Public Procurement for Innovation Policy: Competition Regulation, Market Structure and Dominant design

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1. Introduction

Public procurement accounts for a significant proportion of overall demand for goods and services and is increasingly seen as an attractive and feasible instrument for furthering the goals of innovation policy (Uyarra & Flanagan, 2010). While the interest in the use of procurement as an industrial and technology policy instrument or tool is not new (Geroski, 1990; Rothwell, 1984), there has been a renewed focus on this underexploited 'demand side' approach in recent years (Edler & Georghiou, 2007; OECD, 2011). Policy aspirations in relation to Public Procurement for Innovation (PPI) have been backed by the recommendations of a number of inquiries, reports and policy documents, especially among EU countries (Edler et al, 2005; Lember et al, 2012; Rigby et al, 2012; Stern et al, 2011). Some of those exclusively targeted public procurement to push innovation, while others had a broader remit and situated public procurement within the overall policy toolbox (European Commission, 2007; Aho et al, 2005). Manifesting the advantage of demand-side drive, most of the policy discussion leads to the Lead Market Strategy (Tushman & Murmann, 1998; BMBF, 2010), which is aimed to cultivate a dominant design in the international industry competition (Anderson & Tushman, 1990; Utterback, 1994).

Within the Lead Market and dominant design debate, recent researches focus much more on the pioneering demand as a driven force of innovation, and furthermore points to the First Mover Strategy (Geroski, 1990; Frynas & Mellahi, 2006; Magee & Galinsky, 2007). Some researches tried to fill the other blank fields in the demand-driven policy. Rolfstam (2005) applied the theories of interactive learning (Lundvall, 1988) to view public procurement as a special form of user-producer interaction. After the IPR strategies becoming more crucial in the global technology competition, Fernando Branco (2002) also brought in the consideration of the influence on the technology standard adoption, and exams the relation between the procurement favouritism and the technology standard adoption among suppliers. More and more researches have revealed that the procurement decisions are likely to have a broader innovation impacts, and mostly via their influence on intermediate outcomes such as competition, industrial structure and network effects (Cabral et al, 2006; Uyarra & Flanagan, 2010). However, despite this policy interest, there is little research has a close observation on the intermediate outcomes, like structure, or offers very little empirical evidence on the implementation of such policy aspirations. In this paper, we explore the specific features of public procurement as a competition shaping instrument, and launches an empirical study to measure the correlations among the competition regulation of procurement contracts awarding, industry competition structure and dominant design cultivation efficiency.

2. Theoretical Background

2.1 Dominant design and the Lead Market Strategy

Dominant design is a technology management concept introduced by Utterback and Abernathy (1975), identifying key technological features that become a *de facto* standard. They proposed that the emergence of a dominant design is a major milestone in an industry evolution and changed the way firms compete in an industry and thus, the type of organizations that succeed and prevail. A dominant design can be a new technology, product or a set of key features incorporated from different distinct technological innovations introduced independently in prior product variants. A dominant design is the one that wins the allegiance of the marketplace, the one that competitors and

innovators must adhere to if they hope to command significant market following (Anderson & Tushman, 1990; Utterback, 1994; Christensen & Utterback, 1998).

From the cases of IPTV, OS (operating system), air planes, modem, internet browser, 3G/4G wireless service; the Dominant design theory became the cornerstone of industrial policy research. It attracts more and more research interest from organization theory, strategic management and even technology history (Tushman & Murmann, 1998; Suarez, 2004). Much of these studies revealed that a certain scale of early users is crucial for the emergence of dominant design. Beise (2003, 2004) named this early users demand as a Lead Market. A Lead Market can be defined as a country where users prefer and demand a specific innovation design that not only appeals to domestic users, but can subsequently be commercialised successfully in other countries as well. The technical design preferred by the Lead Market squeezes out other designs initially preferred in other countries and becomes the globally dominant design. Lead Market is a term used in innovation theory and denotes a country or region, which pioneers the successful adoption of an innovative design. It sends signalling effects to other "lag" markets, which in turn helps in triggering a process of global diffusion. Innovations that have been successful with local users in lead markets have a higher potential of becoming adopted world-wide than any other design preferred in other countries.

2.2 Procurement as a Demand Driving Instrument

According to Beise's definition, an ideal Lead Market is provided by: (1) enough innovative purchase demand, which is the sophistication of demand. (2) enough massive on technology product of service, which is the scale of demand. Public procurement is an ideal model for the Lead Market, because it can secure both the scale and sophistication required by Lead Market. On one hand, public procurement accounts for a significant proportion of overall demand for goods and services. On the other hand, modernization process sophisticated the relations among human as well as the nature, represented by the dramatic increase of new social relation and public affairs (Guo & Song, 1997). In order to catch up with the newly-demanded governance, government needs to continuously obtain the innovated infrastructure and service, like the increased traffic load demands more purchase of road camera and ETC. As a result, government tends to be a lead user, or even the first user in many technology sections (Dalpe, 1979).

Recent researches focus much more on the pioneering demand as a driven force of innovation. Different from the regular public procurement occurs when public agencies buy readymade simple products like pens and paper where no R&D is involved. Only price and performance of the (existing) product is taken into consideration (Edquist et al, 2000). Many research illustrated the critical role of demand as a key driver of innovation, and public procumbent is the key elements of a demand-oriented innovation policy (Edler, 2006; Edler & Georghiou, 2007). A quite related implication is that innovation impacts go beyond the procurement of goods and services that 'do not exist'. It is very obvious that innovation theory has revealed such procurement influence long before. Nelson (1982) illustrated the innovation such as GPS and CDMA driven by the pioneering defence procurement. Dalpe's (1979) survey revealed the first user influence of public procurement covered even broadly like railway, broadcasting, energy, shipping, pharmaceuticals. More recently, European Commission (2006) showed the diversified drive force to the information communication technology (ICT) reform from public procurement, like the e-ID system in Belgian and Italy, e-document system in Austria, e-tax system in Finland, 24/7 public service system in Sweden, nation-wide system for patient and hospital in Netherland.

However, some researchers recently started to criticize that these researches pay too much attention to a limited set of examples which are not representative of the bulk of public procurement, and proposed that public purchasing should first and foremost remain concerned with proximate public policy goals and that, rather than trying to co-opt public procurement into the innovation policy toolbox, policy-makers should focus on promoting innovation-friendly practices across all types of procurement at all levels of governance (Uyarra & Flanagan , 2010). Some researchers also argued that public procurement should have broader influence paths. Decisions concerning prices, quantities, and standards' affect innovation, positively or negatively, in a group of industries involved in public procurement (Dalpe, 1994).

2.3 Procurement as a Competition Shaping Instrument

Recently, some studies have tried to fill the research blank in the demand-driven policy. Rolfstam (2005) applied the theories of interactive learning (Lundvall, 1988) to view public procurement as a special form of user-producer interaction. He points out that the explicit expression and understanding of demand is the fundamental drive force to product innovation, which relies on a intensive interaction between user and producer. After the IPR strategies becoming more crucial in the global technology competition, Fernando Branco (2002) briought in the consideration of the influence on the technology standard adoption, and exams the relation between the procurement favouritism and the technology adoption among suppliers.

Procurement is a complex instrument consisting of multiple decisions and multiple forms of intervention, contributing to multiple and varied effects on innovation. One important implication of this is that, regardless of whether the demand public procurement is explicitly oriented towards innovation, procurement decisions are likely to have innovation impacts via their influence on intermediate outcomes such as competition, industrial structure and network effects (Cabral et al, 2006; Uyarra & Flanagan, 2010). In this research, we will have a deep observation specifically on the correlation between the innovation performance and market structure shaping affluence of public procurement.

The other stream that pushes forward the research on the PPI policy as a competition shaping instrument, is that the international trade rules squeezed away the room of selective industrial policy. The demand driven PPI policy is widely used in developed countries. However, among the developing counties, public procurement is often utilized as domestic industry protection. But GPA (Government Procurement Agreement) rules only allows very stringent procurement procedure, with very restricted discretion related to national security, public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour. As a result, international trade rules leaves very restricted room for the PPI policy. With the pressure of GPA entrance negotiation, many developing countries has to dig the PPI policy possibilities within the GPA framework, which leads to much efforts on the competition exceptional rules research as a substitution of trade protection paradigm.

As for the influence of public procurement on the competition structure, OFT (2004) has revealed three major approaches: (1) short-term effects on competition amongst potential suppliers, i.e. effects on the intensity of competition amongst existing suppliers in a particular tender, for example, taking the number of firms in the market, the range of products available and the underlying production technology as given. (2) long-term effects on investment, innovation and the competitiveness of the market, i.e. effects that capture changes in market structure and technology caused by public procurement, which would be reflected, for example, in the level of competition in future tenders. (3) knock-on effects on competition in the supply of other buyers; other buyers are, for example, affected by changes in market competitiveness or technology. They might both benefit from, or be harmed by, attempts by the public sector to use buyer power in order to obtain better terms and conditions from its suppliers.

In the following empirical study, we will examine the correlations among the competition regulation of procurement contracts awarding, industry competition structure and dominant design cultivation efficiency. In particular, we will analyze two specific intermediate outcomes of public procurement shaping regulation: (1) supplier number. Supplier volume reflects the market barrier and dynamic relation between the potential competitors. Levin (1978) showed the innovation comes from the superior competitor's motivation of securing the barrier for the late-comers. (2) Market concentration. Market centralization degree is another widely used indicator of market structure. How market centralization influence the innovation performance has always been an important perspective in research (Caves & Uekusa, 1976; Shrieves, 1978; Geroski, 1990).

3. Methodology

3.1 Data

For the empirical part of this analysis we use Federal Procurement Data System (FPDS) from United States. In order to have a deep observation on how public procurement market cultivates the Dominant design, we select the ADP (Auto Data Process, same as IT) product procurement contract data. ADP is one of the most innovative fields that driven by the public procurement. FPDS consists of a full range of features from procurement contract, is widely used in many policy research. In this analysis, we select 822332 contracts during the nine-year period 2004-2012. From each contract, we extract the following features: procurement methods[1], contract value, Product Service Code (PSC), name of the winning supplier. Classified by agency and fiscal year, we divided the contracts into 1113 research sample, reprinted as 1113 different segmented markets. In each segmented market, we calculate the following three groups of variables: competition regulation (independent variable), market structure (intermediate variable) and Dominant design cultivation performance (dependent variable).

3.2 Variable

3.2.1 independent variable

[1] Within Federal Acquisition Regulation, . In this analysis, we focus on the ratio of three different procurement methods: full and open competition, other than full and open competition, full and open competition after exclusion of certain supplier sources.

Now that we use the data from U.S. federal procurement contract, let us analysis the competition regulating rules from the Federal Acquisition Rules. FAR allows full and open competition, other than full and open competition, full and open competition after exclusion of certain supplier sources. (1) Only full & open competition is a model of market competition that without any government intervention[2], mainly in the form of sealed bidding process; (2) full & open competition after exclusion is shaped by government authorization, mainly in the form of dual resource procurement and set-aside procurement; the set-aside procurement is aimed to protect the small business, which claims the major vitality of innovation; (3) other than Full & open competition allow the procurers pretty much discretion under 6 exceptional situations. Within the 6 exceptional situations, industry mobilization, basic science research protection, continuous followed-on research support[3] could be a strong support to encourage innovation.

