



Ministry of Economic Affairs
and Climate Policy

Public Procurement Monitoring Report of the Netherlands

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Management summary

This report presents an overview of Dutch public procurement practice over the years 2018, 2019 and 2020, in both quantitative and qualitative terms. With this report, the Netherlands fulfils the monitoring obligations laid down in Articles 83 and 85 of Procurement Directive 2014/24/EU. The template provided by the European Commission has been used as a basis for this report.

The main findings are as follows:

- The estimated total value of all procurement procedures both above and below the European thresholds within the Netherlands is €86.6 billion (2019). This means that the procurement volume of Dutch public authorities has steadily risen (from €79.3 billion in 2017). Procedures below the EU thresholds form 66 percent of the total value.
- The number of procurement procedures above the threshold and the total value of the contracts where the contract was awarded to small and medium-sized enterprises (SMEs) appeared stable over the period 2017-2019.
- The number of new procedures above the European thresholds was similar in 2020 compared to 2019. The most significant effect of the COVID-19 crisis was an increase in modifications of ongoing procedures during the first weeks of the crisis. After this period, the situation seems to be normalised. A full analysis of the year 2020 is yet to be conducted and will be reported on in the next monitoring report.
- The Dutch government strongly values the improvement of public procurement practices, as shown by recent policy developments. More information about the follow-up programme to Better Public Procurement (*vervolg Beter Aanbesteden*) and the improvements in the area of legal remedies in public procurement can be found in this report.
- This report also contains a chapter on the most commonly asked questions about public procurement and its application, like the estimation and object of the procurement.
- In the Netherlands, several procedures and legal provisions to avoid fraud and corruption in public procurement are in place. Furthermore, the Netherlands Authority for Consumers and Markets (ACM) monitors and investigates fraud, collusion, corruption and conflicts of interest in procurement procedures.
- Public procurement is increasingly used by contracting authorities in the Netherlands as a strategic tool to achieve policy goals such as environmental, social or employment-related impact. The Dutch government stimulates the application of strategic public procurement through a comprehensive 'National programme for sustainable public procurement (SPP) 2021-2025'. More information about this programme can be found in this report. In addition to a focus on positive strategic policy goals, more attention is paid to the issues of unfair competition and risks for national security in relation to public procurement.

1. Introduction

1.1 Purpose of this report

This report gives an overview of Dutch procurement practice over the years 2018, 2019 and 2020, in both quantitative and qualitative terms. It was not possible to include the year 2020 for all information requested in the report, as some data were not yet available at the time the research was being carried out.

The monitoring and reporting obligations laid down in Articles 83 and 85 of Directive 2014/24/EU form the basis of this report. This report does not stick to the letter of these obligations, but tries to put the data into context.

1.2 Outline of the report

The quantitative data used to implement these obligations have for the most part been collected from TenderNed, the Dutch government's online tendering system. TenderNed publishes all notices from Dutch contracting authorities above European threshold values and therefore forms a complete database with regard to procurement procedures above these thresholds. Chapter 2 gives an overview of the methodology used to analyse these data. Chapter 3 provides information on the Dutch legal system, the monitoring and control of public procurement and the support available for contracting authorities. The data on complaints and disputes presented in this chapter are based on analyses of decisions made available through the website rechtspraak.nl. Since publishing contract notices below European threshold values is not mandatory in the Netherlands, TenderNed cannot provide complete data concerning these contracts. For this reason, the aggregated value of procurement below the thresholds has been estimated by independent experts on the basis of data on government spending. The results are outlined in Chapter 4. Chapter 5 looks at commonly asked questions from contracting authorities and legal uncertainties regarding public procurement. Qualitative data on these subjects

were collected through the Dutch public procurement expertise centre PIANOo, both through an analysis of questions received by PIANOo and through questionnaires among and interviews with representatives of Dutch contracting authorities.

The quantitative data presented in Chapters 6 (on fraud, collusion and conflicts of interest) and 7 (on participation of SMEs) are also based on data from TenderNed. Chapter 8 explains how public procurement is used as a strategic policy tool for purposes such as sustainability and innovation. Chapter 8 also looks at the participation of third-country tenderers in Dutch public procurement procedures and the political discussion surrounding this subject.

1.3 Reflection on recent developments

The past year has been an extraordinary one due to the COVID-19 crisis. However, it is notable that the Dutch procurement market has reacted quite calmly to the crisis. The Dutch government is stimulating economic recovery during the pandemic through a continuation of public procurement procedures. The number of new procedures above the European thresholds was similar in 2020 compared to 2019. The most significant effect was an increase in modifications of ongoing procedures during the first weeks of the crisis. This was probably a result of contracting authorities extending deadlines in order to give both themselves and economic operators time to adjust to the new situation. The fact that public procurement in the Netherlands was already almost completely digitalised has probably helped to avoid crisis-related problems. A full analysis of the year 2020, which takes a closer look at contracting authorities' and economic operators' experiences and at procedures below the European thresholds, is yet to be conducted and will be reported on in the next monitoring report. In the meantime, the Netherlands will focus on the role that public procurement can play in the economic crisis recovery.

