these members to affect the final scoring result substantially (interviewees S2, S3 and S4). The criteria for urban design were inevitably qualitative, broad and subjective (interviewee G2). The generosity of the committee's scoring and the *variance* between the scores proved to be essential to the weighing and, ultimately, the final ranking of the five submissions.

Table 3. Overview of bids submitted for sale of Bijlmer prison.

Competitors	1	2	3	4	5
Land development and land use					
Built area (m ²)	33,479	19,400	25,606	20,505	21,000
Unbuilt area (m ²)	41,521	55,600	49,499	54,457	54,000
Of which (m ²)					
Pavement	21,126	21,900	15,703	19,304	23,290
Water	5,624	16,200	15,464	16,362	19,080
Parks/greenery	14,761	18,567	18,332	18,753	11,630
Floor Space Index (FSI) ^a	N/A	1.8	1.81	1.79	1.8
Portfolio (m ² gross floor area)	135,000	135,000	135,000	134,362	135,000
Housing (number of units)	1,293	1,460	1,499	95,236 m ^{2b}	1,268
Of which (%)					
Market rental	70.2	18.8	62.8	70.8	33.1
Market owner-occupied	^c	28.7	^c	^c	26.2
Social housing	14.6	19.9	18.5	19.7	22.2
Student housing	15.2	25.5	18.6	9.5	18.4
Care homes		7.2			
Business and amenities (m ² gross floor area)	36,600	37,500	27,000	40,500	29,200
Of which (m ²)					
"Fixed" parts ^d	13,000	13,000	13,000	13,000	13,000
Hotel	18,000	7,000	1,000	9,258	6,500
Office/workspace/studio	3,000	5,400	9,500	8,511	6,500
Retail	750	500 ^e	1,000		1,000
Restaurant/café	350	1,100 ^f	1,500		
Exhibition/gallery/museum	750	3,000			
Healthcare		800			
Care concept		4,500			
Sports			1,000	626	2,200 ^g
Education		1,500			
Daycare		700			
Unspecified				8,605	

^aFSI: floor space index. FSI indicates the ratio of a building's total floor area to the size of the piece of land upon which it is built. ^bCompetitor 4 did not indicate the number of housing units but calculated with floor area for housing instead. ^cMarket housing was not split into rental and owner-occupied housing. ^dThe City of Amsterdam had designated areas for a high school and a breeding ground for start-ups. ^eIncluding a biological marketplace. ^fIncluding an "artist club." ^gIncluding an educational institution. Competitors have been anonymised (adapted from Buitelaar et al., 2019).

Table 4. Assessment criteria and calculations used to sell the Bijlmer prison

Scoring elements	Urban design plan	Financial bid
Assessment criteria	Urban and dynamic portfolio Creative interpretation of heritage value Identity within Overamstel district Sustainable neighbourhood Robust development strategy	Amount
Calculations	$Q = \text{Total number of points awarded above (max. 10 points for each category)}$ $Q^a \times (50/\text{highest score awarded}) = \text{Number of points on plan quality for bidder A}$	$P = \text{Amount}$ $P^a \times (50/\text{highest amount}) = \text{Number of points on price for bidder A}$
Eligibility (minimum threshold)	25 points or higher	60 million euros or more

Adapted from Buitelaar et al. (2019).

Unfortunately, we cannot reveal the financial bids and the scores for the urban design, nor the variance and the ranking. We can only say that all bids were above 60 million euros – the minimum threshold that RVB had set – and that the winning plan included a financial bid of 84 million euros. However, we have constructed fictive scenarios for the plan scores and the financial bids to show how sensitive the result is to individual scores, particularly the variance between them. This fictive exercise illustrates that the RVB's idea of equally weighting is illusive or at least dependent on the actual scoring and the discretion of those who assessed.

Table 5. Six fictive scenarios.

