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Study of Principles Governing On Public Procurement

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Abstract: Public procurement constitutes an important part of the economic activities of Iran and EU. In Iran, to combat corruption ،to create equal opportunities for all suppliers of goods and services, to obtain goods and services with good quality and price and to achieve transparency in government procurement, the Expediency Council approved the new Tender Act in early 2005. This legislation is particularly significant for replacing tens of various regulations, which were applicable in different government bodies. In this article ,the principles and objectives of the Tender Act will compared with the principles of public procurement in EU.
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Introduction

Today, public procurement has become a significant macroeconomic variable. It constitutes somewhere between ten and twenty percent of the GDP in most European and OECD countries. [1] Even more importantly, from an economic perspective the accumulation of decades of public procurement decisions has determined the structure of public capital today. Most of the current procedures applied in public procurement in Iran, have not been used systematically and Public procurement subject, especially after privatization, had been as an important concern for legal experts. [2] Gradually, the competitive tendering principles have spread to other social areas and public procurement principles are applied to nearly every activity priced above a certain threshold – which varies significantly among countries – and is paid by a public institution. There is the main political force behind the expansion in using private suppliers of public services and this tendency is caused partly towards low efficiency of public. Sometimes public procurement is discussed as a separate market between private sector and public sector. General market for public procurement exists but only bidding systems introduced to a wide range of goods and services with their own market characteristics. In the EU, public organizations act under the restraints of the EU bidding rules would differ widely according to the characteristics of the specific sector. Bidding rules are intended to introduce a number of good governance standards but by doing so they also pose a number of policy dilemmas. Since most policy-related studies of the introduction of bidding, rules in public procurement have emphasized the potential welfare-enhancing effects of these forms of competition, this paper will emphasize existing principles in two legal systems, between Iran and EU, in discussion, public procurements and their rules. Regulation of public procurement is examined here.

Part I – Public Procurement In General

1-1 The Nature of the Public Procurement[3]

Procurement procedures are made of many distinct parts, on which the buyer can intervene to adapt the process to the product, service or work that he wants to procure. (Carpineti Laura, 2006:2) Procurement of goods, works and other services by public bodies alone amounts on average to between 15% and 30% of Gross Domestic Product (GDP), in some countries even more. Public procurement procedures often are complex. Transparency of the processes is limited, and manipulation is hard to detect. (Dr. Juanita, Olaya, and Wiehen, Michael, 2006: 28-30) A number of countries have adopted dramatically new public procurement regimes, and others are experimenting with new procurement vehicles, such as framework agreements and electronic reverse auctions, and new procurement schemes, including public-private partnerships. (Schooner, Steven and Gordon, Daniel I. and Clark, Jessica L.:2008) Public procurement is in essence a question of matching supply and demand, just as with any private procurement procedure, the only difference being that contracting authorities have to exercise special caution when awarding contracts. This is because they are public entities, funded by the taxpayer's money. This special caution can be translated into two main principles:

• getting the best value for money
• acting fairly

1-2 Best Value for Money[4]

Best value for money does not necessarily mean going only for the cheapest offer. Therefore, value for money does not exclude environmental considerations. Acting fairly acting fairly means following the principles of the internal market, which form the basis for the public procurement directives and the national legislation based on these directives. The most important of these principles is the principle of equal treatment, which means that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of transparency must also be applied. The analysis suggests that the welfare payoffs of adopting mechanisms that foster domestic competition and transparency are likely to be greater than the return to efforts to ban international discrimination. However, improved transparency, which may well reduce corruption, is unlikely to also result in significant enhancements in market access. (Evenett, Simon J. and Hoekman, Bernard: 2004)

1-3 Different Stages of the Public Procurement [5]

A buyer seeks to procure a good characterized by its price and its quality from suppliers who have private information about their cost structure (fixed cost + marginal cost of providing quality). (Asker, John and Cantillon, Estelle: 2008)

The procurement process is examined in relation to three stages of procedure: preparation of specifications, selection of tenderers, and execution

1. OECD (2009: 111).
2. Questions of the macroeconomics of public expenditures, on the other hand, (e.g. whether increases in public expenditures, of which procurement constitutes a large share, stimulate or contract the private economy) have received considerable attention since the evolution of Keynesian economics and its debates.
3 . Buying green! A handbook on environmental public procurement (2004), Printed in Belgium, p 12.
4 . Buying green! A handbook on environmental public procurement (2004), Printed in Belgium, p 12.
5 . Buying green! A handbook on environmental public procurement (2004), Printed in Belgium, p 13.

of contracts, within each of which some specific risks are identified. (Dorn, Nicholas and Levi, Michael and White, Simone: 2008)

The preparatory stage of any procurement procedure is crucial. Any mistakes at this stage will adversely affect every successive stage, and ultimately the result, as all stages build upon each other. Therefore, before starting a tendering procedure, you should set aside enough time for defining the subject of the contract and the instruments to be used to reach the end result. Another factor underlining the importance of the preparatory stage is that the early stages of the procurement procedure offer relatively the best possibilities for taking into account environmental considerations. The general structure of a public procurement procedure is essentially no different from a private one. They both follow roughly the same stages: defining the subject matter of the contract, drawing up the technical specifications and the contractual parameters for the product/ work/service, selecting the right candidate and determining the best bid. The rest of this handbook devotes a chapter to each stage, looking at ways of taking the environment into account at each stage, and giving practical examples and recommendations.(Rosu, Angelica: 2013)