2. Methodology

2.1 About the quantitative data used

Most data in this report were extracted from the database of 'TenderNed'.¹ All contracting authorities are obliged to publish their contract notices and contract award notices on TenderNed when the value of the contract is equal to or exceeds the European threshold values. The publication of documents related to contracts below the European thresholds is voluntary.

TenderNed acts as a central hub for all procurement notifications and documents. TenderNed is free to use and enables governmental bodies to publish procurement documents, while economic operators can apply for tenders, ask questions to the contracting authorities, etc. Governmental bodies are allowed to use other platforms if they wish. However, all notifications for which publication is mandatory according to the European Procurement Directives are to be published on (TED and) TenderNed before they are published on another platform.

2.2 Procedures above EU thresholds

Contracting authorities can choose between different platforms for publishing a procurement procedure. TenderNed is the platform provided by the central government, but there are also commercial alternatives (known as 'T-senders'). If a T-sender is used, the contract notifications and contract award notifications must still be published on TenderNed. About 60% of all procurement procedures in the Netherlands are conducted in full on TenderNed. Consequently, in all other cases (about 40%), the procedure is conducted on another platform, and only the contract notification and the contract award notification are published on TenderNed, through an automatic link established between the platforms. However, underlying data on strategic or social considerations within these procedures, for example, are missing. To prevent missing data from skewing the results, these third-party procedures have been left out of the report. Therefore, in this report, only the data from the procedures that are conducted on TenderNed in their entirety have been used. For the chapters in this report dealing with the number of procurement procedures and the total value of procurement and SME participation, a different methodological approach is used. This approach is explained in the report of Significant.²

2.3 Procedures below EU thresholds

In the Netherlands, there is no obligation to publish contract notices and contract award notices for procedures below the European thresholds in a central database. However, contracting authorities are permitted to make use of TenderNed to publish the documents belonging to such procedures, and they often do so. Therefore, limited data do exist within TenderNed on procedures below the European thresholds. These data have been used as an indication of overall trends.

2.4 Data analysis

The analysis of the data was executed by data experts of TenderNed, part of PIANOo. The data have been examined, selected and validated by this team. The aggregated data are the results presented in this report.

2.5 Data sources

Most data from TenderNed are publicly available.³ Some data are restricted, as they comprise sensitive information that cannot be made publicly available. For this report, both publicly available and restricted data have been used.

¹ For more information about TenderNed see: <https://www.tenderned.nl/cms/english>.

² See Significant 2021.

³ Available on: <https://www.tenderned.nl/cms/english>.

3. Information on monitoring and reporting bodies

3.1 General information about the Dutch legal system

The Netherlands is a decentralised unitary state, in which the decentralised governmental bodies (provinces, municipalities and regional water authorities) have extensive powers and autonomy to regulate their own internal affairs. There are 12 provinces, 355 municipalities (as of 1 January 2020⁴) and 21 regional water authorities.⁵

The principles of subsidiarity and autonomy are key principles within the Dutch legal system. This means that decentralised governmental bodies enjoy a great deal of autonomy, including the power to adopt their own legislative acts (which cannot contradict national legislation). Furthermore, each governmental level has its own financial control mechanism, exercised by local representatives and auditing bodies. A substantial number of policy areas are organised at the local level to bring decision-making as close as possible to the citizens. For this reason, decentralised governmental bodies are responsible for their own procurement policies and procedures. The administrations of municipalities, provinces and water authorities are monitored by local councils elected by their citizens. There are also financial auditing bodies that check financial spending (including procurement decisions). On a higher level, all activities of municipalities, provinces and water authorities are subject to review by the national legal system, within either administrative or private law.

3.2 System for monitoring and control of public procurement

Procurement decisions are made by several bodies: the central government, municipalities, provinces, water authorities and other bodies governed by public law (to the extent that they exercise public powers, such as public utilities). These bodies are considered to be contracting authorities that should procure goods, works and services in accordance with the Public Procurement Act⁶. Governmental bodies – acting in their role as contracting authorities – are subject to political and financial control.

3.3 Complaints and disputes

Public procurement in the Netherlands is part of the pre-contractual system and therefore falls within the scope of private law. This means that any appeal against award decisions, for example,

must be brought to the civil court. If necessary, temporary injunction proceedings can be used to halt the start of the contract, and they are frequently used in public procurement cases. Litigation can take place in three instances, excluding the possibility of invoking the European court in any capacity.