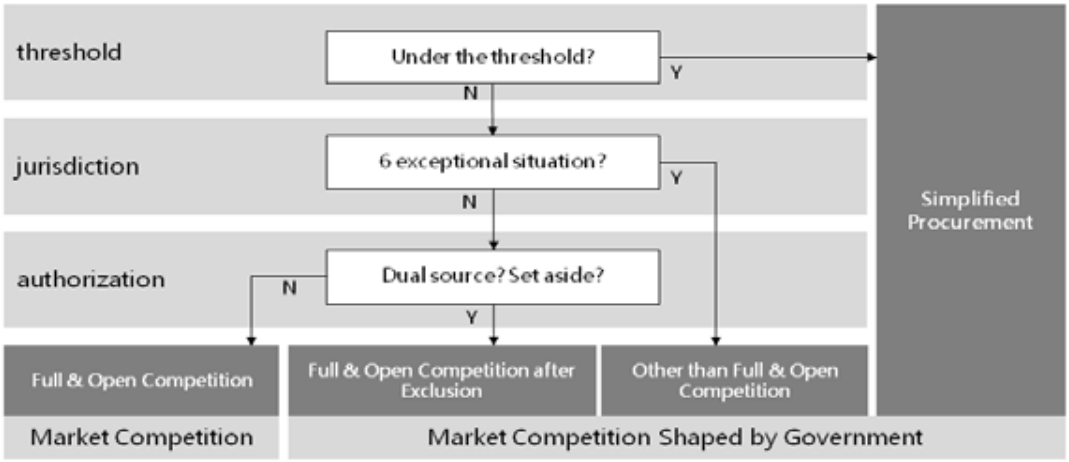

Fig. 1 Competition regulation rules of public procurement

The competitive bidding rules of public procurement always keeps swinging between two different institutional goals: (1) maximize the market competition in the procurement contract bidding process to increase the financial efficiency, which is known as value for money principal. Besides, competition maximization can also serves to reduce the corruption. (2) suitably utilize the exceptional bidding rules to widely mobilize the industrial resource and to safeguard the bottom line of public security or social interest. In our analysis, we use the ratio of three procurement methods to indicate the different competition regulation.

3.2.2 intermediate variable

As Cabral et al (2006) pointed out; procurement regulations are likely to have innovation impacts via their influence on intermediate outcomes such as competition, industrial structure and network effects. In this analysis, we conduct a closer observation on the intermediate outcomes of competition structure via two intermediate variables.

(1) Market barrier

Supplier volume reflects the market barrier and dynamic relation between the potential competitors. Levin (1978) showed the innovation comes from the superior competitor's motivation of securing the barrier for the late-comers. But some research argues the barrier results in the technological lock in, which hinder the sustainable innovation. In our analysis, we use the supplier number to indicate the market barrier.

(2) Market concentration

Market centralization degree is another widely used indicator of market structure. How market centralization influence the innovation performance has always been an important perspective in research (Caves & Uekusa, 1976; Shrieves, 1978; Geroski, 1990). In our analysis, we use the Herfindahl-Hirschman Index (HHI) to indicate the market centralization degree.

$$\mathrm{HHI} = \sum_{i=1}^{N} (a_i/A)^2$$

Where, n, N, i represent the number of supplier, a_i represents the market share of supplier i, A represents the market volume.

[2] 41 U.S.C. § 403(7)

[3] 10 U.S.C. § 2304(d)(1)(A)-(B) & 41 U.S.C. § 253(d)(1)(A)-(B).

3.2.3 dependent variable

According to the Lead Market Strategy, the cultivation efficiency of Dominant design is the policy performance. But it is very difficult to measure the cultivation efficiency. In our analysis, we use a substitutive method to indicate the cultivation efficiency. Gompertz curve is one of the most widely used indicators in the dominant design research, which reflects the evolution process of a certain product, as shown below. The Curve III shows an earlier emergence of the Dominant design than Curve I, while Curve II shows an average trajectory. One way is to calculate the integral value of the Gompertz curve of 1113 segmented markets, the other substitutive way is to calculate the ratio of first half to second half of the Gompertz curve. In our analysis, we use the latter method to indicate the cultivation efficiency of Dominant design in 1113 segmented procurement markets.

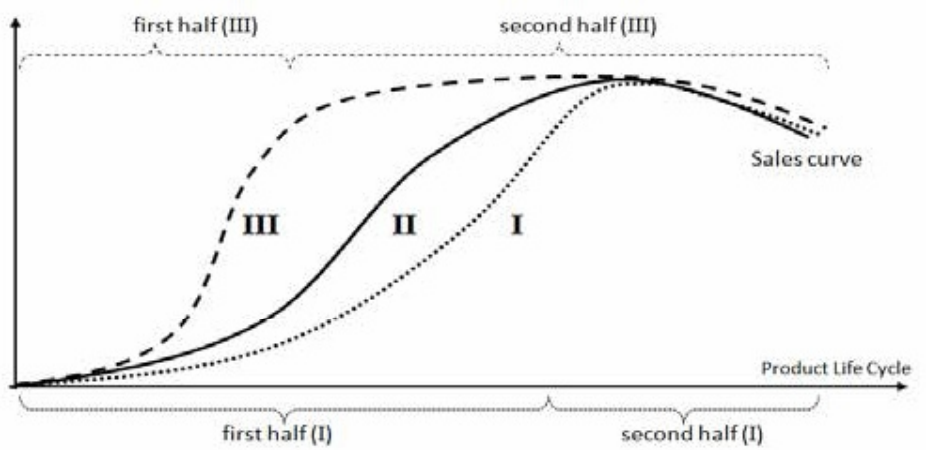

Fig. 2 Gompertz curve and substitutive calculation dominant design cultivation

In order to calculate the second-first half ratio of the Gompertz curve, we need furthermore to calculate the product life cycle distribution in 1113 segmented procurement markets. Among the ADP products researched in this paper, there are 9 smaller classifications, indicated by the code of 7010, 7020, 7021, 7022, 7025, 7035, 7040, 7042 and 7050. We use annual sales, price and supplier number to classify the 9 categories into 9 product life cycle, as follows (the calculation methodology is shown in Appendix)

Table 1 Product Life Cycle Classification

PLC	Product Code	Annual sales*	Price*	Supplier number*
Introduction 1	7040	55	251291.50	3
Introduction 2	7022	623	175160.38	6
Growth 1	7020	2135	75666.50	11
Growth 2	7042	2109	51311.83	11
Growth 3	7021	6510	151243.88	14
Mature 1	7025	9683	153822.74	29
Mature 2	7010	15704	244562.58	25
Mature 3	7050	9594	118490.74	29
Decline 1	7035	13590	83265.36	38

* sample average value

3.3 Descriptive statistics

The median procurement market in our observation contains 80 ADP suppliers, while the maximum is 4532 and the minimum is 1. The average HHI is 0.3349, while the most monopoly market is the only one supplier, so HHI is 1, and HHI of the most competitive market is 0.03. According to our estimation method, the dominant design efficiency also differs widely from 0-1. Among the three procurement methods, FOC claims the most share, FOC after EXC follows and Other than FOC bottom. In order to control for the skewed distribution we use the logarithm of the number of suppliers in the regressions.

Table 2 Descriptive statistics (1113 procurement markets with 822332 contracts)

Variables	Mean	Std. Dev.	Range	Min	Max
Supplier Number	79.84	333.97	4531	1	4532
HHI	0.3349	0.28222	0.97	0.03	1
Dominant design Eff.	6.3107	12.17738	100	0	100
FOC. (%)	0.6447	0.32729	1	0	1
Other than FOC. (%)	0.1684	0.24246	1	0	1
FOC. after EXC. (%)	0.187	0.26436	1	0	1

4. Results and discussion

From the regression result, we find that Dominant design cultivation efficiency is positively correlated to HHI and supplier number. Furthermore, the market barrier (supplier number) has more positive influence on Dominant design cultivation than HHI (market concentration). Dominant design is a set of key features incorporated from different distinct technological innovations introduced independently in prior product variants, so the low entry barrier tends to bring more manufacturers as well as the knowledge from the prior product variants. In practice, many ambitious government sectors even tried all means to mobilize the industry resource to enter a certain strategic innovation. And procurement contract is one of the most attractive baits (Wan, 2013). As for the market concentration, a dominant design is the one that wins the allegiance of the marketplace, so market concentration helps to settle the marketplace for a certain potential dominant design.

Table 3 The influence of market structure on dominant design cultivation efficiency

Variables	Dominant design cultivation efficiency
HHI	.072*(.046)
Supplier Number	.154**(.172)
Constant	.832***
R^2	.032
Adj. R^2	.024
F	3.997
N	1113

*A significance level of 10%
**A significance level of 5%
***A significance level of 1%

In the examination of how competition regulation influences the market structure, we find that: (1) HHI is negatively correlated to FOC application, but is positively correlated to other methods that shaped more or less by the government. Furthermore, exclusion of supplier, as a strong market barrier regulation, has a stronger influence to increase market concentration than exceptional situation rules. (2) Supplier number, as an indicator of market barrier, is negatively related to FOC application and exclusion of supplier resource, but is positively related to the exceptional situation rules.

Table 4 The influence of competition regulation on market structure

Variables	HHI	Supplier Number
FOC. (%)	-.225***(-.206)	-.384**(-.144)
Other than FOC. (%)	.012*(.020)	.067*(.047)
FOC. After EXC. (%)	.054*(.094)	-.178**(-.127)
constant	-2.034***	2.513***
R^2	.081	.018
Adj. R^2	.075	.012
F	13.456	2.862
N	1113	1113

*A significance level of 10%
**A significance level of 5%
***A significance level of 1%

Combined two parts of the regression results; the general probability function of "competition regulation – market structure – dominant design efficiency" model is as follows:

$$Dominant\ Design\ Efficiency = 0.046\ HHI + 0.172\ Supplier\ Number + 0.832$$
$$HHI = -0.206\ FOC + 0.012\ Other\ than\ FOC + 0.054\ FOC\ after\ EXC - 2.034$$
$$Supplier\ Number = -0.144\ FOC + 0.047\ Other\ than\ FOC - 0.127\ FOC\ after\ EXC + 2.513$$

Market competition pursues the value for money principle, which stares at the expenditure efficiency and thus tends to avoid innovative but risky solution. In our regression result, as an indicator of market competition, FOC application is negative with HHI and supplier number, both of which are positive to dominant design cultivation. This will easily bring us to the obvious inference: market competition downplays PPI policy, and well-designed competition regulation shapes the market structure which is crucial for dominant design cultivation. The well-designed competition regulation includes: (1) certain supplier exclusion rules like set-aside procurement and dual resource procurement, (2) certain exceptional rules to FOC, to bear the PPI policy function.

5. Conclusion

We conduct this study to analyze the effects of Public Procurement for Innovation (PPI) Policy, a recently revitalized demand-side innovation policy instrument. Rather than the sophisticated and pioneering demand drive, we judge the effect of this instrument in a new perspective – market structure shaping influence. Our goal is to support policy makers with empirical evidence on the two major research questions: is market structure an remarkable factor to dominant design cultivation, and is public procurement an effective instrument to shape the market structure into an ideal model for dominant design cultivation?

In this paper, we firstly introduce the dominant design and lead market strategy, which is a widely discussed topic in demand-side innovation policy research; and distinguish two different policy approaches: procurement as a demand driving instrument and procurement as a structure shaping instrument; leads the research into the competition regulation of public procurement. Afterwards, we conduct an empirical analysis with the 822332 ADP products procurement contracts from U.S. federal procurement; examine the correlation between competition regulation and market structure, market structure and dominant design cultivation performance. From the regression analysis, we find market barrier (supplier number) and market concentration (HHI) has positive influence on dominant design cultivation, and completely market competition (FOC) decrease both structure indicator. For policy concern, market competition pursues the value for money principle, which stares at the expenditure efficiency and thus tends to avoid innovative but risky solution, thus will downplay the PPI policy. We suggest that a well-designed competition regulation can shape the market structure which is crucial for dominant design cultivation. A well-designed competition regulation includes: (1) certain supplier exclusion rules like set-aside procurement and dual resource procurement; (2) certain exceptional rules to FOC, to bear the PPI policy function.

As for future work, we benefit from an extensive database of U.S. federal procurement contracts. However, the limitations of this study may provide fruitful paths for further research. One constraint of our analysis is that we cannot judge whether the competition regulation adaption has innovation objective, since we do not have any information regarding which exceptional rules to FOC or supplier exclusion is quoted in a certain procurement method. So it is difficult to derive specific recommendations on potential improvements of the competition regulation. Furthermore, we use an substitutive methodology to calculate the dominant design cultivation efficiency, since ADP product is an relatively rough classification, which cannot well represent the evolution of a certain. A deep case study on how public procurement cultivates a certain ADP Dominant design will give a strong support of this paper's argument. In addition, our results are limited to the U.S. context. Comparative studies with other countries could provide valuable new insights.