Part II – The Principles and Rules of EU Public Procurement[1]

2-1 The Principles of EU Public Procurement Law

Principle 1- Authorities as Contracting Parties

EC public procurement law characterizes as contracting authorities the state and its organs, interpreted in functional terms. The term state covers central, regional, municipal and local government departments. The above contracting authorities are primarily responsible for the core procurement requirements of supplies, works and services in a society. The Public Procurement Directives include detailed lists of all central and regional government departments that fall under their remit. However, the state in its function as a procurer of goods, works and services does not contain a range of purchasing operations which are attributed to its organs. By the term organs, procurement law has envisaged all entities which somehow deliver public interest functions and has described them as bodies governed by public law. The latter category is subject to a set of cumulative criteria in order to be classified as contracting authorities for the purposes of the Directives. Bodies governed by public law must be established for the specific purpose of meeting needs in the general public interest. Although they must have legal personality, their operations should not have industrial or commercial character.

These entities must be financed, for the most part, by either the central government, or regional or local authorities, as well as being under their management and supervision control. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 64) Contracting authorities for the purposes of public procurement law also include entities which are considered part of the state and its organs in functional terms. The European Court of Justice has interpreted the term state in functional terms and has considered undertakings which depend on the relevant public authorities for the appointment of their members, are subject to their supervision and have as their main task the financing and award of contracts in pursuit of public interest as contracting authorities, even though not part of the state administration in formal terms. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 64)

Principle 2- Transparency

Lack of transparency and accountability were recognized as a major threat to integrity in public procurement at the 2004 OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement. To verify this hypothesis, the OECD Public Governance Committee launched a survey primarily targeted at procurement practitioners in charge of designing, supervising and managing procurement processes in central governments. Auditors, members of competition authorities and anticorruption specialists have also been involved. (Beth, Elodie: 2007)

One of the most important principles of the Public Procurement Directives is the principle of transparency. The principle of transparency serves two main objectives: the first is to introduce a system of openness into public purchasing in the member states, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated. The second objective aims at ensuring that transparency in public procurement represents a substantial basis for a system of best practice for both parts of the equation, but is of particular relevance to the supply side, to the extent that the latter has a more proactive role in determining the needs of the demand side. Transparency in public procurement is achieved through community-wide publicity and advertisement of public procurement contracts over certain thresholds by means of publication of three types of notices in the Official Journal of the European Communities:

(i) Periodic Indicative Notices (PIN). (H. Bovis JD, MPhil, LLM, FRSA: 2007, 65)

1 . H. Bovis JD, MPhil, LLM, FRSA (2007), **EU Public Procurement Law,** H.K. Bevan Chair in Law, Law School, University of Hull, Published by Edward Elgar Publishing Limited, Glensanda House, Montpellier Parade, Cheltenham, Glos GL50 1UA, UK, A catalogue record for this book is available from the British Library, p 63 .

(ii) Invitations to tender. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 66)
(iii) Contract Award Notices (CAN). (H. Bovis JD, MPhil, LLM, FRSA: 2007, 66)
All types of notices are published by the Publications Office of the European Communities.

Principle 3- De Minims Principle

The Public Procurement Directives are applicable only if certain value thresholds are met. The application of the Directives is subject to monetary considerations in relation to the value of the relevant contracts. There is a clear-cut distinction in the coverage of the public procurement rules upon contracts representing transactions between the public sector and the industry of a certain economic substance and volume. Contracts below the required thresholds are not subject to the rigorous regime envisaged by the Directives. However, contracting authorities are under an explicit obligation to avoid discrimination on nationality grounds and to apply all the provisions related to the fundamental principles of the Treaties of Rome and Maastricht. The thresholds laid down are as follows. However, careful monitoring of procurement systems in the member states has revealed that sub-dimensional procurement appears to be at least three times the size of dimensional public purchasing,[1] a fact that renders the application of the Directives only partly responsible for the integration of public markets in the European Community. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 70)

Principle 4- the Dimensionality of Public Procurement

The dimensional public procurement should, in principle, encompass the majority of procurement requirements of member states and their contracting authorities. However, the legislation on public procurement has had little effect on the principle of transparency, as empirical investigation into the patterns of contracting authorities of member states concerning their publication record in relation to contracts reveals a rather gloomy picture.