Besides proceedings in civil court, an extra-judicial review body has been set up specifically for public procurement procedures: the Commission of Procurement Experts (*Commissie van Aanbestedingsexperts*). The purpose of this impartial and independent body is to contribute to the resolution of public procurement complaints by processing them quickly, carefully and accessibly. To this end, the Commission responds to complaints by issuing non-binding opinions and by mediating between parties, also with the aim of helping to further improve the level of professionalism of procurement practices and to foster a learning effect at economic operators and contracting authorities. The Commission consists of three leading procurement experts. When necessary, the Commission can also request advice from a number of external industry and other experts.

3.4 Recent policy developments

The Dutch Ministry for Economic Affairs and Climate Policy is primarily responsible for the Public Procurement Act and the regulations directly related to it. This Ministry has therefore implemented the Procurement Directives into national law and fulfils the reporting obligations of these Directives.

In 2019, the Dutch Ministry of Economic Affairs and Climate Policy commissioned KWINK Group to conduct research into the legal remedies available in public procurement procedures, and the Ministry published the research results alongside the intended policy measures.⁷ The research focussed on a perceived lack of adequate legal remedies for economic operators, ranging from complaints procedures at contracting authorities' level to access to civil courts. One of the main findings was that economic operators are hesitant to go to court because of high costs (especially in the case of SMEs) and because they are afraid of reputational damage. Measures to address these findings were presented to Parliament in January 2021.⁸ Some of these measures require an amendment of the Public Procurement Act. The measures were developed with a broad focus group with representatives from contracting authorities, entrepreneurs and experts in the field of public procurement.

⁴ <https://www.cbs.nl/nl-nl/nieuws/2019/53/gemeentelijke-indeling-ongewijzigd-in-2020>

⁵ <https://dutchwaterauthorities.com/about-us/>

⁶ <https://wetten.overheid.nl/BWBR0032203/2019-04-18> (in Dutch)

⁷ Rechtsbescherming in de aanbestedingspraktijk: Kamerbrief over het onderzoek naar rechtsbescherming bij aanbesteden en beleidsconclusies (Kamerstukken II 2018-2019, 34.252, nr. 13) (in Dutch).

⁸ Kamerbrief over de uitwerking van maatregelen voor verbeterde rechtsbescherming bij aanbesteden (Kamerstukken II 2018-2019, 34.252, nr. 21) (in Dutch).

The intended measures roughly cover four areas. Firstly, all contracting authorities will be required by law to set up an internal complaints desk that meets certain minimum criteria. Not all contracting authorities have a complaints desk yet. This desk constitutes the first stop for economic operators to submit any complaints during the procurement procedure and offers a complaints handling process that is free of cost and easily accessible. The desk tries to address the complaints as early as possible in the procedure. Secondly, the Proportionality Guide, which contains provisions for practical application of the proportionality principle by contracting authorities, will be updated. The update concerns what are known as time-bar clauses, which are grounded in the Grossmann judgment.⁹ Thirdly, the role of the Commission of Procurement Experts will be adjusted, and the Commission will exclusively focus on complaints made before the date of tender submission. The Commission will provide a non-binding advice within two weeks after the complaint has been received. Contracting authorities will be required to pause the procurement procedure until the advice is issued, for a maximum of two weeks. Lastly, different rules to improve the process of private appeals against procurement decisions will be adjusted. Contracting authorities will be required by law to provide better and more elaborate justifications for award decisions. Also, more possibilities for economic operators to appeal will be created by the expansion of grounds for annulment of agreements.

3.5 Information and support

Another important body within the Dutch procurement system is PIANOo, financed by the ministry of Economic Affairs and Climate Policy and some other governmental bodies. PIANOo provides guidance on procurement-related subjects to contracting authorities. This is done by sharing knowledge and highlighting best practices through a website (www.pianoo.nl), by answering questions and by hosting numerous events (webinars, congresses) on all kind of subjects related to good public procurement (sustainable, innovative, according to the Directives). From 2021 onwards, PIANOo has been awarded additional funds for a programme called ‘*vervolg Beter Aanbesteden*’ (follow-up programme to Better Public Procurement). The programme is aimed at local and other contracting authorities and businesses and should contribute to the professionalisation of Dutch public procurement, through knowledge sharing and by highlighting best practices. The programme is a cooperation between the ministry of Economic Affairs and Climate Policy, the Association of Netherlands Municipalities, and the Dutch business association (VNO-NCW/ MKB-Nederland). PIANOo will coordinate the programme and will facilitate these exchanges. Furthermore, PIANOo is responsible for the national public procurement platform TenderNed (see also Chapter 2).