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Appendix

Table 5 ADP Product Distribution in 1113 procurement markets

Product Code	Sample / purchase record	Sample / no purchase record	Frequency
7010	826	167	83.18%
7020	501	492	50.45%
7021	700	293	70.49%
7022	292	701	29.41%
7025	829	164	83.48%
7035	960	33	96.68%
7040	109	884	10.98%
7042	631	362	63.54%
7050	841	152	84.69%

Take indicator a (annual sales) as an example, the following table shows the fuzzy sets and corresponding membership function of indicator a. The rest of average price and supplier number can be done in the same method.

Table 6 Fuzzy sets and membership function of indicator a (annual sales)

Fuzzy sets	Membership function of s_i				
s_1: small	$0 < x_1 \le a_1$	$a_1 < x_1 \le a_2$	$x_1 > a_2$		
	1	$\frac{a2 - x1}{a2 - a1}$	0		
s_2: relatively small	$0 < x_1 \le a_3$	$a_3 < x_1 \le a_4$	$a_4 < x_1 \le a_5$	$a_5 < x_1 \le a_6$	$x_1 > a_6$
	0	$\frac{x1 - a3}{a4 - a3}$	1	$\frac{a6 - x1}{a6 - a5}$	0
s_3: big	$0 < x_1 \le a_7$	$a_7 < x_1 \le a_8$	$a_8 < x_1 \le a_9$	$a_9 < x_1 \le a_{10}$	$\mathbf{x_1} > a_{10}$
	0	$\frac{x1 - a7}{a8 - a7}$	1	$\frac{a10 - x1}{a10 - a9}$	0
s_4: very big	$0 < x_1 \le a_{11}$	$a_{11} < x_1 \le a_{12}$	$x_1 > a_{12}$		
	0	$\frac{x1 - a11}{a12 - a11}$	1		

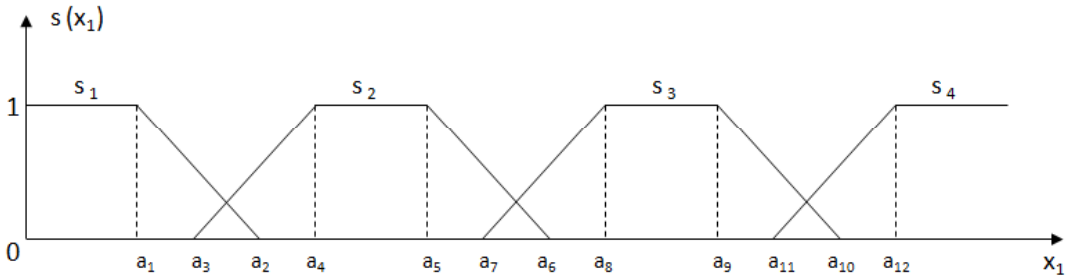

Fig. 3 Membership interval of indicator a (annual sales)

According to the membership interval chart shown above ($a_1a_3=a_2a_3=a_2a_4=0.5*a_4a_5$, $a_{12}=7.5*a_1$), we calculate each interval as follows: a_1=2132, a_2=4264, a_3=3198, a_4=5330, a_5=7562, a_6=9594, a_7=8528, a_8=10660, a_9=12792, a_{10}=14924, a_{11}=13858, a_{12}=15990. The each interval and value for 3 indicators are shown in the following table.

Table 7 Parameter and value for membership function

parameter	a1	a2	a3	a4	a5	a6	a7	a8	a9	a10	a11	a12
value	2132	4264	3198	5330	7462	9594	8528	10660	12792	14924	13858	15990
parameter	b1	b2	b3	b4	b5	b6	b7	b8	b9	b10	b11	b12
value	3.4	6.8	5.1	8.5	11.9	15.3	13.6	17	20.4	23.8	22.1	25.5
parameter	c1	c2	c3	c4	c5	c6	c7	c8	c9	c10	c11	c12
value	5.34	10.68	8.01	13.35	18.69	24.03	21.36	26.7	32.04	37.38	34.71	40.05

Table 8 fuzzy function result of each ADP classification

Fuzzy set	7010	7020	7021	7022	7025	7035	7040	7042	7050
s1	0	0.998	0	1	0	0	1	1	0
s2	0	0	1	0	0	0	0	0	0
s3	0	0	0	0	0.542	0.626	0	0	0.500
s4	0.866	0	0	0	0	0	0	0	0
g1	0	0	0	0	0	0	0	0.500	0
g2	0	0.735	0	0	0	0.941	0	0	1
g3	0	0	0.441	1	0.529	0	0	0	0
g4	0.706	0	0	0	0	0	0.882	0	0
e1	0	0	0	0.876	0	0	1	0	0
e2	0	1	0	0	0	0	0	0.562	0
e3	0	0	0.075	0	1	0	0	0	1
e4	0.682	0	0	0	0	0.382	0	0	0

According to the features of each Product Life Cycle (PLC) period, we define each period as follows: (1) introduction, annual sales small, price low or relatively low, supplier number small; (2) growth, annual sales small or relatively small, price low or relatively low or high, supplier number relatively small or large; (3) mature, annual sales large or very large, price relatively low or high or very high, supplier number large or very large; (4) decline, annual sales relatively small or high, price low or relatively low, supplier number very large. The corresponding fuzzy function is shown as follows:

Table 9 Fuzzy set and membership degree for each PLC period

PLC period	Fuzzy set	Membership degree
Introduction	s1 ∩ (g4 U g3) ∩ e1	U_{T1} (y)
Growth	(s1 U s2) ∩ (g1 U g2 U g3) ∩ (e2 U e3)	U_{T2} (y)
Mature	(s3 U s4) ∩ (g2 U g3 U g4) ∩ (e3 U e4)	U_{T3} (y)
Decline	(s2 U s3) ∩ (g1 U g2) ∩ e4	U_{T4} (y)

Table 10 Results of membership degree and corresponding PLC period

U_T (y)	7010	7020	7021	7022	7025	7035	7040	7042	7050
Introduction	0	0	0	0.876	0	0	0.882	0	0
Growth	0	0.734	0.033	0	0	0	0	0.281	0
Mature	0.234	0	0	0	0.287	0	0	0	0.211
Decline	0	0	0	0	0	0.363	0	0	0
PLC Stage	M2	G1	G3	I2	M1	D1	I1	G2	M3

FACTORS INFLUENCING THE CHOICE OF INCOTERMS IN SELECTED SEMICONDUCTOR AND ELECTRONICS COMPANIES OF PHILIPPINE ECONOMIC ZONE AUTHORITY IN CALABARZON TOWARDS A LOGISTICS MANAGEMENT MODEL

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ABSTRACT

International Commercial Terms or simply *incoterms* are the official internationally recognized trade terms, formulated and published by the International Chamber of Commerce (ICC) since 1936, which was based in Paris (ICC, 1999). The purpose of incoterms is to provide with a set of international rules for the interpretation of the most commonly used trade terms in foreign trade (ICC, 1999). Therefore, the main function of incoterms is to avoid or minimize the uncertainties of different interpretation of trade terms in different countries. Hence, when introducing different trading practices to parties involved in a contract, their rights and obligations are clearly described, which makes the process of conducting a contract more straightforward (Moens, 2006).

This study was aimed to determine the significant factors influencing the semiconductor companies' choice of incoterms in the Philippine Economic Zone Authority (PEZA) in Region IV-A, and develop a logistics management model that would help the importers choose the right incoterms in their importation activities. This study compared and analyzed the factors affecting the choice of incoterms of selected semiconductor and electronics companies of PEZA to find out similarities and differences in their usage of incoterms and the factors that influence their choices. In evaluating these incoterms, this study is, therefore, designed to answer the following research questions: (1) Are there significant relationships between the companies' choice of incoterms and their mother company's decision, supplier's decision, written incoterms policy, buyer's understanding of incoterms, customs regulations, company practices, insurance, freight cost, shipment's country of origin, mode of shipment, value of goods, volume of shipment, terms of spending, satisfaction with suppliers, trust with suppliers, commitment with suppliers, and conflict with suppliers?; and (2) What is the logistics management model that can be developed for the use of incoterms of PEZA semiconductor and electronics companies in the Philippines?

In this study, surveys were carried out from April 2013 until July 2013, with procurement and logistics managers as respondents working in PEZA, Region IV-A (CALABARZON). Gathered data were tested using multinomial logistic regression to determine possible significant relationships between the perceived factors and the choice of incoterms. The results showed that customs regulations and freight cost were the significant factors that influence the choice of incoterms.

INTRODUCTION

This study is a first of its kind in the Philippines. Other studies on this particular topic exist but they were done in other countries like Norway and Russia. In Norway, the study of Shangina et al. (2007) discussed that, the

relationship quality between the exporter and importer played an essential role in the export-import development between countries as it might influence decision-making on the important issues connected with international trade, such as choice of incoterms.

Review of the Factors that Influence the Choice of Incoterms

Shangina et al. (2007) explained that countries' participating in international trade encompassed different practices in the use of terms of delivery that could be set by different factors such as geographical location of the country itself and its suppliers, economical and legal regulations, customs and others. Thus, Zineldin and Jonsson (2000) stressed that companies needed to explore the main factors that could affect the choice of incoterms.

Van Bruggen et al., (2005) used satisfaction as the construct in their study of relationship quality in creating long-term relationships among customers and suppliers. On the other hand, Anderson and Narus (1990) stated that trust was the firm's belief that another company would perform actions that result in positive outcomes for the firm. Morgan and Hunt (1994), in their study, discussed that business-to-business relationships require commitment. Business relationships were based on mutual commitment, and thus the relationship quality could not be evaluated without this construct. Furthermore, Lionidou (2006) explained that disagreements between importer and exporter related to business issues could be a serious obstacle in developing a sound relationship. As a result of different business practices, traditions, and norms disagreements between importers and exporters may arise from incompatibility of goals, unclear expectations and different perceptions.

All semiconductor and electronics companies in every country have a unique set of factors that are essential and influential for the choice of delivery terms. As a result, identifying these factors is important for understanding the decision making in the importer processes.

The Choice of Incoterms in the Philippines

In the Philippines, the semiconductor and electronics companies were not accustomed to how incoterms works in the import activities. As mentioned in one of the assemblies of the Association of Semiconductor Logistics Management (ASLM), the semiconductor and electronics companies needed to have awareness about the importance of incoterms.

In the case of company H, it has been observed that most of its suppliers are shipping the goods using EXWORKS incoterm. As an importer, company H takes more risks and responsibilities because this incoterm gives risk transfer to the importer. It results to more risks in company H since the seller is not obliged to take responsibility after endorsement of goods to the buyer's forwarders. The burden is then passed on to the importer. Furthermore, it shows that the on time delivery is also affected because company H cannot control the export side because the party responsible for monitoring its goods is the supplier.

Compliance to customs regulations. The goods would be put on hold at Philippine customs if there were no proper regulatory documents such as complete composition of material data safety sheet (MSDS), complete certificates from Philippine Drug Enforcement Agency (PDEA), certification from Environmental Management Bureau (EMB), and other pertinent documents needed in order to release the shipments. The Bureau of Customs is considered as one of the lead agencies responsible for controlling and monitoring of the import and export flow in the Philippines. The main function of the Bureau of Customs is to assess and collect the lawful revenues from import goods and all other dues, such as charges, fines and penalties ensuing under the tariff and customs laws. The other functions of customs include the prevention and suppression of smuggling, frauds, and the supervision and control over the entrance and clearance of vessels and aircraft engaged in foreign commerce, the enforcement of the tariff and custom laws and all other laws, rules and regulations relating to the tariff and customs laws, the rules and regulations relating to the tariff and customs administration.