Bidder	Average score on quality of urban design plan	Score on quality of urban design plan – scaled	Financial bids (in millions of euros)	Financial bids – scaled	Total score
Scenario 1: high variance in plan quality, low variance in financial bids					
1	5	25	64	50	75
2	6.25	31.25	63	49.22	80.47
3	7.5	37.5	62	48.44	85.41
4	8.75	43.75	61	47.66	91.41
5	10	50	60	46.88	96.88
Scenario 2: high variance in plan quality, moderate variance in financial bids					
1	5	25	80	50	75
2	6.25	31.25	75	46.88	78.13
3	7.5	37.5	70	43.75	81.25
4	8.75	43.75	65	40.63	84.38
5	10	50	60	37.50	87.50
Scenario 3: high variance in plan quality, low variance in financial bids					
1	5	25	63	49.22	74.22
2	6.25	31.25	61	47.66	78.91
3	7.5	37.5	64	50	87.50
4	8.75	43.75	60	46.88	90.63
5	10	50	62	48.44	98.44
Scenario 4: high variance in plan quality, high variance in financial bids					
1	5	25	90	45	70
2	6.25	31.25	80	40	71.25
3	7.5	37.5	100	50	87.5
4	8.75	43.75	60	30	73.75
5	10	50	70	35	85
Scenario 5: low variance in plan quality, low variance in financial bids					
1	5.2	46.43	61	50	96.43
2	5.3	47.32	60.8	49.84	97.16
3	5.4	48.21	60.4	49.51	97.72
4	5.5	49.11	60.2	49.34	98.45
5	5.6	50	60	49.18	99.18
Scenario 6: low variance in plan quality, high variance in financial bids					
1	5.2	46.43	100	50	96.43
2	5.3	47.32	90	45	92.32
3	5.4	48.21	80	40	88.21
4	5.5	49.11	70	35	84.11
5	5.6	50	60	30	80

Shaded cells indicate winning bidders and total scores. Adapted from Buitelaar et al. (2019).

Table 5 presents six fictive scenarios which alter the variance in the scores for plan quality and the financial bids. The first scenario shows high variance in plan quality, i.e. scores between 25 and 50, and low variance in financial bids. This scenario demonstrates that the bidder with the highest-quality plan can combine it with the lowest financial bid and still be the overall winner of the procedure. With a moderate variance in financial bids, as in the second scenario, the

highest plan quality and the lowest financial offer remain a winning combination. The highest financial bid always scores 50 points; its real value does not make a difference as long as the division of scores on quality remains the same.

The variances shown in the third scenario are similar to those we used in the first scenario: high variance in plan quality, small variance in financial bids, yet with a different allocation of financial bids among the five bidders. Nevertheless, our initial observations are still standing; despite the intended equally weighted assessment, plan quality weighs more where the range between financial bids is narrow. When we increase the variance in financial bids significantly, as presented in the fourth scenario, the bidder with the highest financial offer will win from the competitor with the highest-quality plan as long as the plan of the former is at least of average quality.

Finally, the fifth and sixth scenarios illustrate how the simultaneous and equally weighted assessment works when there is low variance in plan quality. If combined with low variance in financial bids, plan quality remains a dominant element in the evaluation (fifth scenario). When we widen the range between the lowest and highest financial bids, the decisiveness of plan quality is reduced (sixth scenario).

These six fictive scenarios demonstrate that the calculation methods used in this case have not valued the *absolute* plan quality and financial bids as much as the *range in* and *differences between* these elements across the final proposals submitted – i.e. the *relative* values. The caveat is that there is a chance for final proposals to win the competition, despite a limited or lacking ability to achieve both good plan quality and the highest possible financial bid – which several interviewees addressed explicitly, including the private developers and members of the selection committee (M1, M2, S3 and S4). The fifth scenario aptly illustrates this pitfall: while the winning final proposal scores low on plan quality (though slightly higher than other proposals) and includes a financial bid that is barely eligible, it comes to a total score of 99.18 out of 100. The fifth scenario also shows the role and discretion of the assessor: while the financial bids, and the variance between them, were the result of private actors bidding, and therefore independent from the receiving public actor (i.e. RVB), the receiving end did play a much more significant role in scoring urban design quality.

Balancing Between Private Transaction and Public Tender

The way the sale of the Bijlmer prison was structured, with its strong focus on the local spatial and social impact of the redevelopment of government land, essentially fits the increasingly popular discourse to seek and achieve value beyond financial gains. However, RVB also aspired to run a fast sales procedure. It opted for a “normal” sales trajectory resulting in a transaction rather than a European tender. Before entering the procedure, RVB sought legal advice from two lawyers, asking if, and under which conditions, it could avoid public procurement with no or limited risk of litigation (interviewees G1 and G3).

Following the definition of public procurement provided by the Dutch Ministry of the Interior and Kingdom Relations (2011), the sale of the Bijlmer prison can indeed be considered a transaction rather than a case for public procurement. First, the contracting authority has no direct economic interest in the project: the development of both land and real estate is done by a private purchaser who bears the risks. Second, the agreements resulting from the sale do not impose any obligation for the purchaser to develop the site within a specific timeframe (i.e. there is no construction obligation). Third, the transaction includes several conditions that RVB imposes through private law, such as a breeding ground for start-ups. Hence, the Bijlmer prison case only meets the third criterion of public procurement, not the first and second, and does

not meet the requirement of conformance to all three criteria. Therefore, according to the definition used by the Ministry of the Interior and Kingdom Relations, selling the prison does not require public procurement. RVB then concluded that legal risks had been eliminated.