Table 1: National review system

	2018 ¹	2019
Number of first instance review decisions	129	114
Median length of the review*		
Number of review decisions challenged	19	21
Number of decisions (primarily) upheld	13	13
Number of decisions (primarily) rejected	6	6
Number of decisions – other	0	2

* The legal term in the Dutch Procurement Act for a temporary injunction is 20 calendar days after the award of the contract. The court aims to plan court sessions within two months. However, this depends on the availability of the lawyers of both parties. After the temporary injunction, the judgment of the court generally takes place within six weeks (which is a target date).

⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0230&qid=1615302773279>.

¹⁰ <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/01/aanbestedingsrechtspraak-in-nederland>.

4. Key quantitative indicators

4.1 The number of procurement procedures and the total value of procurement

As stated before, there is no obligation in the Netherlands to publish contract notices and contract award notices for procedures below the European thresholds in a central database. For this reason, the only possible way to find out the total value of public procurement procedures below the European thresholds is through estimation. On behalf of the Dutch Ministry of Economic affairs and Climate Policy, Significant Synergy has done research on the value of public procurement procedures in the Netherlands and on the total number of procedures both below and above the European thresholds for the years 2017-2019. It was not possible to include the year 2020 in the report because essential data were not yet available at the time the research was being carried out. For more detailed results and the methodology used, please find the report attached (Annex I).

Main results:

Table 2: Total number of procedures (estimated) (source: Significant 2021)

	Below EU thresholds (estimated)	Above EU thresholds
2017	130,900	5,031
2018	150,400	5,790
2019	163,500	6,397

Table 3: Estimated total value of Dutch public procurement procedures¹¹ (source: Significant 2021)

	Estimated total value (in billion euros)	Estimated total value below threshold (in billion euros)	Estimated total value above threshold (in billion euros)
2017	79.3	52	27.3
2018	86.2	56.5	29.7
2019	86.6	56.7	29.8

¹¹ For the estimation of the total value of Dutch public procurement, a combination of data on contract awards (above threshold) and the national accounts (below threshold) is used. For more details about the methods used, please see Significant 2021.

5. Commonly asked questions and legal uncertainties

5.1 General information

This chapter is based on an analysis of questions received by PIANOo, both from contracting authorities and to a lesser extent from businesses, as well as non-structured interviews with experts from PIANOo. We selected a number of interesting topics to emerge from this analysis, which we discuss below.

5.2 Topics

Estimation of the procurement:

The correct estimation of the contract value of a procurement is considered to be problematic by contracting authorities. For example, it is not always clear what an accurate and diligent estimation of a contract should be and what the legal consequences would be if this value were to be exceeded during the term of an awarded contract. This applies in particular to the special estimation methods for performance agreements and contracts that are carried out on a regular basis. Value estimation is also a problem with respect to homogeneous contracts, given that there is no definition of this concept.

Object of the procurement:

The Public Procurement Directive stipulates that all established requirements must be related and proportionate to the object of the procurement or contract. This is an aspect that contracting authorities are struggling with, as it is unclear what is meant by the object of the procurement. In particular, it is unclear what the connection to the object of the procurement entails in relation to minimum or other eligibility requirements and selection criteria. Within the context of the transition objectives, including sustainable procurement, it should be possible to establish requirements, conditions and criteria for the object of the procurement as well as for the operational management of the tenderer/candidate. A contract for the supply of green electricity, for example, should also take into account the level of sustainability of the contractor itself. At present, that flexibility is restricted by the requirement that the selection criteria, within the meaning of the Directive, must be related to the object of the procurement. Clarification and easing of this requirement (relation to the object of the procurement) would give contracting authorities greater scope to achieve the transition objectives.

European Single Procurement Document:

There seems to be confusion amongst contracting authorities and (especially) businesses concerning the content of the ESPD-form. The objective of reducing the administrative burden through the introduction of the ESPD does not appear to have been achieved, given that businesses (SMEs and start-ups in particular) find it very burdensome. In some cases, filling in the ESPD incorrectly can even lead to exclusion from the procurement procedure.

The 'light regime' for healthcare services:

With the entry into force of the latest European Public Procurement Directive (2014/24/EU), all home care and youth care tenders above 750,000 euros fall within the scope of the Directive. As recently shown in a study on regulatory burdens and the level of cross-border dimension in the domain of social care services, Dutch contracting authorities (mainly municipalities) and health care services perceive the European procurement rules to be burdensome, time-consuming and costly. This study also shows that there is no cross-border dimension in this domain.¹² Capacity building and a national direct support programme have been set up for contracting authorities. However, the light regime in itself cannot yet solve the need for integration, innovation and collaboration to guarantee cost-effective and high-quality care in the domain of social care services without a cross-border dimension. Discussions with Member States and the Commission have been initiated to find an appropriate and effective solution.