It is mandatory for the semiconductor and electronics companies in the Philippine economic Zone Authority in the Philippines to comply with the customs regulations as mandated by the state. As such, there are two major acts that are necessary to comply by the semiconductor and electronics companies of the PEZA in the Philippines, these are RA 1937 an Act to Revise and Codify the Tariff and Customs Laws of the Philippines Section 2530 Property Subject to Forfeiture and RA 6425 the Dangerous Drugs Act.

Compliance to ISO 9001. The International Standard Organization (ISO 9001) clearly stated under section 8.2.3 monitoring and measurement of processes that "organization shall apply suitable methods for monitoring and, where applicable, measurement of the quality management system processes". These methods shall

demonstrate the ability of the processes to achieve planned results. When planned results are not achieved, correction and corrective action shall be taken, as appropriate. The companies who are certified must adhere and comply with the ISO standard. The semiconductor and electronics companies in the Philippine Economic Zone Authority in CALABARZON are not exempted to this rule. One of the requirements of an ISO certified companies is to strictly comply with the regulatory requirements of the government for both import and export requirements.

Objectives of the Study

This study was primarily aimed to determine the significant factors influencing the semiconductor and electronics companies' choice of incoterms in the Philippine Economic Zone Authority, and develop a logistics management model that would help the importers choose the right incoterms in their importation activities. Specifically, this study was designed to (1) determine the significant relationships between the semiconductor companies' choice of incoterms and their mother company's decision, supplier's decision, written incoterms policy, buyer's understanding of incoterms, customs regulations, company practices, insurance, freight cost, shipment's country of origin, mode of shipment, value of goods, volume of shipment, terms of spending, satisfaction with suppliers, trust with suppliers, commitment with suppliers, and conflict with suppliers; and (2) develop a logistics management model for the use of incoterms of PEZA semiconductor and electronics companies in the Philippines.

METHODOLOGY

This study primarily utilized correlational research design. It was used to find out the significant relationships between the importation elements and supplier-relationship elements (independent variables) and the choice of incoterms (dependent variables).

Survey method was used for data collection. The computed sample size was 50 based on the number of purchasing managers or logistics managers inside the Philippine Economic Zone Authority in CALABARZON region. One representative from every semiconductor company was necessary to produce the total required sample respondents. The actual samples turn-out was 60.

Cluster analysis was employed to effectively analyze the relationship between the choice of incoterms and the importation and supplier relationship elements. It was done owing to high dimensionality of the variables, specifically country of origin (with elements of US, Asia, and Europe), shipment mode (with elements of courier, air, sea), value of goods (with elements of < $100, < $1,000, < $10,000), volume of shipment (with elements of <=45kg, <=100kg, <=300kg, <=500kg, <=1000kg, >1000kg), and terms of spending (with elements of capital, expense, and raw materials), pertaining to the determination of the choice of incoterms. The main criterion for clustering a company respondent was based on its mostly applied incoterms with respect to the inquiries stated on the survey questionnaire, thus, from the original main incoterms choices of EXW, FOB, FCA, CIF, and DAP, it was narrowed-down into four clusters, namely (a) mostly CIF, (b) mostly EXW, (c) mostly FOB, and (d) mostly other incoterms as presented in Figure 9. Then, multinomial logistic regression was used to determine the relationship between the dependent variable choice of incoterms with four categories, namely (a) mostly CIF, (b) mostly EXW, (c) mostly FOB, and (d) mostly other incoterms, and the independent variables from importation factors having eight elements, namely (a) mother company's decision, (b) supplier's decision, (c) written incoterms policy, (d) buyer's understanding of incoterms, (e) customs regulations, (f) company practices, (g) insurance, (h) freight cost.

RESULTS AND ANALYSIS

Clustered Choice of Incoterms

Clustering was performed based on the most applied incoterms of companies upon importation in reference to their shipments' country of origin, mode of shipment, value of goods, volume of goods, and terms of spending. As shown in Table 1, the choice of incoterms was clustered into four. The first cluster, termed as "mostly CIF", represented those companies applying CIF more often. It took more than 29 percent (29.31%) of the total respondents. The second cluster, termed as "mostly EXW", represented those companies applying EXW more often. It received almost 26 percent (25.86%) of the total respondents. The third cluster, termed as "mostly FOB", represented those companies using FOB more often. It got more than 29 percent (29.31%) of the total respondents.

Then the last cluster, termed as "mostly other incoterms", represented those companies applying other incoterms like FCA and DAP more often. This cluster received almost 16 percent (15.52%) from the total respondents.

Table 1: Summary of Clustered Choice of Incoterms Distribution per Province in Special Economic Zone, Philippines

Provinces	Incoterms				Total
	Mostly CIF	Mostly EXW	Mostly FOB	Mostly other incoterms	
Batangas	5	3	5	1	14
Cavite	7	3	3	1	14
Laguna	5	9	9	7	30
Total	17	15	17	9	58

Influences of Importation Elements and Supplier's Relationship on the Choice of Incoterms

Multinomial logistic regression was used to determine the significant relationships between the dependent variable "choice of incoterms" with 4 categories namely, mostly CIF, mostly EXW, mostly FOB, and mostly other incoterms, and the 12 independent variables, namely (a) mother company's decision, (b) supplier's decision, (c) written incoterms policy, (d) buyer's understanding of incoterms, (e) customs regulations, (f) company practices, (g) insurance, (h) freight cost, (i) satisfaction with supplier, (j) trust with supplier, (k) commitment with supplier, and (l) conflict with supplier. The initial and full model regression results showed that the choice of incoterms (CI) was significantly determined by customs regulations (CR) with *p*-value of .068 and freight cost (FC) with *p*-value of .054 at 0.10 level of significance as presented in Table 2 and Table 3. On the other hand, mother company's decision (MCD) with *p*-value of .660, supplier's decision (SD) with *p*-value of .591, written incoterms policy (WIP) with *p*-value of .205, buyer's understanding of incoterms (BUI) with *p*-value of .218, company practices (CP) with *p*-value of .146, insurance (I) with *p*-value of .732, satisfaction with supplier (SS) with *p*-value of .542, trust with supplier (TS) with *p*-value of .377, commitment with supplier (CS) with *p*-value of .358, and conflict with supplier (CFS) with *p*-value of .159 did not show any significant relationship ($p < .1$) with the choice of incoterms. The result also showed that 70.9 percent of the effects in companies' choice of incoterms could be attributed to the 12 independent variables of the full regression model. As shown in Table 3, the final multinomial logistic regression model with customs regulations (*p*-value = .088) and freight cost (*p*-value = .034) left as independent variables also showed significant relationship on the choice of incoterms at 0.1 level of significance and at 0.05 level of significance, respectively. The final regression model showed that 25.7 percent of the effects in companies' choice of incoterms were attributed to customs regulations and freight cost.

Table 2: Full Model Multinomial Regression Likelihood Ratio Test Result of Respondents' Choice of Incoterms and their Importation Elements and Supplier's Relationship in Special Economic Zones, Philippines

Independent variables	Chi-Square	p-value
Mother company's decision (MCD)	1.599	.660
Supplier's decision (SD)	1.913	.591
Written incoterm policy (WIP)	4.582	.205
Buyer's understanding of incoterms (BUI)	4.433	.218
Customs regulations (CR)	7.130	.068
Company practices (CP)	5.386	.146
Insurance	1.287	.732
Freight cost (FC)	7.639	.054
Satisfaction with supplier (SS)	2.151	.542
Trust with supplier (TS)	3.098	.377
Commitment with supplier (CS)	3.230	.358
Conflict with supplier (CFS)	5.174	.159

R Squared = .709

Table 3: Final Model Multinomial Regression Likelihood Ratio Test Result of Respondents' Choice of Incoterms and Customs Regulations and Freight Cost Importation Elements in Special Economic Zones, Philippines

Independent variables	Chi-Square	p-value
Customs regulations (CR)	6.535	.088
Freight cost (FC)	8.693	.034

R Squared = .257

The final model result can be further explained through the parameter estimates as shown in Table 4 wherein considering "mostly other incoterms" as the reference category, the odds of being "mostly CIF' is given by the formula:

Odds of being mostly CIF = exp [0.863 - 1.897*(CR) + 2.015*(FC)],

which means that when the company's choice of incoterms is determined by custom regulation (CR), the odds of being a "mostly CIF" is decreased by 566.59% [exp (1.897) – 1 or $2.718281828^{(1.897)}$ - 1], when the company's choice of incoterms is determined by freight cost (FC) the odds of being a "mostly CIF" is increased by 650.07% [exp (2.015) – 1 or $2.718281828^{(2.015)}$ - 1]. This mathematical behavior fits the logic that with stricter customs regulations, the tendency of companies' is not to use CIF incoterm because the supplier stop his/her obligations and passes the risk when the goods are handed over to the first carrier, thus suppliers are no longer responsible with the customs issues and risks in the destination point, since the importer has no control over releasing factors which deals with customs issues, it will entail more delays in releasing the shipments, however if the freight cost increases, the importers' tendency is to use CIF incoterm because the seller pays for the carriage and insurance from the destination point, also if the freight cost is directly proportional to the value of goods, it is more logical to use CIF. On the other hand, the odd of being "mostly EXW" is given by the formula:

Odds of being mostly EXW = exp [-1.946 - 0.916*(CR) + 2.862*(FC)],

which means that when the company's choice of incoterms is determined by customs regulation (CR), the odds of being a "mostly EXW" is decreased by 149.93% [exp (0.916) – 1 or $2.718281828^{(0.916)}$ - 1], while for each unit increase in freight cost (FC) the odds of being a "mostly EXW" is increased by 1,649.65% [exp (2.862) – 1 or $2.718281828^{(2.862)}$ - 1]. This mathematical behavior fits the logic that with stricter customs regulations, the tendency of companies' is not to use EXW incoterm because the customs in the country of origin has a regulatory requirements and restrictions that is not known for the importers, also an importer cannot act as an exporter in the other country, as they are not in charge for proper documentation, proper classification and proper packaging of goods, these mention requirements are critical in customs regulations. If the freight cost increases, the importers' tendency is to use EXW incoterm, wherein the buyer has full control of freight consolidation and fill rates, this is the idea of consolidating small shipments into larger ones is a primary way to reduce transportation or freight cost. Consequently, the odds of being "mostly FOB"are given by the formula:

Odds of being mostly FOB = exp [-0.523 + 0.300*(CR) + 0.511*(FC)],

which means that for each unit increase in customs regulation (CR), the odds of being a "mostly FOB" is increased by 34.99% [exp (0.523) – 1 or $2.718281828^{(0.300)}$ - 1], while for each unit increase in freight cost (FC) the odds of being a "mostly FOB" is increased by 66.70% [exp (0.511) – 1 or $2.718281828^{(0.511)}$ - 1]. This mathematical behavior fits the logic that with stricter customs regulations, the tendency of companies' is to use FOB incoterm, because most of the chemicals and dangerous goods are shipped via ocean with the sailing lead time of 21 days. This given leadtime is enough for the buyer to apply for necessary regulatory permit and customs requirements. The departments of customs in all countries are strict with their regulations, the importers are afraid to break the law because non-compliance with regulatory requirements may result in import shipments being detained by customs, this may result to monetary penalties assessed against the importer, loss of import privileges and in extreme cases criminal liabilities will be imposed to the importer. If the freight cost increases, the importers' tendency is to use FOB incoterm because shipping the goods with a larger volume via air shipment is very expensive, the tendency is to ship the goods via sea, and the right incoterm to choose is FOB.

Table 4: Multinomial Logistic Regression Parameter Estimates Showing the Effects of Customs Regulations and Freight Cost on Respondents' Choice of Incoterms in Special Economic Zones, Philippines

Choice of Incoterms	β	Exp (β)	p-value
Mostly CIF			
Intercept	.863		.628
Customs Regulations	-1.897	.150	.078
Freight Cost	2.015	7.500	.158
Mostly EXW			
Intercept	-1.946		.319
Customs Regulations	-0.916	.400	.433
Freight Cost	2.862	17.500	.035
Mostly FOB			
Intercept	-0.523		.785
Customs Regulations	0.300	1.350	.751
Freight Cost	0.511	1.667	.690

Note: The reference category is "mostly other Incoterms"

The Actual Incoterms Logistics Management Model of PEZA

The results of cluster and multinomial logistic regression analyses revealed that the actual choice of incoterms, namely (a) mostly CIF, (b) mostly EXW, (c) mostly FOB, and (d) mostly other incoterms were significantly affected by customs regulations and freight cost, thus the actual flow to describe the relationship model about the choice of incoterms in special economic zones in the Philippines is presented in Figure 1.