In comparison with the total volume of public procurement in the member states, the volume of public purchasing which is advertised and tend red according to the requirements of the relevant Directives appears disproportionate and beyond expectation, bearing in mind the importance that has been placed upon the principle of transparency for the opening-up of public markets in the European Union. The percentages of public contracts advertised in the Official Journal by member states reveal the relatively low impact of public procurement legislation on the principle and objectives of transparency in European public markets. Clarification of the above impact of the law upon the transparency patterns which contracting authorities have established should be sought by exploring three scenarios. The first scenario is based on the distinction between dimensional and sub dimensional public procurement in the member states. The second scenario is based on the excessive utilization of award procedures without prior publication. Finally, the third scenario implies the blunt violation of Community law by member states by avoiding the publication of tender notices in the Official Journal of the European Communities. Bearing in mind the relative absence of complaints and subsequent litigation concerning non-advertisement of public contracts before national courts (H. Bovis JD, MPhil, LLM, FRSA: 2007, 70-71) or the European Court of Justice, the third scenario reflects to a large extent the underlying reason for the lack of transparency in public procurement. In fact, intentional division of contracts into lots with a view to avoiding the Directives and excessive and unjustified recourse to award procedures without prior publication amounts to a blunt violation of member states' obligations arising from the relevant Directives and from primary Treaty provisions. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 72)

Principle 5- Fairness

- Selection and Qualification

After the advertising and publicity requirements, the next phase in the public procurement process is the selection and qualification of the tenderers. At this stage, contracting authorities vet all the responses received and determine the suitability of the candidates according to objectively defined criteria, which aim at eliminating arbitrariness and discrimination. The selection criteria are determined through two major categories of qualification requirements: (i) legal and (ii) technical/economic. Contracting authorities must strictly follow the homogeneously specified selection criteria for enterprises participating in the award procedures for public procurement contracts in an attempt to avoid potential discrimination on grounds of nationality and exclude technical specifications, which may favor national undertakings. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 72)

On the other hand, in supplies contracts, the references, which may be requested, must be mentioned in the invitation to tender and are as follows:

• a list of the principal deliveries effected in the past three years, with the sums, dates and recipients involved, whether public or private, in the form of

1. See European Commission, The Use of Negotiated Procedures as a Non-Tariff Barrier in Public Procurement, Brussels, and CC 9364, 1995.

certificates issued or countersigned by the competent authority;
• A description of the undertaking's technical facilities, its measures for ensuring quality and its study and research facilities;
• an indication of the technicians or technical bodies involved, whether or not they belong directly to the undertaking, especially those responsible for quality control;
• Samples, descriptions or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;
• Certificates drawn up by official quality-control institutes or agencies of recognized competence attesting to the conformity to certain specifications or standards of goods clearly identified by references to specifications or standards;
• where the goods to be supplied are complex or, exceptionally, are required for a special purpose, a check should be carried out by the contracting authorities (or on their behalf by a competent official body of the country in which the supplier is established, subject to that body's agreement) on the production capacities of the supplier and, if necessary, on his study and research facilities and quality control measures. The provisions covering the contractors' eligibility and technical capacity constitute an exhaustive list.

In principle, there are automatic grounds for exclusion, when a contractor, supplier or service provider (i) is bankrupt or is being wound up; (ii) is the subject of proceedings for a declaration of bankruptcy or for an order for compulsory winding up; (iii) has been convicted of an offence concerning his professional conduct; (iv) has been guilty of grave professional misconduct; (v) has not fulfilled obligations relating to social security contributions; and (vi) has not fulfilled obligations relating to the payment of taxes. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 73)

- Legal Requirements for the Qualification of Contractors

The definition of a contractor wishing to submit a tender for the award of a public contract comprises any legal or natural person involved in supplies, construction or services activities. It also includes private consortia, as well as joint ventures or groupings. Contracting authorities may impose a requirement as to the form and legal status of the contractor that wins the award. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 73-74)

This requirement focuses only on the post-selection stage after the award of the contract and indicates the need for legal certainty. The specific legal form and status requirement for contracting entities facilitates monitoring of the performance of the contract and allows better access to justice in case of a dispute between the contracting entity and the undertaking in question. The successful contractor should also fulfil certain qualitative requirements concerning his eligibility and technical capacity [1] and his financial and economic standing. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 75)

- Lists of Recognized Contractors

Being listed on a register of recognized contractors such as exists in various member states may be used by contractors as an alternative means of proving their suitability, also before contracting authorities of other member states. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 75)

Information deduced from registration on an official list may not be questioned by contracting authorities. Nonetheless, the actual level of financial and economic standing and technical knowledge or ability required of contractors is determined by the contracting authorities. Consequently, contracting authorities are required to accept that a contractor's financial and economic standing and technical knowledge and ability are sufficient for works corresponding to his classification only in so far as that classification is based on equivalent criteria with respect to the capacities required. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 75)

Principle 6- Non-Discrimination in Tendering Procedures

Participation in tendering procedures is channeled through open, negotiated or restricted procedures.