5.3 Other frequently asked questions

In addition to the foregoing topics, contracting authorities have many questions regarding the following issues:

- *classification of contracts*: this primarily relates to questions regarding the qualification of a contract as a work or service. The CPV code may provide an indication in this regard, but it is not always conclusive;
- *public-public cooperation*: to contracting authorities, it is not always clear what public cooperation or cooperation in the public interest means, what exactly this partnership should be based on and what the realisation of common objectives entails. The 2011 European Commission working paper should be updated;¹³
- *use of TenderNed*: a variety of questions regarding the use of the TenderNed platform (such as the relationship between TenderNed and TED and delays in the process when processed through TED).

¹² <https://www.rijksoverheid.nl/documenten/rapporten/2020/08/31/report-public-procurement-of-social-health-services-study-of-regulatory-burden-and-the-level-of-cross-border-dimension>

¹³ <https://ec.europa.eu/docsroom/documents/21190/attachments/1/translations/en/renditions/native>

6. Fraud, collusion and conflicts of interest

6.1 Legal provisions

This chapter gives an overview of the legal provisions in place to prevent fraud, collusion and conflicts of interest in public procurement. Quantitative indicators are shown to a lesser extent, as it is challenging to quantify these subjects. The Dutch Procurement Act implements the EU Procurement Directives, including the provisions on fraud, corruption and conflicts of interest. In the general part of the Procurement Act, which applies to all procurement procedures regardless of the value of the contract, Section 1.10b states the following (unofficial translation):

Section 1.10b

1. A contracting authority or a public utilities operator must take appropriate measures to effectively prevent, identify and remedy fraud, favourable treatment, corruption and conflicts of interest during a procurement procedure, to avoid any distortion of competition, ensure the transparency of the procedure and guarantee the equal treatment of all economic operators.
2. The concept of conflicts of interest as indicated in the first part shall at least apply to any situation where personnel of the contracting authority, the public utilities operator or a procurement service provider acting on behalf of the contracting authority or the public utilities operator that is offering a supplementary procurement activity on the market, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure, have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

The Procurement Act also contains other provisions that are relevant in this context. For example, Section 2.51 regulates the involvement of economic operators in the preparation of the procurement procedure. Besides the Procurement Act, there are rules governing integrity, such as the general rules on integrity for civil servants (for example, see the Municipalities Act (*Gemeentewet*), the Civil Servants Act (*Ambtenarenwet 2017*) and the House for Whistleblowers Act (*Wet Huis voor Klokkeluiders*)). Also, bribery or attempted bribery of civil servants is punishable by criminal law. If provisions on integrity are infringed, concerned parties can take legal or other action against the infringing contracting authority.

Besides legal provisions, soft law also contains guidance on the prevention of integrity violations. A good example is the '*Modelaanpak basisnormen integriteit*'¹⁴ ('Model approach to basic standards for integrity') (2006), which mandates that every governmental body must implement and carry out an integrity policy that at least

conforms to the minimum standards set out in that document, including on public procurement. By implementing and actively carrying out an integrity policy that includes procurement provisions, the main sources of fraud, corruption and conflicts of interest within a contracting authority can be eliminated.

6.2 Guidance

Several agencies have been set up specifically to give guidance to decentralised authorities, including on the implementation of the provisions on integrity by contracting authorities and public utilities operators. For example, the Association of Netherlands Municipalities (VNG), Europa decentraal (Europe decentralised¹⁵) and the website of the Dutch central government provide detailed information on preventing fraud and corruption within the government in general and within procurement procedures in particular. The most detailed effectuation of the provisions on preventing fraud and corruption within procurement can be found on the website of PIANOo.¹⁶ PIANOo collects and presents information on the prevention of integrity violations on its website, gives advice and answers questions on this matter.

Furthermore, the Netherlands Authority for Consumers and Markets (ACM) monitors and investigates fraud, collusion, corruption and conflicts of interest in procurement procedures. The ACM encourages contracting authorities and economic operators to contact the ACM when they suspect anticompetitive or fraudulent behaviour in procurement procedures. The ACM provides information about indicators that could signal suspicious agreements, prices and behaviour.¹⁷ In 2020, the ACM fined two cases of collusion in public procurement. One fine was imposed on roofers¹⁸ and the other on construction companies.¹⁹ These cases are also mentioned in the ACM annual report.²⁰

¹⁵ Europa decentraal is the local and regional authorities' premier institute for queries concerning European law and legislation.

¹⁶ <https://www.pianoo.nl/themas/integriteit/integriteit-toegelicht> and the other pages linked from there (in Dutch).

¹⁷ <https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/concurrentie-en-afspraken-tussen-bedrijven/aanbestedingen/meedoen-aan-aanbestedingen>
<https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/concurrentie-en-afspraken-tussen-bedrijven/aanbestedingen/verboden-afspraken-herkennen-en-melden-voor-inkopers>

¹⁸ <https://www.acm.nl/en/publications/roofing-contractors-fined-distortion-competition-tender-process>
<https://www.acm.nl/nl/publicaties/boetes-voor-dakdekkers-voor-concurrentievervalsing-bij-aanbesteding-blijven-stand>

¹⁹ <https://www.acm.nl/en/publications/acm-imposes-fines-four-construction-firms-illegal-arrangements-tender-processes-amsterdam>

²⁰ <https://www.acm.nl/nl/publicaties/jaarverslag-acm-2020> (in Dutch; an English version of the Annual Report will be published soon).