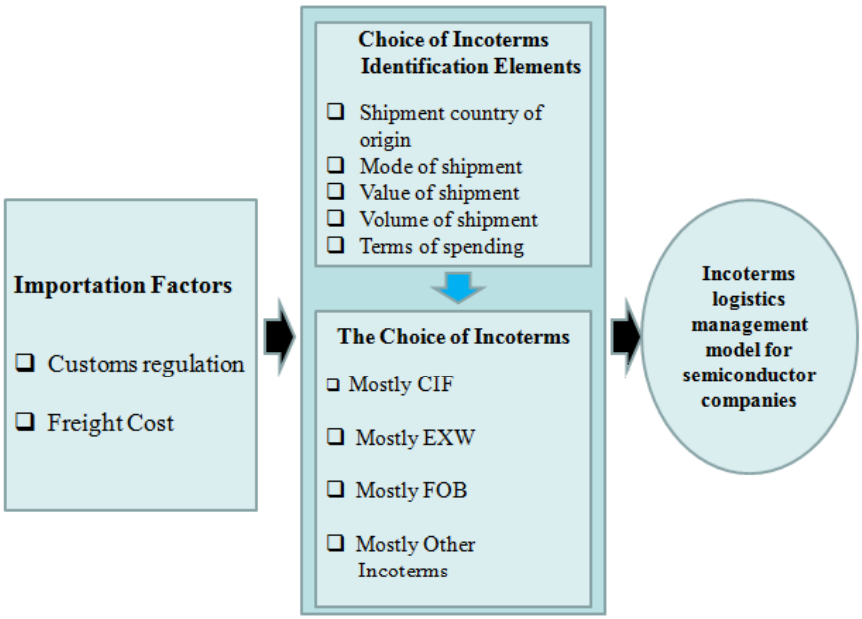

Figure 1: Actual flow of relationship model about the choice of Incoterms of semiconductor and electronics companies in the Philippines

A proposed working logistics management model as shown in Figure 2 is a general model which captures all areas related to importation elements as a result of the actual model being discovered in the semiconductor and electronics companies within PEZA zones in CALABARZON. This working logistics management model for customs regulation and freight cost is simple and practical but not a common knowledge to the semiconductor and electronics companies. The proposed model is the output of this study, and this is something that will contribute in the decision making of the importers, specifically in the semiconductor and electronics companies in the Philippines. It implies that regulatory goods, loss/damage and risk, and shipment consolidation are associated with customs regulations and freight cost. These are the significant factors among the elements of the

factors affecting the choice of incoterms among importers of the semiconductor and electronics companies in the Philippines. Mostly CIF is best to use when the importation element is related to freight cost, especially if the shipments are with high value. Since the importer need to secure the loss and damage entitlement, using mostly CIF will help to facilitate the insurance and claims. Mostly FOB is best to use when the importation element is related to customs regulations, especially if the shipments are regulatory goods and high risk. Subsequently, if the importer has no control over releasing factors which deals with customs issues, using mostly FOB will help to facilitate customs related issues in the origin. Mostly EXW is advisable to use when the importer would like to control the shipment consolidation, and the goods are with low value. The model also suggests that if the value of goods is significantly lower than the freight cost, the importer choice should be EXW incoterm, and if the value of goods is significantly higher than the freight cost, the importer choice should be CIF.

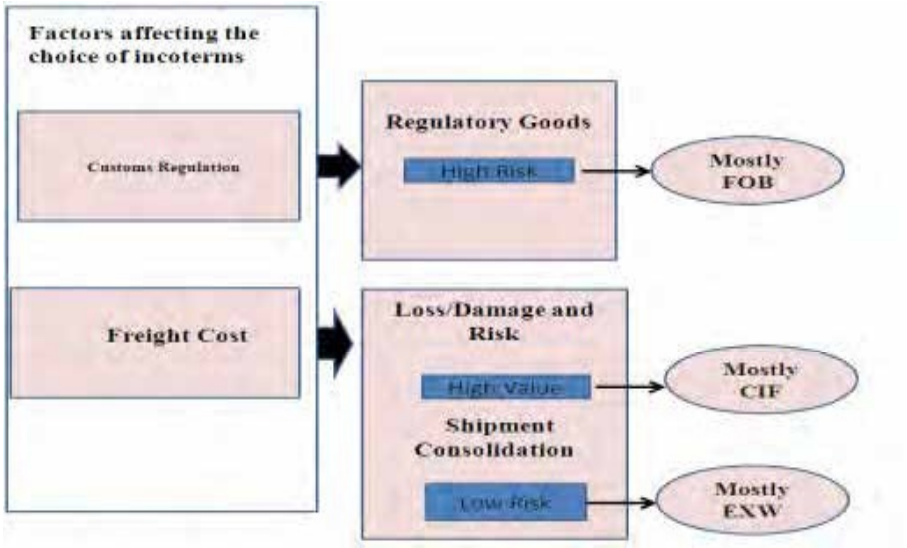

Figure 2: Proposed Incoterms Logistics Management Model for customs regulation and freight cost in semiconductor and electronics companies in special economic zones, Philippines

CONCLUSIONS AND RECOMMENDATIONS

Among the 17 identified independent variables, only customs regulations and freight cost were found significantly influencing the choice of incoterms, thus the actual relationship model to describe the choice of incoterms in special economic zones in CALABARZON should focus on these two identified factors. Unlike in other countries, the role of supplier relationship was not significant in the choice of incoterms in the Philippines. This finding suggests that in countries where customs regulations were stable like in the case of Norway, the role of supplier relationship matters but for countries where customs regulations are unstable, like in the Philippines, the role of supplier relationship in the choice of incoterms does not significantly matter.

In the Philippines, when choosing appropriate incoterms, the procurement and logistics managers should, therefore, evaluate their freight cost and customs regulation requirements prior importation. This finding is reflective of the model presented by Moens (2006) stating that when deciding on incoterms, the company should consider the finance or payment terms related cost. Furthermore, Ballou (2004) mentioned that freight consolidation and fill rates to reduce rates should be part of importation activities. In terms of factors related to customs, this finding jibes with the study of Zander and Bolotova (2009) who pointed out that the party with the best knowledge to perform customs procedures and who had better connections with the customs in the particular country was the best actor to handle customs related issue. Thus, if the importer has a problem with customs it is best to choose the FOB incoterm. The CIF incoterm is good to use when you require the seller to procure minimum coverage insurance of the goods for possible risk of loss or damage to the goods during in transit. The export clearance is being handled by the buyer but for the local import clearance the buyer is responsible for the customs requirements and associated costs. In the case of EXW, the importers should realize that the term means minimal obligation to the seller, the seller responsibility ends when the goods are handed over to the buyers forwarder, the seller is not

responsible of loading the goods to the buyers collecting vehicle. There is a risk associated due to loss of control over transportation movement, how export documentation is presented to relevant governments, and the buyers must handle all requirements even though they are on the other side of the country, they pay all associated duties and fees. The buyer bears all cost and risk involved in taking the goods from the named place to the buyers' plant. This incoterm should not be used when the buyer cannot carry out export requirements directly or indirectly.

This study suggests several directions for future research. One possibility is to extend this analysis to include the exporters to make this study more useful. Another suggestion for further research is to extend the study and examine the whole supply chain management in order to identify other possible important factors in the choice of incoterms within the semiconductor and electronics industry in the Philippines. It is highly recommended that all semiconductor and electronics companies in the Philippines use this study and consider the significant factors identified on their decision-making process towards their choice of incoterms.

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Exploring legitimacy in major public procurement projects

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ABSTRACT

In the UK, major IT public procurement projects fail at an astonishing rate and significant cost to the taxpayer. The prevalence of these failures presents scholars with a challenge; to both understand their genesis and to facilitate learning and prevention. Functional approaches have revealed numerous determinants of failure ranging from procurement specifications to risk escalation, but true and definitive causes remain elusive. However, since failure is not itself an absolute truth, but rather a concept which is reached when support is withdrawn, the survival of a project depends on there being sufficient belief in its legitimacy. This paper explores what influences legitimating belief systems throughout the life of a major procurement project, namely the UK's FiReControl Project which was cancelled after five years in 2010, with a reported loss of £469m. Through the conceptual lens of legitimacy we explore why commitment escalates far beyond an economically sustainable point. In major public procurements the thread of legitimacy begins at a political ideological level, where a project is legitimated into existence by the macro, context-laden myth and rhetoric that successfully secure resources for that project over others. As approved projects journey from cabinet offices into the ministerial departments tasked with delivery, other variants of legitimacy evolve in key project areas that influence and routinise seemingly rational behaviour such as rhetorical institutionalism and institutional logics.

Through a critical hermeneutic case analysis we show that FiReControl, once up and running towards the quest for efficiency and national security began to lose course marking an inevitable departure from the initial political rhetoric that defined and legitimate the early goals and objectives. Though major public procurement projects are framed around concepts of public value and efficiency, we argue that the nature of procurement and project management allows goals to be agreed, and in many cases contracts are even awarded, all before final business case figures are understood. As the project unfolds following taken-for-granted paths of public projects, organisational and professional legitimacy continues to develop. However, as true costs emerge, and cognition diverges we begin to see the familiar phenomenon of escalation of commitment. We mark a departure from the deterministic tendency to blame poor procurement and project management, seen in the retrospective analysis by government-commissioned auditors or consultants that tend to focus on process. These evaluations of projects that have been deemed failures take place long after legitimacy and belief systems have been dismantled, so the very processes which framed and maintained the project are not those that are analysed in the search for answers. Illustrated through the FiReControl case, we show how powerful political rhetoric can create legitimacy at multiple levels, combining to create and move the colossal "project machine", which influences the seemingly rational actions of decision-makers to escalate commitment to a failing course of action. Through this second-order approach we challenge the assumptions of major public procurement projects to shed new light on the lessons learned.

INTRODUCTION

Annually, the U.K. public sector procures around £238bn from the private sector, a third of its total expenditure and manages in excess of 3000 large procurement projects and tens of thousands of smaller projects, totalling hundreds of billions of pounds [1]. Public sector projects, be they large-scale infrastructure or IT reform projects, are technologically and logistically complex ventures. Concern continues to grow about the frequency and cost of project failures [2, 3], a problem that has been challenging governments for decades. Despite numerous reviews, governance structures, and lessons learned inquiries, still public projects are failing at a current rate of two in every three [1] and retrospectively commissioned lessons learned inquiries firmly place the blame on procurement processes and project management. In these reports, project failures become project management failures [4]. A common phenomenon in major public projects is escalation of commitment; the tendency to commit resource to a course of action in spite of evidence that signals its likely failure [5]. Whilst escalation of commitment does not cause failure, it influences considerably the magnitude of failure. However, since failure is not itself an absolute truth [6], but rather a state which is reached when support is withdrawn [7], the survival of a project depends on there being sufficient belief in its legitimacy.

This paper explores the role of legitimacy to provide explanatory power to the theory of escalation of commitment in failed public procurement projects. We contribute to the research and policy agenda by challenging the dominant functionalist approaches of the lessons learned process through two complementary lenses. The first lens is methodological. We call for a move from functionalist public research that elevates rationality in decision-making, to a critical hermeneutic approach that explores context and meaning to provide substantive insights into existing public procurement and project thinking. Secondly, we draw on the theoretical lens of legitimacy to explain the antecedents to escalation of commitment. From this position we illustrate how the legitimating devices that influence decisions and action within projects are not the things which are scrutinised in post-analysis audits and inquiries that powerfully claim to know and disseminate lessons learned. Indeed, we argue that these inquiries themselves are part of the legitimating process, thus will tend to produce "more of the same" process-failure conclusions, and that ever tighter procurement and project management can still result in failure. Without this challenge the public sector will continue on its existing cycle of providing ever tighter project controls through its lessons learned inquiries but projects will still fail, suggesting that the current processes may be necessary but are not sufficient.