Open procedures are those where every interested supplier, contractor or service provider may submit an offer. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 75)

Negotiated procedures are procedures for the award of public contracts whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them. In most cases, they follow restricted procedures and they are heavily utilized under framework agreements in the utilities sectors. There are two different kinds of negotiated procedures: (i) negotiated procedures with prior notification and (ii) negotiated procedures without prior notification. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 75)

Restricted procedures are those procedures for the award of public contracts whereby only those contractors invited by the contracting authority may submit tenders. The selection of the winning tender

1. See Articles 20–23 of Directive 77/62; Articles 23 et seq. of Directive 71/305; Articles 29 et seq. of Directive 90/531; Articles 29 et seq. of Directive 92/50.

usually takes place in two rounds. In the first round, all interested contractors may signal their interest and the contracting authority selects which candidates will be invited to tender. In principle, the minimum number of candidates to be selected is five. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 76)

The Directives stipulate that, where possible, open procedures should constitute the norm. Open procedures increase competition without doubt and can achieve better prices for the contracting authorities when purchasing goods in large volumes. Price reduction based on economies of scale can bring about substantial cost savings for the public sector. Open procedures are mostly utilised when the procurement process is relatively straightforward and are combined with the lowest price award criterion. On the other hand, competition in tendering procedures is limited by using the restricted and negotiated procedures. By definition, the number of candidates that are allowed to tender is limited (five and three respectively in restricted and negotiated procedures), therefore the Directives have attached a number of conditions that the contracting authorities should meet when they intend to award their contracts through restricted or negotiated procedures. Restricted and negotiated procedures are utilized in relation to the most economically advantageous offer award criterion and suited to more complex procurement schemes. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 76)

By the European Council and the Commission of the European Communities.[1] Also the European Court of Justice has condemned post tender negotiations as in case 243/89, Commission v. Denmark.[2] (H. Bovis JD, MPhil, LLM, FRSA: 2007, 77)

The selection process must be completely distinguished from the award process. Quite often, contracting authorities appear to fuse the two basic processes of the award of public procurement contracts. This runs contrary to legal precedent of the European Court of Justice and in particular case 31/87 Gebroeders Beentjes v. Netherlands. [3] (H. Bovis JD, MPhil, LLM, FRSA: 2007, 77)

The Court stated expressly that suitability evaluation and bid evaluation are distinct processes which shall not be confused. The same line was adopted by the Court in case C-71/92, Commission v. Spain.[4]

The competitive dialogue is a new award procedure introduced by the new public procurement Directives alongside open, restricted and negotiated procedures. Arguably, the rationale of the competitive dialogue is to address the shortcomings of traditional award procedures and in particular, (i) the inability of open or restricted procedures to facilitate the award of complex public contracts, including concessions and public–private partnerships, (ii) the exceptional nature of negotiated procedures without prior advertisement[5] and (iii) the restrictive interpretation[6] of the grounds for using negotiated procedures with prior advertisement. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 78)

Principle 7- Objectivity in the Award Criteria

In principle, there are two criteria laid down in the Public Procurement Directives for awarding public contracts:

• The lowest price;

• The most economically advantageous offer.

The lowest price criterion reflects a numerical comparison of tendered contract prices. The tenderer who submits the cheapest offer must be awarded the contract. Subject to qualitative criteria and financial and economic standing, contracting authorities do not rely on any factor other than the price quoted to complete the contract. The reasons for utilizing the lowest price criterion are simplicity, speed, less qualitative consideration during the evaluation of tenders. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 79)

The assessment of what is the most economically advantageous tender offer is to be based on a series of factors and determinants chosen by the contracting

1. See OJ [1994] L 111/114.
2. See the Court's judgment of 22 June 1993.
3. See [1988] ECR 4635.
4. See the Court's judgment of 30 June 1993.

5 . Negotiated procedures without prior advertisement are exceptionally allowed … when for technical or artistic reasons or reasons connected with the protection of exclusive rights the services could only be procured by a particular provider … in cases of extreme urgency brought about by events unforeseeable by the contracting authority. In cases C-199/85, Commission v. Italy, [1987] ECR 1039 and C-3/88, Commission v. Italy, [1989] ECR 4035, the Court rejected the existence of exclusive rights and regarded the abuse of this provision as contrary to the right of establishment and freedom to provide services which are based on the principle of equal treatment and prohibit not only overt discrimination on grounds of nationality, but also all covert forms of discrimination, which, by the application of other criteria of differentiation, lead to the same result. Interestingly, in case 199/85, Commission v. Italy, op. cit., the Court elucidated that exclusive rights might include contractual arrangements such as know-how and intellectual property rights. For reasons of urgency brought about by unforeseen events affecting contracting authorities, the Court established two tests: (i) the need for a justification test based on the proportionality principle, and (ii) the existence of a causal link between the alleged urgency and the unforeseen events (see C- 199/85, Commission v. Italy, op. cit.; C-3/88, Commission v. Italy, op. cit., C-24/91, Commission v. Spain, [1994] CMLR 621; C-107/92, Commission v. Italy, judgment of 2 August 1993; C-57/94, Commission v. Italy, judgment of 18 May 1995; C-296/92, Commission v. Italy, judgment of 12 January 1994).