¹⁴ <https://www.rijksoverheid.nl/onderwerpen/kwaliteit-en-integriteit-overheidsinstanties/documenten/brochures/2005/09/26/modelaanpak-basisnormen-integriteit>
Video: <https://www.rijksoverheid.nl/documenten/videos/2019/02/26/gedragcode-integriteit-rijk>

6.3 Quantitative indicators

It is difficult to quantify the risk of fraud, collusion, corruption and conflicts of interests. It depends on a lot of factors, one of which is the type of procedure. Performing a risk assessment that looks at certain types of procedures is one way to analyse the risk of fraud and corruption. The quantitative indicators below show that certain procurement procedures only received one bid, or there was no prior publication of a call for competition. This does not mean that there was fraud or corruption in these cases. In general, there are many possible legitimate reasons why only one bid was received or no prior call for competition was published. To ensure that such legitimate reasons are not misused, proper control mechanisms must be in place both within the organisation of the contracting authority itself and independent of it.

Table 4 shows the cases in which a call for competition received only one bid. In most procedures, contracting authorities received more than one bid. The percentages are based on all open procedures of contracting authorities registered in TenderNed.

Table 4: Cases in which a call for competition resulted in only one bid (source TenderNed)

Year	Percentage of awards that received only one bid	Percentage of awards that received more than one bid
2018	14%	86%
2019	16%	84%
2020	16%	84%

Table 5 shows the percentages of negotiated procedures without publication of a prior call for competition. It should be noted that, for technical reasons, a procedure is sometimes recorded as having been conducted 'without a call for competition' while, in reality, there was a call for competition. For this reason, the category of technical reasons is not included in Table 5.

Table 5: Percentage of negotiated procedures without publication of a prior call for competition (source: TenderNed)

Year	Percentage
2018	4%
2019	5%
2020	5%

7. Participation of small and medium-sized enterprises

7.1 General information

As the data in this chapter show, the participation of SMEs is quite high in the Netherlands. Nevertheless, SME participation continues to be an important policy objective. A distinction can be made between the *direct* participation of SMEs in procurement procedures as bidders and *indirect* participation, for example through subcontracting. This section will exclusively focus on the direct participation of SMEs.

The main perceived constraint for direct participation by SMEs in procurement procedures is the idea that the costs to participate in procurement procedures are high in terms of money, time and effort. Especially compared to large-sized enterprises, the impact of these costs can be relatively significant for SMEs.²¹ For this reason, contracting authorities are encouraged to make their procurement procedures as accessible as possible for SMEs.

An important measure to facilitate participation by SMEs in procurement procedures is the prohibition in the Dutch Public Procurement Act on unnecessarily clustering contracts (Section 1.5). Due to this provision, contracting authorities have to consider the structure of the relevant market and the effect of clustering on the access of SMEs. If a contracting authority decides to cluster contracts, it has to give an adequate reason for its decision. Of course, this does not relieve contracting authorities in any way from the obligation to take the sum of the value of similar contracts into account when deciding whether European threshold values are being surpassed. Besides this, the mandatory 'Proportionality Guide' strengthens the position of SMEs by giving detailed explanations of the proportionality principle.

Moreover, PIANOo provides contracting authorities with examples of how to take measures to improve the participation of SMEs in the tender procedure. Examples of these measures are, amongst others:

- organising local meetings with representatives of SMEs on a regular basis;
- providing SMEs with specific information about the procurement process (while respecting the principle of transparency);
- making SMEs aware of the possibility to create a combination or consortium in procurement procedures;
- explaining ways to pay subcontractors directly.

Furthermore, the programme '*Beter Aanbesteden*' ('Better Public Procurement'), initiated by the Dutch government in 2016, encourages SMEs and contracting authorities to identify constraints and develop concrete actions to improve the practice of public procurement. The constraints and concrete actions have also been discussed at a national level, with different representatives of SMEs

having been consulted. This process was largely completed in 2017, and the resulting Agenda of Actions was presented in February 2018. One of the actions in this Agenda focuses on the possibilities for contracting authorities to communicate with economic operators in general and SMEs in particular. This initiative is going to be continued by the programme '*vervolg Beter Aanbesteden*' (follow-up programme to Better Public Procurement). This programme will start from 2021 onwards and will have the objective of further professionalising public procurement in the Netherlands, through regional knowledge sharing, by highlighting best practices and through dialogue and cooperation between economic operators and local and other governments. PIANOo will coordinate this programme and will facilitate the exchanges between economic operators and governments.