We use the initial launch of the UK's FiReControl case to provide an illustrative example of how threads of legitimacy develop at multiple levels, combining to create and move the colossal "project machine", which influences the seemingly rational actions of decision-makers to escalate commitment to a failing course of action. Our hermeneutically-analysed extract forms part of a wider study exploring the role of legitimacy and escalation of commitment throughout the full project lifecycle. Given the space limitations of this paper, the case analysis here is exploratory only to highlight how the methodological argument for critical hermeneutics can be applied to challenge the assumptions of major public procurement projects and shed new light on the lessons learned.

CONCEPTUAL FRAMEWORK

Failure in major public procurement projects

Failure in public projects can have economic, societal, community and health implications [8] and can destroy value and add risk to supply chains. There is an acceptance that a range of stakeholders, including procurement through the commissioning process, have a view, and role, on the perceived success or failure of a project [9] although the research tends towards narrow, functionalist approaches [10] building on early studies that identify issues including budget and schedule overruns, lack of clear objectives and scope creep [11, 12]. The project failure literature has two predominant schools of thought. The first, the Factor School is grounded in descriptive, statistical research of the criteria of project success and failure [10] and has led to the development of standardised tools and methods to improve project control and efficiency [13]. The second school of thought is the Decision School. This school tends to favour interpretative methods [10] to describe the role of politics and decision-making in projects [14] and covers issues of over-optimism [15] and the reluctance to cancel failing projects [16].

The Decision School, in common with major projects research, has its origins in the early experimental studies of escalation of commitment, a phenomenon where otherwise rational people commit additional resources to a failing course of action [17-19]. Later escalation research develops an alternative conceptual framework where escalation results from difficult decision dilemmas rather than a behavioural tendency to 'throw good money after bad' [20].

It has been argued that considering escalation of commitment as persistence beyond an economically defensible level misses the point, as escalation is result of decision rationales which people create for themselves [5]. In the case study analysis of escalation in decision making in the London Stock Exchange's ***Taurus Project***, there is evidence of both decision dilemmas and social psychological factors as motivating factors in escalation [5, 21]. Studies of the project identify self-interest for escalation through the elevation of individual changes over the greater interests of the project resulting in unmanageable complexity. In addition, superficial levels of due diligence decision making are evidenced where agents carry out roles expected of them without challenge as "attention is riveted upon solving the problem rather than questioning the problem itself" [5, p.124]

Decision dilemmas are compounded through a chain of decisions that establish a dominant myth [22], created partly through the use of future perfect strategies [23, 24]. These fantasised outcomes shape the processes of decision- making including the overestimation of benefits and underestimation of costs [25-28] further embedding the myth. Many technology projects by their nature are new and lack evidence of their results [29], thus the myth creates the seductive vision necessary to ensure actors take part without being convinced of the project being practicable in economic, contractual and technical respects [30].

The departure from traditional research in this area explores macro-level forces where a series of decisions define escalation as the establishment of a dominant myth, which must be destroyed and replaced with a new myth if a failing project is to be terminated [5]. Fundamental to decision makers' ability to destroy a dominant myth is power as it requires institutionalised norms of behaviour to be overcome [5]. Power is available from the various sources on which to act decisively; audit reports, changes in leadership and monitoring groups.

The wider socio-economic environment contextualises the meaning and legitimatisation of public sector goals and their project outcomes [31] yet is outside the remit of project management [8]. For major public projects, procurement's role is leading the tendering, sourcing and contract negotiation phases of a project to ensure regulatory compliance, prudent use of the public purse and third-party delivery of expected outcomes. Despite efforts to reflect impact measures in the procurement process, the downstream project management methodologies isolate projects from the societal context [32, 33]. The delivery of outcomes is often beyond a technical scope and it can be difficult to develop predefined criteria for outcomes that can be appraised through a procurement contract given their emergent or ambiguous nature [34]. Failure goes beyond technical failure. Public projects can meet functional specifications but still fail to increase underpinning goals of productivity, efficiency or modernisation [35] and their temporal nature is such that initial assessments of a projects success can change when consequences are revealed with the passing of time [36].

Despite the ubiquitous nature of project failure and the quantity of research in this area none appears to have been particularly useful in preventing failure [35] and organisations fail to draw lessons from previous failures [37]. This is in part owing to the reliance on functionalist, instrumental views of projects and organisations [38]. There is a call to shift the research agenda away from the search for 'better' theories, and move instead to studies that conceptualise the limits of the procurement and project management processes [8], recognising that ever-tighter processes can still result in failure. This requires the stripping away of dominant, conflated and potentially self-fulfilling, deterministic theories of projects to probe the ideology and assumptions of public projects that are often accepted as unproblematic by its advocates [39]. This is important to break the cycle of 'more of the same' approaches that typically focus on procurement or project management failures and can create conceptual blindness and obscure the complexities at play.

Lessons learned in major public projects

In addition to internal project controls, major public procurements and projects are subject to the scrutiny of several official overseers including the Major Projects Authority (MPA), the Office of Government Commerce (OGC), the National Audit Office (NAO) and the Public Accounts Committee (PAC). Launched in 2011, the MPA is a partnership between the Cabinet Office the HM Treasury and is tasked with overseeing the management of all central government funded major projects, with lessons learned one of its four pillars of operation [40]. The NAO and the PAC are the two key audit institutions. The NAO is a parliamentary rather than a government agency and since devolution in the UK it works alongside Audit Scotland, the Wales Audit Office and the Northern Ireland Audit Office to generate financial savings. The NAO is responsible for the financial auditing of central government accounts and for the production of circa 60 value for money (VFM) audit reports annually on selected issues [41]. Each VFM report takes between 6-12months to complete and the NAO costs £73.9 million a year and employs 900 staff [41].

The ultimate purveyor of received wisdom in lessons learned for public projects is the Public Accounts Committee (PAC), whose main work is to examine the VFM reports produced by the NAO. PACs are common across the commonwealth countries and their focus is to identify lessons learned and to assess the economy, efficiency and effectiveness of government departments' spend. Despite their underpinning role in the public sector reform agenda, their role has been criticised as paradoxical [42] given that their focus is on managerialism rather than political oversight [43]. In a similar vein, it has been posited that their role does not examine public accounts *per se*, rather their role is consideration of NAO reports [44] and there is often an exclusive concentration on financial probity [45]. The economic positioning of the PAC limits its ability to challenge values, beliefs, behaviours and underpinning assumptions stemming from political rhetoric, which prevents learning in these areas and reduces lessons learned to functional failures. This position is highlighted in the NAO's publication on lessons learned [46] that criticises governments departments for not learning the lessons it presents and for their lack of reflection on performance, yet does not recognise its own performance as part of a two-way learning process.

Project success is measured on the realisation of expected outcomes while project management success measures whether it was on-time, within budget and on-quality [47]. The realisation of expected outcomes is a more important outcome [48], particularly given the nature of public projects. The evidence from empirical studies suggests only a weak relationship however between project management success and delivery of expected outcomes [49, 50]. The lessons learned cycle of PAC and NAO reports aligns to conventional wisdom to improve procurement controls and focus on tighter project methodologies, both requiring more stakeholder involvement, planning and high quality staff [51]. Yet despite these lessons being implemented failure rates persist suggesting that these functionalist areas are inadequate [47].

METHODOLOGICAL ISSUES

Claims of procurement and project management inadequacies in failed projects are common conclusions of government inquiries. Whilst acknowledging the deterministic findings of these conventional lessons learned approaches, the taken-for-granted assumptions implicit in public inquiries and their methods fail to be acknowledged. People interpret institutions, actions and artefacts differently and attach different meaning to them [52]. From this position the general claims of functionalist public project research and audit analyses fail to acknowledge subjective meaning and confidently assume objectivity and rationality. Traditional public project inquiries marginalise procurement and project roles by reducing them to implementers of control and scope management, and further, the approaches assume rationality, universality, objectivity and value-free decision-making, perpetuating a causal link between failure and process control [38].

Social sciences cannot claim to be universal or predictive because they are always context-dependent [53]. Rule-based knowledge, as represented through PAC accounts of procurement and project process shortcomings, have their place in understanding project failure and lessons learned but it is regressive to elevate its status to the highest goal of learning [53] . A model of skill acquisition [54] highlights the issue as people pass through five distinct stages of learning - novice, competence, proficiency, expertise, and mastery. Rule-based thinking is the most important basis for action in the first three levels. In the latter two, logic-based action is replaced by experience rooted in context and intuition where experts simply perform an act and do not consciously separate the identities of problems from solutions [54]. Rather than increasing skills levels indicating increasingly rational acts, performance reaches its rational peak when skills are acquired to a competent level, thereafter, analytical rationality declines and gives way to expert level arationality [54]. Experts perform optimally with a diminished dependency on specific rules for action [55]. Intelligent action, which is likely to dominate given the scale and complexity of major public projects, consists of something other than calculated, analytical rationality [53]. The skill acquisition model demonstrates the need to see beyond rational levels of behaviour and recognises the criticality of tacit knowledge [56]. The lessons learned approach in public projects predominantly uses rule-governed measures to evaluate rule-governed behaviours that are found only at the lower levels of the learning process. Such inquiry consistently fails to appreciate the tacit skills, values-governed, context-dependent behaviour that is at play in complex projects.

Phronetic research

Therefore, challenging conventional approaches in an effort to understand more about project failure, we argue that a different research approach is needed for analysing public projects that acknowledges rules-based behaviour, logic and rationality whilst promoting the criticality of context and the relevance of the particular. There is a call for a revival of Aristotelian phronesis in organisational research [57, 58]. Phronesis is primarily about peoples' actions – i.e. what they do and it emphasises the particular context of behaviour over universality and rules. It is concerned with context-specific values, judgement and practical wisdom, attributing at least equal importance to behaviour as

to the other two intellectual virtues suggested by Aristotle, episteme (scientific knowledge) and techne (skill) [53]. An emerging dimension of contemporary phroentic research is the incorporation of power to studies of human and organisational behaviour, to enable studies to answer more impact-relevant questions such as 'where are we going?'; 'is it desirable?'; and 'what should be done'? [53]. The introduction of power to the phronetic research agenda adds an additional question of 'who gains and who loses, and by which mechanism of power?' [53].

In light of the frequency and cost of project failures in the public sector [1], and importantly the suggestion that lessons learned are not preventing failure [35], the questions of 'where we are going, and is it desirable?' are depressingly predictable. We call for research that helps to further our understanding of the second two questions – what should be done, and who are winners and losers? We contribute to this debate through exploring how powerful rhetoric created legitimacy in the context of the FiReControl project, and providing explanation for how the power dynamic sustained seemingly rational actions of decision-makers to escalate commitment to a failing course of action.

Critical hermeneutic methods

To ensure the primacy of context as required in phronetic research [59] we use a critical hermeneutic methodology to illustrate how different methods can extend our understanding of failed public projects, beyond a functionalist rule-based view of procurement and project control deficiencies. In the limits of this paper, we argue for new phronetic-orientated research agenda to add a deeper understanding of arational behaviour in major public projects. We provide an illustrative example of phronetically-rooted critical hermeneutics methodology that demonstrates how legitimacy was created and maintained in the case of UK's FiReControl project, and how this contributes to escalation of commitment. Critical hermeneutics is a method particularly suited to public administration research [60] as it understands action as opposing performances driven by ideological-moral views [61]. Although case research has been encouraged in the procurement field [62], critical hermeneutics is rare.