6. The grounds for using this procedure are confined to: (i) the nature of the works or services or risks attached thereto do not permit overall pricing and (ii) the nature of the services is such that specifications cannot be established with sufficient precision.

entity for the particular contract in question. These factors include price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, security of supplies. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 80)

The above list is not exhaustive and the factors listed therein serve as a guideline for contracting authorities in the weighted evaluation process of the contract award. The order of appearance of these factors in the invitation to tender or in the contract documents is of paramount importance for the whole process of evaluation of the tenders and award of the contract. The most economically advantageous factors must be in hierarchical or descending sequence so tenderers and interested parties can clearly ascertain the relative weight of factors other than price for the evaluation process. However, factors which have no strict relevance to the particular contract in question or factors which are irrelevant in economic terms are classified as subjective. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 80)

It is clearly stated in the European Commission's Guide to the Community Rules on Open Government Procurement [1] that '... only objective criteria which are strictly relevant to the particular project may be used ...'. The European Court of Justice has established [2] that the award criteria concern only the qualities of the service the provider can offer and that contracting authorities may use the most economically advantageous offer as award criterion by choosing the factors which they want to apply in evaluating tenders, provided these factors are mentioned in hierarchical order in the invitation to tender or the contract documents. [3] (H. Bovis JD, MPhil, LLM, FRSA: 2007, 80) The most economically advantageous offer as an award criterion has provided the European Court of Justice with the opportunity to balance the economic considerations of public procurement with policy choices. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 80) Although on numerous occasions the Court has maintained the importance of the economic approach [4] in the regulation of public sector contracts, it has also recognised the relative discretion of contracting authorities to utilise noneconomic considerations, such as employment and social policy considerations [5] and the protection of the environment [6] as award criteria. (H. Bovis JD, MPhil, LLM, FRSA: 2007, 80)

2-2 Rules of EU Public Procurement

2-2-1 Public procurement legislation [7]

2-2-1-1 Public procurement legislation in the EU is aimed at creating a common market by ensuring free movement of goods, persons, services and capital, and promoting effective competition in the Internal Market.[8] The guiding principles[9] by which these aims are sought to be achieved are:

(a) Equal treatment of all economic operators;

(b) Transparent behavior;

(c) No discrimination based on nationality.

2-2-1-2 The Procurement Directives emphasize the coordination of national procedures in order to guarantee that these principles are achieved. The harmonized rules regarding advertising, procedures, deadlines, selection and award criteria and reporting are thought to lead to greater transparency, participation, objectivity and non-discrimination in procurement markets. It is believed this would increase competition and cross-border trading, resulting in a better price/quality ratio (value for money) for public authorities, while increasing the productivity in the supplying industries and improving the participation and access to such markets by SMEs. A more efficient use of public funds coupled with competitive industries would have obvious economic benefits for the economy.

2-2-2 EU Rules and Documents[10]

2-2-2-1 Public Procurement Directives

1- The "Classical" Directive - Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

2- The "Utilities" Directive - Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

1. See [1987] OJ C 385/1 at 36.
2. See case C-31/87, Gebroeders Beentjes v. The Netherlands, [1988] ECR 4635
3. See case C-324/93, R. v. The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd.
4. See cases C-380/98, (Cambridge University) at paragraph 17, C-44/96, (Strohal), paragraph 33; C-360/96, (BFI) paragraphs 42 and 43; C-237/99, (OPAC), paragraphs 41 and 42.
5. See case 31/87, Gebroeders Beentjes B.V v. The Netherlands, [1989] ECR 4365; case C-237/99, Commission v. France, [2001] ECR 934. Also, see case C360/89, Commission v. Italy, [1992] ECR 3401.
6. See case C-513/99, Concordia Bus Filandia v. Helsingin Kaupunki et HKLBussiliikenne, [2000] ECR I-7213.
7. Estimating the Benefits from the Procurement Directives (2011), A Report for DG Internal Market, Europe Economics Chancery House 53-64 Chancery Lane London WC2A 1QU, www.europe-economics.com, p 7-8.
8. These objectives are laid out in Articles 2 and 3 of the Treaty of Rome (1957).
9. These are laid out in Articles 2 and 3 of the Public Sector Directive 2004/18/EC.
10. European Institute of Public Administration (EIPA) P.O. Box 1229, 6201 IS Maastricht (NL). Tel-Fax: +31 43 3296 222 – 296

3- The "Defense and Security Directive" - Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC
4- Directives on Remedies

- Modernization of the EU Public Procurement rules
- Legislation and Documents on Thresholds
- Legislation on the Common Procurement Vocabulary
- Legislation on Standard Forms for the Publication of Notices
- Legislation on lists of contracting entities and contracting authorities
- Explanatory notes on the Classical and Utilities Directives
- Public-Public Cooperation
- Contract Awards not or not fully subject to the provisions of Public Procurement
- Other Documents on Remedies
- Defense procurement
- Social considerations in Public Procurement
- Green procurement
- Electronic procurement
- Public-Private Partnerships
- Legislative package of the Classical and Utilities Directives- the reform process

Studies on Public Procurement

Part III – the principles and rules of Iran public procurement

3-1 the principles of Iran public procurement

3-1-1 Tender Act of Iran, 2005 (Public Procurement Act of Iran)

In 2000, some of the members of the Islamic Consultative Assembly (Majlis) in Iran prepared a plan entitled “Plan of Draft of Holding Tenders” for the purpose of clarity in holding tenders, competition in governmental purchases and reduction of multiple laws. After removing the objections made to the said plan by the guardian council, it was approved in 2005 by the Expediency Council.[1]

3-1-2 Objectives and principles of Tender Act of Iran, 2005

Tender Act of Iran was approved in parallel with legal amendments in the economic sector, clarification, the process of governmental purchases, campaigning against corruption, competition and access to goods and services with a higher quality and a lower price (Mizani Ghobad: 2003, 4). The said Act aims to integrate several regulations existing in different institutions and organizations in relation to governmental purchases and to put all governmental purchases under a single rule. Furthermore, it aims to guaranty justice and impartiality in the option of the party to transaction by reducing the formalities of tenders. More competitions in governmental purchases, clarification of tender process and providing an effective procedure to review the objections are some of the principles governing this Act (Shiravi: 2006, 50-51).