7.2 Sources

The most up-to-date information concerning measures taken in support of SME participation can be found on the PIANOo website: <https://www.pianoo.nl/nl/themas/mkb-vriendelijk-inkopen>. This includes, but is not limited to, the measures described in the section above.

Further information can also be found in other sources, such as the website of MKB Nederland (the largest entrepreneurs' organisation in the Netherlands), but this is primarily aimed at economic operators.²²

7.3 Quantitative indicators

The attached report of Significant Synergy includes detailed quantitative results on SME participation in the Netherlands for the years 2017, 2018 and 2019. This report also includes the methodology used.

Main results:

Table 6: SME participation above the threshold (source: Significant Synergy 2021)

	Estimated percentage of SME participation (value)	Estimated percentage of SME participation (number of contracts)
2017	48%	62%
2018	46%	61%
2019	54%	62%

²¹ <https://www.rijksoverheid.nl/documenten/rapporten/2015/07/08/effecten-van-de-aanbestedingswet-2012>

²² <https://www.mkb.nl/over-mkb-nederland/english>

Table 6a: SME participation below the threshold (source: Significant Synergy 2021)

	Estimated percentage of SME participation (value)	Estimated percentage of SME participation (number of contracts)
2017	59%	63%
2018	60%	57%
2019	62%	68%

8. Strategic procurement

8.1 General information

Public procurement is increasingly a strategic tool to achieve policy goals such as environmental, social or employment-related impact. Responsible business conduct also contributes to the United Nations Sustainable Development Goals. The Netherlands stimulates the application of strategic public procurement through a comprehensive ‘national programme for sustainable public procurement (SPP) 2021-2025’²³ containing actions such as creating targeted impact with buyer groups, improving the way sustainability is embedded in public organisations and coordinating the monitoring of strategic procurement. This national programme encourages contracting authorities to create as much sustainable impact as possible. The national programme for SPP unites the procurement activities of six departments in one comprehensive programme: the Ministry of Infrastructure and Water Management (circular economy, climate and sustainability), the Ministry of Economic Affairs and Climate Policy (green transition and social enterprises), the Ministry of Foreign Affairs (international responsible business conduct), the Ministry of Social Affairs and Employment (labour market), the Ministry of the Interior and Kingdom Relations (social return and procurement by the national government) and the Ministry of Education, Culture and Science (diversity and gender equality). Other ministries might join in the future to include biodiversity policy in the programme.

The previous programme ran from 2015 to 2020 and has been renewed for the next five years with an enhanced budget. The programme focusses on adjustments within the current legal framework; additional legislation is not part of the programme. Currently, more than half of all local and regional governments (175 in total) in the Netherlands are partners in the programme. The Dutch public procurement expertise centre PIANOo plays an important part in executing the programme, stimulating activities and providing information on the legal and other opportunities for sustainable public procurement. Rijkswaterstaat (responsible for the design, construction, management and maintenance of the main infrastructure facilities in the Netherlands) also plays an important role in providing up-to-date SPP criteria, among other things. The programme interacts with the ‘Better Public Procurement’ programme, as a professional public procurement sector is an important requirement for successful responsible and suitable public procurement.

Innovation in public procurement

Innovative public procurement is different in the sense that innovation is not an aim, but a vehicle to achieve different policies, such as creating a circular economy. Innovation can result in

improved quality and reduced costs. Simultaneously, innovation can play a key role in stimulating the green transition. Innovative public procurement offers opportunities for start-ups and SMEs to develop new technologies and contribute to the Dutch economy. PIANOo executes a programme for innovative public procurement on behalf of the Ministry of Economic Affairs and Climate Policy. PIANOo organises meetings for sharing experiences (e.g. in communities of practice) and offers advice. PIANOo is an active member of the European Network of Competence Centres for Innovation Procurement. One prominent trend is a move towards functional specification in tender documents and increased use of innovation competitions to address societal challenges in the Netherlands. Adopting top-down internal policies, design guidelines and standards in favour of innovative solutions within the contracting authority is often required to ensure structural uptake of innovation. These policies must enable sufficient support for bottom-up initiatives and may not be limited to the procurement department alone.

8.2 Quantitative indicators for sustainable public procurement

The results of the data search performed on sustainable public procurement are presented in Table 7 and 8. It should be noted that these percentages are only indicative. The percentages are estimated, as there is no obligation to note in a procedure if there is mention of a strategic procedure. Therefore, there may be a self-selection bias. In 2018, 161 contracting authorities filled in the Sustainable Public Procurement self-evaluation tool (MVI-zet), with a total amount of 1,690 contracts. In 2019, 162 contracting authorities filled in the self-evaluation tool with a total amount of 1,999 contracts. In 2020, 164 contracting authorities filled in the self-evaluation tool with a total amount of 2,411 contracts.