Whether that conclusion was justified remains to be seen, we conclude from our legal analysis and interviews with two public procurement experts. Also, critical reflections of interviewees G1 and G3 (both at RVB) indicated doubts about whether this interpretation was appropriate. First, the European Court of Justice has never tested the validity of the three criteria set out by the Dutch government in any Dutch case of land and real estate sales for development. Second, several lawyers have criticised the Dutch transpositions of the three criteria defined by the EU and have interpreted the European Court of Justice rulings differently. For instance, Hebly and Manunza (2017) read the second criterion differently than the Dutch government. The Dutch government interprets the criterion rather narrowly, namely as an “obligation to build”, making it mandatory for a buyer to start or complete construction within a specific timeframe. Hebly and Manunza (2017) apply a broader interpretation: they define the second criterion as setting requirements for the execution of the development and enforcing the requirements over time. When using Hebly and Manunza’s broader understanding of the criterion, the sale of the Bijlmer prison may well meet this. Especially because the purchase agreement between the parties involved does not end before all obligations have been fulfilled, and the City of Amsterdam has the right to inflict financial penalties upon sub-standard task execution by the purchaser. In other words, it comes close to a public contract. We observe that different subjective interpretations of public procurement legislation may lead to different legal assessments of the sale of the Bijlmer prison.

All in all, the dilemma is not just about choosing between a private transaction and a public tender. It is also, and probably even more, about balancing diverse interpretations of ambiguous procurement rules and, even more fundamentally, about the division between what qualifies as public and private.

Balancing between Certainty and Flexibility

Questions of certainty and flexibility played different roles in different phases of the sale process of the Bijlmer prison: *before* signing the purchase agreement (i.e. until March 2018) and *after* signing it. Therefore, we make a distinction between a *pre-contractual* phase and a *contractual* phase.

The pre-contractual phase included the substantial involvement of RVB and the City of Amsterdam, which both sought to guide or even steer the site’s future. Both authorities were explicit about their ambitions to sell the land and real estate to a purchaser with a creative and innovative plan. Rules and assessment criteria were established and explained in a bid book to make the sales trajectory open and responsive to the designs and portfolios that would be submitted (RVB, 2016). Thus, bidders were allowed some room for action; here we observed a substantial degree of *material flexibility*. However, for bidders to use that freedom, clarity was needed about the concepts used in the rules and the assessment criteria. Some interviewees addressed the lack of clarity regarding substantive aspects, particularly the assessment criteria. For instance, they reported that it had been challenging to understand a description in the Set of Principles about the authorities’ view on dealing with “cultural-historical values” (interviewees M5 and M8). The Set of Principles invited bidders to deliver a “creative interpretation of the core values” to maintain the “readable history” of the site and the buildings. Some developers

criticised the vagueness of the terms used in this explanation, indicated by interviewees S1 and S5, who were both members of the selection committee. Also, developers expressed similar criticism about the requirements regarding sustainability, said interviewee S3 (a member of the selection committee). Moreover, interviewees from the development industry stated that bidders would have appreciated feedback on the initial development visions used to select five consortia and invite them to make a bid.

While the Set of Principles was criticized for its lack of clarity, interviewees stated that the bid book indicated the procedure, the different steps in the process, the two selection rounds, and the criteria used for selecting the winning bid clearly (interviewees G3, G7, M1, M2, M3, M4, S3). The sale of the Bijlmer prison included a transparent process: the sales procedure was known or at least knowable beforehand. Therefore, the pre-contractual phase arguably came with a significant degree of *procedural certainty*.

We observed opposite ways of dealing with certainty and flexibility in the contractual phase. The purchase agreement contained several clauses that harnessed *material certainty*. For instance, it included a strict definition of the obligations to be fulfilled by the buyer, who would have to act in line with the urban design plan proposed during the sales process. Also, the agreement indicated that the City of Amsterdam had the right to impose financial sanctions if the buyer were to perform poorly or inappropriately in light of the requirements (interviewee M5). *Procedural flexibility* was obtained by leaving room for the contractual partners to change the arrangements made, based on mutual agreement.