3-1-3 the principles of Tender Act of Iran, 2005

Principle 1. Integration of Regulations Supervising the Governmental Purchases

One of the objectives of Tender Act is to provide integrated regulations and to cancel all general and specific rules concerning governmental purchases and holding tenders (Panahi, Moosavi Nejad: 2003, 132) because before the approval of this Act, there were specific, various and multiple regulations supervising governmental purchases. Note (b) under article 1 of Tender Act approved by the Expediency Council provides as follows: The three forces of the Islamic republic of Iran including ministries, governmental organizations, institutions and companies, nonprofit institutes affiliated to government, governmental banks and credit institutes, governmental insurance companies, nongovernmental public institutes and organizations, public institutions, Islamic revolution foundations and firms, guardian council of the Constitutional Law as well as organizations and units to which the inclusion of law requires mentioning or stipulation of names, whether they have their own specific law or follow general rules and regulations, such as ministry of agriculture, NIOC, NIGC, National Iran Petrochemical Company, Industrial Development & Renovation Organization of Iran (IDRO), Ports and Shipping Organization of Iran and their affiliated companies shall all observe the regulations of this Act in holding tenders. Except for the armed forces that according to the note under this article are subject to their own specific rules and regulations, it seems that article 1 of this Act is prepared such that it covers the institutes, ministries, governmental companies and even nongovernmental public institutions in cases where they enjoy national budget. However, in case nongovernmental public institutes do not use national budget, they shall not be subject to these regulations. It should be noted that the condition of using national budget was added to the note (b) under article 1 by the Expediency Council. This condition is only related to nongovernmental public institutes and it seems that centers such as public universities, IRIB and governmental companies are subject to the regulations of this Act even for spending the incomes

1. Iran Official Journal (2005), No. 17474

obtained from domestic resources, public assistance and/or sale of advertisement (Shiravi: 2006, 53).

Principle 2. Reducing the Instances for Relinquishment of Tenders Formalities

Article 27 of the Tender Act provides that holding tenders is not feasible at the discretion of a 3-member committee. Considering the fact that interest is a subjective issue and may be abused, the said condition was removed from the late Act and the condition of possible is retained which is an objective issue. With this condition, relinquishment of formalities is restricted to the cases whereby purchase will not be possible through tenders. However, possibility and impossibility is more independently measurable as compared to interest or noninterest, supervision over the performance of the said three-member committee and the possibility for rejecting its assessment are not specified (Shirvani: 2006, 55).

Principle 3. Practicing justice and fairness in selecting the party to transaction

One of other goals of tender act is to fully practice justice and to maintain fairness in selecting the party to tender, who has offered the most proper quality and price. In order to practice justice among offering parties of goods and services and to guaranty fairness of the tendering organization, it is required that respective conditions would be met in such a way as the participants may provide tender deeds and present their offers within the respective deadlines first and second none of offering parties should discriminatorily be prohibited from purchase of tender deeds or access of complementary information. Item A of Article 14 of Tender Act has prescribed: All deeds shall be delivered to all participants equally. Third, all of offering parties should be given enough opportunity to provide tender deeds and to present their offers together with required documents and information. For this purpose, according to Item B of Article 15 of this Law, it has been prescribed that the deadline given for accepting the offers for local and international tenders should not be less than ten days and one month as of the last date of delivery of deeds. Fourth, in order to prevent probable collusion, all correspondence and deeds of tender should be recordable in some way. Fifth, in public purchases, respective points among public tenders, on the one hand and private and cooperative tenders have been removed on the other hand (Shirvani: 2006, 56).

Principle 4. Clarity in Tender Process

One of the other goals of Tender Act is to maintain principle of clarity in tender process (Ahrari: 2003, 123). For this purpose and for the first time, Item A of Article 23 of the said Law, elaborating the case of documentation and information, has stated that government is obligated to establish a national tender database and to record and to keep the following information and deeds:

- Call for tender
- Name and particulars of the members of the committee, tender parties and participants in tender sessions
- Brief summary of tender deeds
- Method and stages for qualitative evaluation of tender parties and results of their evaluation
- Proceedings and results of evaluations
- Name, particulars and manner of choosing winner/s of tender

And, Item B of Article 23 has also prescribed: The tender party is obligated to record respective information, subject of Item A of this Article and tender deeds confidently and to submit one copy of the said record to the tender database. Furthermore, Item C of Article 23 has prescribed: Information of all transactions including tender and leaving the tender is among those transactions, which should be kept secret upon discretion of the Cabinet of Ministers and that the said information should be offered to the public through a national information network. Items A and B are more applicable for enacting surveillance of supervising authorities over tender parties and investigating the claims. However, Item C provides certain conditions through which public could easily access tender information. In addition to establishment of national database portal of Iran tender's information, the legislator has for clarification of necessary documents required in note (b) under article 14 that tender documents shall also contain criteria and procedures for qualitative assessment of tender parties. Furthermore, it is provided in note (b) under article 10 of Tender Act that anticipation shall be explicitly stipulated and undertaken in the tender conditions and documents by the tender holding organization for financial resources and procedure for guarantying the delayed obligations of transaction. Moreover, according to note (a) under article 17 of the same Act, in case tender parties find any ambiguity in the tender documents, they can ask for explanations from the tender holder. Based on note (d) under article 18 of the same Act, tender holding system is obliged to invite tender parties or their representatives to attend the session for financial proposals (Shiravi: 2006, 57).