Table 7: Percentages of strategic procedures (source: TenderNed)

Year	National or European procedures	Tenders with at least one SPP element selected in MVI-ZET
2018	European procedures	74%
	National procedures	62%
2019	European procedures	72%
	National procedures	78%
2020	European procedures	82%
	National procedures	85%

²³ <https://www.piano.nl/nl/themas/maatschappelijk-verantwoord-inkopen/nationaal-plan-maatschappelijk-verantwoord-inkopen-2021>.

Table 8: Percentages of strategic procedures in terms of contract values (source: TenderNed)

Year	National or European procedures	Tenders with at least one SPP element selected in MVI-ZET
2018	European procedures	97%
	National procedures	77%
2019	European procedures	88%
	National procedures	82%
2020	European procedures	92%
	National procedures	91%

8.3 Unfair competition and risks for national security

Unfair competition within the EU internal market by economic operators from or supported by third countries is a subject that has gained a lot of political attention in the Netherlands lately. This subject was, for example, a prominent part of the government's position on European competitiveness²⁴ issued in May 2019:

The EU should not be naïve where unfair competition from third countries is concerned. The EU should use its market power adequately to enforce a level playing field in trade with third countries by means of new and existing instruments and to thus fully reap the benefits of an open market.

The government's position 'Netherlands – China: a new balance',²⁵ which was issued around the same time, gives examples of unfair competition and specifically mentions a lack of reciprocity where public procurement is concerned.

The number of Dutch government contracts directly awarded to economic operators from third countries is low to very low. In the period 2015-2019, only 0.24% of all contracts above European thresholds were awarded to such economic operators. It is unknown which percentage of contracts is awarded to economic operators that are established in the EU but have ties to third countries.

Still, the issues of unfair competition and the lack of reciprocity in the field of public procurement gain a lot of political attention. The most striking example is the case of a public transport concession in the east of the Netherlands, awarded by three provinces. This concession was won by a transport company offering electric buses made by a company that was originally Chinese. The owner of a Dutch company sought publicity²⁶ over losing this order, claiming that the playing field between European and Chinese economic operators is anything but level and that "Europe is jeopardising its prosperity by opening up its market to

import from China". While it is impossible to say to what extent distortive foreign subsidies actually played a role in this case, it led to three series of parliamentary questions.²⁷ The proposal for an International Procurement Instrument (IPI) as well as the white paper on foreign subsidies have also received considerable political attention.²⁸

In addition to the issues of unfair competition and the lack of reciprocity, the issue of national security (including economic security) in relation to public procurement has been receiving more attention over the last years. In certain situations, contracting authorities want to prevent certain economic operators from participating in a public tender. In 2018, the Dutch central government implemented a stricter public procurement policy for the central government in order to mitigate national security risks.²⁹ In 2019, the National Coordinator for Security and Counterterrorism (NCTV) published a quick scan for national security and public procurement that provides a practical framework for public buyers on how to assess whether a certain tender brings about national security risks and how to mitigate these risks.³⁰ Cases such as the one in which Dutch customs in main ports made use of scanners made by an originally Chinese company have received political attention.³¹ Contracting authorities are looking for instruments to mitigate risks.

²⁴ <https://zoek.officielebekendmakingen.nl/kst-30821-73.html>

²⁵ <https://zoek.officielebekendmakingen.nl/blg-883780.pdf>

²⁶ <https://fd.nl/opinie/1328623/import-elektrische-bussen-uit-china-gaat-ten-koste-van-werkgelegenheid-in-nederland>

²⁷ Although the fact that fraud was later rumoured to play a role was also a factor: <https://zoek.officielebekendmakingen.nl/ah-tk-20192020-2582.html>, <https://zoek.officielebekendmakingen.nl/ah-tk-20192020-3405.html> and <https://www.rijksoverheid.nl/ministeries/ministerie-van-economische-zaken-en-klimaat/documenten/kamerstukken/2020/08/31/beantwoording-kamervragen-over-bericht-gedeputeerde-kaart-oneerlijke-concurrentie-busaanbesteding-aan-in-brussel>.

²⁸ <https://zoek.officielebekendmakingen.nl/kst-35207-33.html>, <https://zoek.officielebekendmakingen.nl/ah-tk-20192020-2310.html>.

²⁹ <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/04/18/tk-tegengaan-statelijke-dreigingen>.

³⁰ <https://www.piano.nl/nl/document/16908/quickscan-nationale-veiligheid-bij-inkoop-en-aanbesteden>.

³¹ <https://www.rijksoverheid.nl/documenten/kamerstukken/2021/04/19/antwoorden-kamervragen-over-het-bericht-vrees-voor-chinese-spionage-via-douanescanners-in-haven-rotterdam>

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