Hermeneutics is a systematic approach to interpreting the meaning of texts, human action and institutions that can be treated as text [63] to unearth the symbolic meaning [64]. This is achieved by going beneath the text surface to identify direct, literal meaning and indirect, secondary and figurative meaning [64], using language to reveal what, paradoxically, words can never say [65]. Texts have a broad meaning and include; official documents, structures, official and unofficial documents, press coverage, government transcripts of parliamentary debate, specialist press, national project board reports and minutes and parliamentary audit reports.

Empirical studies in public technology procurement often rely on self-reported data whether through more traditional management research methods of questionnaires, surveys, and interviews. In comparison, this study uses secondary data sources to provide a real-time context, where there are no ego-defensive issues imposing on participants' recollections, and where the data is less selective, minimising socially-constructed realities from only the most powerful sources. The method is useful to extend our understanding of failed public projects as it allows a temporal restoration of the past and its social and political context to avoid retrospective constructions of social realities. As FiReControl was well publicised as one of the worst cases of public project failure [66], it would be difficult for participants to look back 'untarnished' by this label.

Critical hermeneutics adds a phronetic angle through extending insight about 'the fix we are in' [65, p.8] by exposing hidden meaning and how the socially and politically powerful sources impact behaviour [64]. The method allows for the analysis to be rooted in the socially and historically conditioned context [53] to explore the structures of meaning which underlie interactions among organisations, groups and individuals to discover how legitimacy is created, and maintained through the power structures. This study will follow the 'hermeneutic circle' [67], an interpretive cycling between layers or perspectives. The researcher first aims to understand small sections of each text in isolation before it is then re- considered in relation to the whole - its historical and cultural context. Understanding is achieved when there is a consistency between the whole and all its component parts, and vice versa [68]. This layering, or cycling of evidence limits simplistic, mono-causal conclusions [69] and is in direct contrast to existing realist levels of interpretations where managers accounts are taken as factual reports [70]

LEGITIMACY IN MAJOR PUBLIC PROJECTS

Fundamental to phronetic, critical hermeneutic research is the specific role that meanings, values, beliefs and feelings play in the understanding of social realities [71]. To shed new light onto why support for failing projects is not withdrawn sooner, rather than ask how values, beliefs and feelings can influence escalation in decision making, we ask how these make it difficult to stop project actors from escalating commitment to evidently failing courses of

action. To understand more about these decision rationales [5], especially the role of meaning in the social realities of failing projects, we explore the less well-understood influences of legitimacy and its many variants throughout the project life-cycle enabling or constraining action.

The motivations, strategies and perceptions of legitimacy are multifaceted. While we acknowledge the difficulties of capturing conceptual diversity in a single definition, legitimacy can broadly be defined as a generalised perception that within a socially-constructed set of norms, values and beliefs, particular actions are perceived as desirable, proper or appropriate [72]. Emphasising the centrality of values and norms, legitimacy it is the cognitive process by which an entity becomes embedded in norms through taken-for-granted assumptions that effects collective action [73, 74]. Legitimacy has a boundary setting role through limiting what people may or may not do, and it shapes perceptions, determines agendas and informs decisions [75].

It has been suggested that legitimacy is essential for the survival of an organisation [76] since it is difficult to exert influence over others based solely upon the possession and use of power. It leads those connected to it to believe that the entity is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward [77]. Three main sources of legitimacy are; 1) charismatic legitimacy, which occurs when people have faith in the rulers, 2) traditional legitimacy referring to the faith people have in a particular political or social order because it has been there for a long time, and 3) legal-rational legitimacy, where people trust the legality of an entity, and conform to its rules [78]. We contend that each type exists throughout various stages and domains of a major project, ebbing and flowing depending on complex and changing power relations, which combine to establish levels of authority to influence decisions and to enable or constrain actions.

How well a public procurement project operates and delivers depends largely on whether it is deemed legitimate by the legitimating domains of each project stage, which assess its conformity to a specific standard or model [79]. A completely legitimate organisation is one about which no questions could be raised [80]; this is rarely the case in public projects as they are subject to waxing and waning of threads of legitimacy that when present attract commitment and when absent attract withdrawal. We propose that by exploring legitimacy and devices used to create it, as central concepts and influential mechanisms that keep failing projects moving forward, a broader appreciation of the phenomenon of escalation of commitment can be gained.

We conceptualise legitimacy as a metaphorical rope, twisted from multiple threads until sufficient strength is established to move a major project along its trajectory. Threads of legitimacy are built over time, in and amongst the permanent organisations, supply chains and networks around which the project is built. The prevailing political ideologies for public sector reform construct the first legitimating thread. Public projects are first conceived based on political ideologies in the realm of high politics that shape the behaviours of decision-makers inside government [81]. Looking even further back than the planning stages, where myths may be seen to begin through future perfect strategising [24, 25], we assert that the seeds of legitimacy begin at the political ideological level, where a project is legitimated into existence by the macro, context-laden myth and rhetoric that successfully secure resources for that project over others. Many major public projects have been predicated on the concepts of New Public Management (NPM) and their genesis was legitimated through the rhetoric of continuous improvement [82]. NPM conceptually represents the move towards a managerial approach to public service delivery [82] to improve efficiency and outcomes [83] and is an international phenomenon across governments [84]. To underline the power of rhetoric in establishing legitimacy, it has been suggested that the proposed efficiencies are unproven [85] and despite the challenge to the applicability and assumptions of NPM [86-88], there is global convergence towards it and the public records are steeped in ministerial visionary rhetoric expounding such promises [89].

NPM's popularity across the globe provides legitimacy for other governments to adopt it despite the lack of evidence-based results [85, 89]. The functionalist notions of global convergence lead to the taken-for-granted behaviour of governments who want to be seen by international peers to be doing something under the remit of NPM [89]. The early influences of political rhetoric legitimate approaches and translate talk into exigencies for reform using provocative language and symbolism [90] and creating myths. For example, there is no 'reality' in the claims that many of the UK's public sector projects are in our national interest. The UK fire service regionalisation project, FiReControl was idealised as a critical project towards efficiency and improving national security. HS2 is claimed to bring prosperity to the North and redress London-centricity, and many of the failed IT reform projects in the NHS were predicated on 'patient choice'. Whilst they each have the rhetoric, all are predicated on increasing efficiency, whether through joined-up working, faster transport or reduced waiting times. There is no proven evidence that the visionary claims can be achieved but ideologically such talk helps to secure resources, and thus begins the legitimating of large-scale reform projects. Political ideology, perceptions and expectations are often not based on empirical evidence but rather upon signals between contextually similar groups who jointly create

meanings of current and anticipated events [90]. Talk and decisions indicate the way forward, the frames of thinking, they allocate responsibility whether implicitly or explicitly and they affect activity in a direction even if the intended outcome is not completed or delivered. From a phronetic perspective the legitimacy implicit in political rhetoric [91] can help us to understand who holds the reins of power and how this is deployed, as it is argued that political legitimacy can only be established through rhetorical action [92].

As the project emerges as an entity, new threads of legitimacy being laid out can be conceptualised, and subsequently twisted together, thereby strengthening and enhancing belief in the project. Additional threads of legitimacy are established, usually rapidly, from within the new structures and supply chain assembled to deliver the project. New threads of legitimacy develop from multiple influences, such as institutionalism, rhetoric as well as the actual discipline of project management. Each influence constructs and sustains a social reality in which those involved engage in taken for granted rational behaviours, further reinforcing legitimacy. When projects are up and running towards the quest for efficiency and public value they can begin to lose course and there is inevitable departure from the initial political rhetoric that defines early goals and objectives. Organisations and employees engage actively in generating rhetorical institutionalism [93] at their own operating level to construct the appearance of knowledge or institutional myths in order to provide meaning and legitimacy to organisational practices and beliefs. All the time, the threads are combining, rope-like to strengthen overall belief in the project, its purpose and indeed its very survival. With a rope constructed now of multiple threads, overall project legitimacy is strong, the machine is in motion, set on its path to deliver 'reforms'.

Though public projects are framed around concepts of public value and efficiency, the nature of planning and management allows goals to be agreed, and in many cases contracts are awarded all before final business case figures are understood. In the design and delivery stages of public projects, variants of institutional legitimacy evolve in key project areas that influence and routinise seemingly rationale behaviour such as rhetorical institutionalism [94] and institutional logics [74, 95, 96] influencing, in the absence of a final business case, decisions to continue commitment to what is, or may become a failing courses of action. As true costs emerge, and cognition diverges we begin to see the familiar phenomenon of escalation of commitment although they are able to maintain legitimacy, not through delivering efficiency but through taken-for-granted adherence to legitimating activities.

The retrospective analysis of projects through the PAC and NAO, themselves legitimated bodies in the production and dissemination of knowledge that constitutes lessons learned, add another layer of legitimacy but their reviews take place long after project legitimacy and belief systems have been dismantled and the very processes which initiated, framed and maintained the project are not those that are analysed in the functionalist search for answers. We seek to illuminate legitimacy in relation to the phenomena of escalation in decision making - the tendency to commit resources to failing courses of action [97]. Using a phronetic, critical hermeneutic approach, we provide an illustrative example of how these approaches can be used to explore forces and devices which create, maintain and destroy legitimacy during the lifetime of a major public project and the effects on decisions and actions as key junctures. The illustration will focus on identifying legitimating devices employed specifically at the early stages of conceiving reform projects; the political ideology that secures resources for one project over others. In illuminating legitimacy in its various forms, our phronetic intention will be to reveal more about power relations, which when combined with legitimating devices give authority to groups and in so doing influence action or inaction.

ANALYSIS

The UK FiReControl Project - a critical hermeneutic analysis

Critical, phronetic research is used to make sense of the project organisation through text-analogues, where different stakeholders may have confused, incomplete, cloudy and often contradictory views [98], and to give insight on the consequences of power and value [57]. By 'organisation' we refer to the temporary project organisation and all its constituents; government departments, public sector employees, suppliers, unions and consultants. Viewing organisations, their stakeholders, structures, symbols and actions as text-analogues in a hermeneutic circle, cycling between the parts and the whole, allows a contextualised, rich picture of the project and decisions to emerge [68]. As part of a wider study, a full critical hermeneutic enquiry will be conducted of the UK Government's FiReControl project over its full life-cycle. For illustration purposes in this paper we demonstrate the methodological process and its potential research benefits using a small selection of key texts to ask questions of the political rhetoric and the political industry-review processes which instigate public reform projects. Using a critical hermeneutic method we reveal new understanding of the roots of escalation and ultimate project failure using the conceptual lens of legitimacy.

Background to the texts

In 2000, the UK Government commissioned the consultancy company, Mott MacDonald, to review control rooms and communications across the fire service. Best value and efficiency were the main focus of their resulting report, *The Future of Fire & Rescue Service Control Rooms in England & Wales*, and they concluded that while amalgamation of the 49 control rooms into just nine offered greatest efficiency benefits, implementation barriers would be high and therefore recommended a compromised approach reducing from 49 to 21 sub-regional control centres [99].

In 2002, the Office of the Deputy Prime Minister (ODPM), later known as the Department of Communities and Local Government, (DCLG), commissioned a fire service review chaired by Professor Sir George Bain. Bain's report, *The Independent Review of the Fire Service*, recommended fire service modernisation through wide-ranging reform also including the rationalisation of control centres [100]. In response, the government published a white paper, *Our Fire and Rescue Service*, setting out the proposals for reform, its objectives, and the legislative mechanism by which Fire and Rescue Authorities (FRA) would achieve government objectives [101]. In 2003 Mott MacDonald were asked to review whether their original conclusions were changed by either the Bain report or the new national requirements for resilience and management of larger-scale incidents that had emerged since the '9/11' terrorist attacks in America.