Principle 5. More Competition in Governmental Purchases

Competition helps government in purchasing the necessary goods and services with the higher quality and a lower price. Article 2 of Holding Tender Act describes tender as a competitive process and legislator has used the term "The lowest proportional

price" instead of the term "Lowest Price". This shows that the lowest proportional price shall be proportional to the work volume and price estimation. Moreover, restricting the instances of relinquishment of tender formalities, emphasizing on holding general tenders, publication of general tender invitation in the widely circulated newspapers at least in two shifts and use of other ways of information dissemination for publication of tender call and documentation and information dissemination are all necessary for causing more competitions in governmental purchases and all of them are anticipated in this Act (Shiravi: 2006, 58).

Principle 6. Reviewing the Objections

Another objective of Tender Act is to provide an effective procedure to review the objections of tender participants. There should be an impartial and just authority to review such objections. Based on the content of article 7 of the said Act, a committee will be established to review the complaints. Objections shall be first submitted to the highest authority of tender holding system. In case an objection is not accepted within 15 days, the plaintiff can submit his/her complaint to the complaints review committee and the committee shall announce its final decision within 15 days. In case of any objection to the said decision, the case will be referred to competent authorities for legal proceedings. This means that complaints review committee is an administrative authority and its decision may be reviewed by a judicial authority (Shiravi: 2006, 59).

3-2 The rules of Iran Public procurement

3-2-1 Background of Iran rules and regulations on governmental purchases

3.2.1.1) Public Audit Act approved in 1910
3.2.1.2) Public Audit Act approved in 1933
3.2.1.3) Public Audit Act approved in 1970
3.2.1.4) Public Audit Act approved in 1987

3-2-2 Current System Governing Governmental Purchases

3.2.2.1) Tender Holding Act approved in 2005
3.2.2.2) Executive bylaw of note (c) under article 12 of Tender Holding Act approved in 2006
3.2.2.3) Executive bylaw of note (d) under article 23 of Tender Holding Act approved in 2006
3.2.2.4) Executive bylaw of note (a) under article 26 of Tender Holding Act approved in 2006
3.2.2.5) Executive bylaw of note (e) under article 29 of Tender Holding Act approved in 2006
3-2-2-6 Law for Maximum Utilization of Technical, Engineering, Production, Industrial and Implementation Capabilities of the Country towards Implementation of Projects and to Provide Funds for Export of Services (1996).

Part IV – Comparison of Iran and EU Public Procurement

Purchase of goods and services by governments and governmental agencies forms a large part of national economy of the countries. This figure in different countries has allocated about 10 to 40% of gross national income to itself (Pathirane and W.Blades:1982, 261-289). The figure of governmental purchases in industrial countries is 5 to 8% of national gross income. This is while this figure was estimated between 9 to 13% in 2000 for Middle East countries (Walter & Kamau: 2003, 10). This figure in Iran forms about 10 to 20% of national gross income. According to the report of International Money Fund (IMF), government costs in 2003 formed about 30% of national gross income. [1] Governments generally intend to supply their needs with the best conditions and lowest price (Shiravi, Nazarnejad: 2000, 7-28).

Governments can influence on economic liberalization, can remove trade discriminations and hinder free trade through adopting specific policies in public procurement contracts (Trionfetti Federicon: 2000, 57-76). In the tariffs and trade general agreement of 1947[2], governmental purchases were explicitly excluded from the obligations contained in GATT; however, they were put in the agenda later on in the next negotiations considering the negative effect of governments' adopted policies for governmental purchases on GATT objectives including trade liberalization and removal of business discriminations (Evenett J. Simon: 2003, 3).

Finally, a new agreement entitled "Agreement for Governmental Purchases" was approved in 1994 in the Uruguay Round Negotiations (1986-1994). Incorporation to WTO requires acceptance of all organization's agreements but the agreement for governmental purchases is optional (Shiravi, Nazarnejad: 1999, 7-25). As for clarification of governmental purchases however, the member countries agreed to conduct negotiations (Mc Govern Edmond: 1995, 1-6). Clarification of governmental purchases is quite effective in the supply of competition (World Trade Organization: 2001, 5) and fulfills the objectives intended by WTO (Arrowsmith Sue: 1997, 793). Review of EU instructions has also indicated that it has similarly used WTO principles for the European member states and has made its best to attain a good competition in parallel with achieving a good ruling by adhering to the said principles.[3]

European member states shall follow the principles contained in the EU instructions and governmental