Conclusion and Discussion

As regulators and traders in the land market, governments are bound to deal with dilemmas between various interests. Governments do not necessarily serve a clearly defined and homogeneous public interest, nor an interest entirely directed towards itself. The heterogeneity of interests, and how actors deal with practice, specifically in the practice of contracting, has been the focus of this article and its intended contribution to the literature on planning theory. Based on the interaction between empirical observation and conceptual exploration, we distinguished three dilemmas among interests that arose in the case of the Bijlmer prison. Although these dilemmas touch upon fundamental justifications for planning and government intervention, we found that subjective, pragmatic and context-specific choices are crucial to the balance reached within each dilemma.

First, regarding the dilemma of prioritising financial revenue or social value, we showed how decisive the variance in the scores for plan quality was for the total scores awarded to bids submitted for the sale of the Bijlmer prison. As plan quality was assessed by a selection committee and based on rather qualitative – and therefore subjective – criteria, individuals have played a significant role in the sale process. While the assessment of potential buyers' proposals intended to weigh plan quality and financial offers simultaneously and equally, our sensitivity analysis demonstrated that it was not the actual *absolute* valuation of proposals that determined the outcome of the bidding process, but the *relative* valuation. Relative valuation is prone to whether a selection committee engages in "stretched marking" or marking around the average. This research adds to the academic debate on systematically assessing price and quality (cf. Carmona & Sieh, 2004; Kuiper, 2009). Our critical remarks on the simultaneous and equally weighted assessment of price and quality in the Bijlmer prison are not unique; other scholars

have criticised similar assessment methods for their implications (Chen, 2005; Himmel & Siemiatycki, 2017).

Second, our discussion of the sale of the Bijlmer prison as a case for a private transaction or a public tender raised questions about the strategy applied by RVB. While some staff members at RVB considered the sale a private transaction, others had a different interpretation of public procurement law. Our analysis demonstrates the fine line between these two ostensibly opposite approaches. The criteria for qualifying public contracts, as such, are interpreted differently from one lawyer to the next. In the case of the Bijlmer prison, RVB acted pragmatically in the interest of running a fast sale process, using a relatively narrow and specific definition of projects eligible for public procurement, so that the sale would not require a European tender.

Third and finally, we demonstrated the presence of both material and procedural forms of certainty and flexibility in the process of selling the Bijlmer prison. Material flexibility and procedural certainty were dominant before the sale was made. Once the deal was sealed, material certainty and procedural flexibility took over. For instance, the City of Amsterdam increased material flexibility pre-contractually for bidders by not establishing a land-use plan until the sale process concluded (cf. Savini, 2016). This specific decision granted potential buyers leeway in creating urban design plans for the site. In addition, the vague formulation of some plan criteria, particularly around heritage protection and sustainability, provided flexibility and uncertainty to the bidders.

In other words, while we are talking about the very interests behind and justifications for urban planning, and the conflicts that may occur between them, our analysis shows that individual, specific and pragmatic interpretations and choices ultimately decide matters of principle. The result means that governments in general, and planning agencies in particular, become hybrid organizations. They are partly serving the *public* interest, and sometimes even various conceptualizations of the public interest at the same time, such as creating maximum social welfare in the Pigovian sense (Klosterman, 1985) as well as upholding the rule of law and protecting property rights as promoted by liberal theories (Moroni, 2007). Simultaneously, governments and planning agencies are partly serving special *private* interests (Pennington, 2002), such as maximum revenues for the agency, through asking maximum land and property prices. Whether that results in serving all these interests, or serving none of them sufficiently, is up for discussion in case-specific assessments. This article has tried to make the notion of hybridization of interests explicit, most notably by illustrating it through a specific Dutch in-depth case. But this notion is relevant to every country where planning agencies assume an entrepreneurial role alongside their role as regulator.

Notes

1. It is not always clear whether an interest should be qualified as public or private.
2. Although it may be argued that “real” legal certainty, through creating general, simple, non-location-specific rules, creates both legal *certainty* and spatial *flexibility* at the same time (Moroni, 2007).
3. The official name of this prison was *Penitentiare Inrichting Over-Amstel*; it was generally nicknamed as *Bijlmerbajes* (*bajes* is Dutch slang for “prison”).
4. After the closing date, parts of the buildings served as temporary asylum center, community space, and housing units (Posthumus, 2018).

Disclosure Statement

No potential conflict of interest was reported by the author(s).

Funding

This work was supported by RVB (Rijksvastgoedbedrijf), which is the Central Government Real Estate Agency in the Netherlands.

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