1. International Monetary Fund (2003), IMF Country Report No.03/280, IMF, Washington D.C.
2. General Agreement On Tariffs And Trade (Gatt)
3. World Bank (2004); Guidelines Procurement under IBRD Loans and IDA Credits; World Bank, Washington D.C

purchase agreement. EU instructions concerning governmental purchases obligate European member states to refrain enacting rules and regulations or establishing discriminatory procedures for governmental purchases.[1]

EU instructions for governmental purchases nullifies any discrimination between national and non-national tender parties while Iran Tender Holding Act has considered discrimination issue more as observing justice and maintaining impartiality in choosing a tender party who has proposed the most appropriate quality and price. It has also emphasized that national tender party is prior to non-national tender party (Jalali: 2004). This is while governmental purchases agreement of WTO also emphasizes that member states shall in facing with tender parties of member countries have the same behavior they have with their local tender parties and they shall not omit tender parties of other member countries from the tender process (Hird: 1996, 131-132). Therefore, Iran Tender Holding Act has explicitly discriminated between domestic and foreign tender parties. Note (d) under article 20 and note (d) under article 13 of the said Act have explicitly stipulated the priority of domestic tender party to the foreign tender party (Shiravi: 2006, 63). The law of maximum use of local force intends to assign to local natural and legal persons the responsibility for performing and management of different governmental plans and to increase the contribution of local resources in those plans (Saeid: 2004). According to article 3 of the law of maximum use of local force, all governmental and public organizations subject to this law are obliged to refer to local institutes and companies all their consulting engineer service works, construction, installation, equipment and service contract works. In case of no competent local companies, the works may be referred upon approval of economy council to Iran-foreign partnership provided that the contribution of the Iran party in the partnership is not lower than 51%. Based on this article, referral of the aforesaid works to foreign companies is prohibited unless the foreign company participates in the tender in terms of an Iran-foreign partnership with a contribution of at least 51% for the Iran party (Shiravi: 2006, 63). In addition to the above restriction, it has specified the contribution of local resources in this type of contracts to at least 51% of contract value. To avoid assignment of work to foreigners, the law of maximum use of local force has provided that minimum contribution of Iran resources shall be 51% of the project value. Any exception in this regard shall be approved by the economy council. Another significant case in the EU instructions in relation to governmental purchases is the consideration given to clarification in the process of public procurement assignment. This will be guaranteed through publication of a general tender call, discretion of qualification of goods and service suppliers based on predetermined standards, recording of tender documents and general announcement of winner. It is required in the assignment of public procurement contracts that all the rules, regulations, circulars and bylaws of the European Union concerning governmental purchases are published and are made available to all participants in the general purchase. Moreover, to avoid applying any personal taste in the recognition of qualification and unjust omission of some of the tender participants, it is required in the preliminary stage of qualification assessment that recognition procedure and its criteria are clearly provided to the public. Furthermore, recognition of qualification for suppliers shall be such that there would be no discrimination between the suppliers of EU member states.

Concluding

This paper analyzed the followings:

1) Tender Holding Act in Iran is for applying guidance policies of the government in economic activities, use of government's purchase power and achieving special economic goals such as supporting domestic production and accessing goods and services with appropriate quality and price.

2) Tender Holding Act observes in many aspects the international standards concerning governmental purchases and has prioritized domestic suppliers in public procurement as compared to EU circulars while EU instructions strongly rejects it and sets its principle on no discrimination between national and non-national suppliers.

3) Review of objections related to governmental purchases in the Iran Tender Holding Act has been assigned to the approval of the Islamic Consultative Assembly. This approval has not been ratified yet and the case is therefore faced with bottlenecks in execution. However, review of the objections related to governmental purchases in the EU is assigned to the European Court of Justice.

4) Executive scope of EU instructions for governmental purchases is even related to private firms that perform general works or those who handle their activities based on governmental advantages. As for private firms, especially after application of privatization, even if they are engaged in public works, they are not subject to this Act, i.e., use of general budget has been seriously addressed by legislator.

1. Asian Development Bank (2004); Guidelines for Procurement under Asian Development Bank Loans; Asian Development Bank

5) EC instructions try to promote a unique and fix procedure for purchase decisions in EU member countries. Basic principles of this procedure include no discrimination, fair play, clarification of procedures and open relations with international community of suppliers while one of the main goals of Iran Tender Holding Act was integration. However, there are several exceptions in this way and several systems including governmental and non-governmental systems are not excluded from this law.
6) Although EU instructions concerning public procurement provide rational principles and procedures for purchasing, complete execution of the contents of these instructions were accompanied with difficulties and the main reason of such difficulties is their complicatedness. Some of the factors of this disturbance include lack of any supervisory system by the EU and non-execution of instructions in most of the EU member states. Due to lack of any legislative and executive mechanism, Iran Tender Holding Act has not achieved the necessary efficiency including non-ratification of the approval related to the dispute settlement procedure in the tenders.
7) Except for EC instructions concerning public procurement, institutions under the inclusion of public procurement legislation system shall observe the legislated regulations approved by US, Canada and Japan in governmental procurement agreement. In Iran however, observance of requirements contained in the governmental purchase agreement of WTO has not become enforceable due to some challenges.

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