Amongst other updates, the revised report recommended their original amalgamation to just nine regional control centres, rather than 21 on the basis of modernisation needs in a changed environment [102] and this was in essence the genesis of the FiReControl project as part of the Government's Resilience Programme. The project's aim was to improve the resilience, efficiency and technology of the Fire and Rescue Service by replacing 49 local control rooms with a network of nine, purpose-built, regional control centres using a national computer system and infrastructure to handle calls, mobilise equipment and manage incidents. FiReControl commenced in 2004 and was expected to be complete by October 2009. In 2007, DCLG contracted European Air and Defence Systems (EADS) (now Cassidian) to design, develop and install the computer system underpinning the project. However, the project was subject to delays and costs escalated over its lifetime. DCLG cancelled the project in December 2010 after concluding that it could not be delivered to an acceptable timeframe. At the point the cancellation decision was made, DCLG estimated it had spent £469 million on the project and calculated that completion would take the total project cost to £635 million, more than five times the original estimate of £120 million [66].

Stage 1: Selection and initial reading of the texts

To illustrate the critical hermeneutic process we select several media records of political speeches and key contemporary texts (see Table 1). The first reading of the texts centres on language to understand apparent meaning and identify thematic references. Themes reveal political undertones that may be deemed unimportant or go unnoticed in mainstream management research methods [103]. Our initial thesis is that public sector reform projects originate from politically or ideologically legitimating devices at play, which are subsequently strengthened or weakened (depending on power and thus authority) by other sources of legitimacy throughout the project lifecycle. These legitimating forces influence behaviour, decision making and ultimately escalation (and de-escalation) of commitment to a failing course of action from the initial securing of government resources through to procurement, delivery and the final PAC and NAO analyses.

Table 1: Sources used in critical hermeneutic analysis of FiReControl

Date	Text
1997	Televised Interviews with Tony Blair (by Jeremy Paxman and Peter Sissons), as transcribed in Bull (2000)
2000	The Future of Fire & Rescue Service Control Rooms in England & Wales, Mott MacDonald
2001	Tony Blair speech on reform of public services (16 July)
2002	Independent Review of the Fire Service - The Future of the Fire Service: Reducing Risks, Saving Lives, Sir George Bain
2003	The Future of Fire & Rescue Service Control Rooms in England & Wales (update), Mott MacDonald
2011	Public Accounts Committee: The failure of the FiReControl project Fiftieth Report of Session 2010–12

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Our entry point [103] for the selected text for illustration is the theme of *public sector reform to achieve efficiency*, indicating our initial perspective or hermeneutic horizon [67] that many public reform projects are predicated and legitimated on efficiency and the NPM agenda, despite a lack of empirical evidence. Content analysis shows that the efficiency theme is mentioned regularly across all initial key texts selected. The Bain Report uses phrases with the word efficiency 116 times over 158 pages (including stemmed words, such as 'efficient management'), and the 180 page Mott MacDonald report includes 234 uses of the word in phrases, such as in the examples in table 2.

Table 2: Excepts illustrating efficiency agenda

Bain (2002), The Future of the Fire Service: Reducing Risks, Saving Lives	
P.iv	'...increased efficiencies and economies could result'
P.vii	'..the most efficient and effective means of meeting the needs of users and the wider community.
P.1	enable it to respond effectively to all the operational demands which may be placed upon it;
P.1	'..enable the responsibilities of the Fire Service to be delivered with optimum efficiency and effectiveness'.
P.3	'..this opportunity to create a modern and effective Fire Service fit for the 21st century must now be seized..'
P.8	'..respond most effectively and efficiently to the community's needs..'
P.9	'..we want the Fire Service to be an effective, responsive community service.'
P.40	'Unless it is repealed, the sorts of efficiency improvements we are looking for as a result of a move to the new system will not be realised.'
Mott MacDonald (2003), The Future of Fire & Rescue Service Control Rooms in England & Wales	
P.S-1	'The report concluded that maximum efficiency could be achieved from a reduction in the number of control rooms.'
P.S-1	'There has been no significant progress made towards securing efficiency and economy in fire service control rooms as a consequence of the Best Value regime.'
P.S-4	'This would secure and maximise the realisable efficiency gains..'
P.4	'..provides the basis for a recommended national strategy for the rationalisation of fire and rescue service control rooms to secure efficiency and effectiveness in service delivery.'
P.16	'Reforming our Public Services: Principles into Practice'17, which defines the principles of quality and efficiency in public services, guaranteed by policy making that is 'more joined-up and strategic..'
P.39	'..was considered that the next step towards gaining maximum efficiency and effectiveness was through a regional brigade arrangement.'
P.161	'As with all Best Value authorities, fire authorities are expected to collaborate with other public and private sector agencies to improve their efficiency and effectiveness.'

The initial reading to understand the texts' manifest meaning indicates a common focus on the politics of reform bringing about efficiency, improving effectiveness, enabling effective management.

Stage 2: The contexts

The next stage of the hermeneutic process builds up the industrial, political and cultural context of the period under study (2000-2003). For illustration, reviews of press, parliamentary debate and audio 'texts' of the era indicate the shifting political landscape of new Labour policies towards their modernisation agenda, including the growing trend for public private partnerships and private financing of public sector projects. The 2002-3 UK fire-fighter dispute was a prominent backdrop to the industry context. In November 2002, the Fire Brigades Union (FBU), voted to take strike action in an attempt to secure significant increases to fire-fighter salaries. This was the first nationwide fire fighters' strike in the UK since the 1970s. In addition, the post 9/11 terrorist threat looms large politically and in the general psyche.

New Labour and Best Value

Under the first Blair administration of 1997-2001, the Local Government Act (1999) came into force. The act required local authorities, including fire authorities, to undertake Best Value Reviews of their public service provision and to publish Best Value performance plans for their improvement considering the 4Cs – challenge, compare, consult and compete. Best Value aimed to secure continuous improvements in public service delivery by the most economic, efficient and effective means available. Regionalisation was an important tenet in Best Value. Specifically for fire authorities three specific areas were mandated for review; procurement, training, and

communications/control. It was within the Best Value remit that the first Mott MacDonald report was conducted, suggesting a reduction in control rooms from 49 to 9, although given the anticipated barriers they recommended reducing just to 21 [99].

New Labour and the public sector

Several years into its first administration under Prime Minister, Tony Blair, New Labour's political agenda was well under way towards public sector reform. The zeitgeist of those years was public-private partnership schemes promoting the involvement of private sector capital and operating methods in the delivery of the public services. During the previous Conservative government Labour, in opposition, had fervently condemned the Conservatives Private Finance Initiative (PFI) as 'creeping privatisation'. However, by their 2001 re-election the Blair administration was thoroughly committed to PFI as a cornerstone of their public services' modernisation programme and to promote the UK 's competitiveness [104]. The Prime Minister claimed that his second term mission was to deliver 'the biggest reform programme in public services for half a century' [105] and PFI was the mechanism of choice. Despite powerful consultancy reports and an ambitious, new political agenda all pressing for change that embraced the ethos of public private partnerships, by 2003 nothing had actually changed in the fire sector. However, two significant events had happened between these years.

International terrorism

The 2001 terrorist attacks on the World Trade Centre and the Pentagon on September 11th had a profound global impact and changed public expectation of emergency service response capability. The event significantly affected how the UK emergency services would operate in terms of scale and scope and how prepared they would need to be to respond to catastrophic, multiple and sustained incidents on a scale now envisaged. The 9/11 attacks made the concept of multiple and simultaneous terrorism a reality. This introduced a 'new philosophy of enduring preparedness for sustained response to unprecedented and unanticipated occurrences' [102]. A direct UK Government response to 9/11 was the Civil Contingencies Capabilities Programme and specifically for the fire service, the New Dimension programme, which would see the issue of specialist equipment, procedures and support mechanisms to all fire and rescue services so as to improve resilience and preparedness to civil contingencies throughout the UK enabling an efficient, effective and sustained response to large-scale catastrophic incidents wherever they might occur.

Pay dispute and independent review of the fire service

The second significant event was the long drawn-out pay dispute of UK firefighters from 2002-2004 that led to the first nationwide firefighters' strike in the UK since the 1970s. In addition to the length of the dispute, other factors underline the significance of the pay campaign. As the only major labour dispute to have occurred under a Blair administration, the way the dispute was conducted, particularly by government ministers, demonstrated the Labour government's approach to public sector reform and to the role of trade unions. The strike was a very bitter affair, aggravated by government threats to send troops and police across picket lines to seize fire engines and by attacks and counterattacks over the implications of modernisation. The Deputy Prime Minster, John Prescott's announcement that he would bring back 1940s legislation giving him power to decree firefighters' pay and conditions was seen as incendiary. The pay dispute led to the ODPM ordering an independent review of the fire service chaired by Professor Sir George Bain. The FBU challenged its independence and refused to take part in the review. The topic was heavily debated in Parliament throughout the years 2001-2004 and the Hansard records provide a rich record of the bitter dispute that had even led to ministerial authorisation of MI5 surveillance of strike leaders [106]. The Bain report [100] recommended a raft of reforms that would form one of the keystones of the modernisation of the fire service on the terms of the Blair government.

The hermeneutic circle, horizons of interpretation and fusion of horizons

With the contexts established and texts initially read for their apparent meanings and thematic references we begin the hermeneutic circle, cycling between stages, texts or text analogues and the various contexts in which they were produced as we have briefly fore-grounded here for illustration. In so doing, we seek to understand "the parts ...in relation to the whole and the whole from the inner harmony of its parts" [107, p.77] and we begin to reveal relationships which may otherwise have been overlooked. In addition, the researcher's own prior understanding of the context and worldview represent their horizon of understanding, which add another layer of illumination and

interpretation [67]. These horizons do not necessarily imply bias [67], but can provide alternative interpretations as meaning of social action is constructed and informed by peoples' networks and traditions they represent [108].

In acknowledging this horizon, we identify the researchers' prejudices brought to the interpretation; One of the researchers spent time as a private sector consultant, project managing FiReControl on behalf of a metropolitan fire service being regionalised, and the other moved from a private sector procurement role to an academic career and has researched, and provided consultancy to, a number of public sector procurement projects. Our horizon of understanding is also informed by our ontological positioning of the research. In the study we take a critical realist perspective to enable a philosophical departure from the dominance of positivist approaches that have striven for a one-best explanation of escalation focusing predominantly on generalisability rather than explanation [109]. Critical realism opens up the possibility of multiple mechanisms at play and acknowledges that several explanations may coexist [110]; thus, this second-order approach challenges dominant positivist methods, which present a reductionist approach to understanding projects. The prejudices we bring through our ontological position, the selection of texts, the thematic reference entry points of public sector reform for efficiency, and our choice of contexts (fire service pay dispute, terrorism and the politics of New Labour), within which we position our interpretations signal our participation in our own socio-cultural traditions that define our horizon of understanding [67].

Stage 3: Closing the hermeneutic circle

The hermeneutic circle is closed by demonstrating links or relationships between the focus of the texts, in relation to specific chosen entry points (for example, our entry point of 'efficiency') and the contextual story of the political-social landscape of the time to lead us to a greater, or at least different, understanding [111]. Fundamental to this stage in a phronetic approach is that we do not simply reach a deeper understanding through rule-bound logic and analysis, rather the process is, "intuitive and divinatory" [107, p.87] to enable the taken-for granted assumptions to be exposed.

The critical hermeneutic analysis of the FiReControl case exposes several key contextual issues that help to understand the role of legitimacy and escalation of commitment. The first issue to emerge is the general shifting ideologies of the time; Labour to New Labour, and state-ownership to public-private partnerships. New Labour had a public service modernisation agenda that defined their modernisation as a political party. Labour had undergone a transformation from its old labour ways pre Thatcher/Major administrations and Tony Blair was committed to an agenda that would see public sector reform towards private partnerships come what may [112]. It has been posited that politicians desire for enhanced power or status that the occupation of elective office brings leads to the formulation of policies to win elections rather than winning elections to formulate policies [113]. Thus, vote-losing policies can be abandoned, even if they are heavily-grounded in a party's ideology or values and can lead to a drift from ideological traditions [114]. This ideological drift is manifest in the Labour's 1997 general election victory at which Blair's 'fairness not favours' line demonstrated the tone of their winning manifesto that contained few commitments to union-related issues. The Blair government opted to shift its ideological position towards a pro-business image, in line with other global social democrat leaders of the post soviet union era, such as Bill Clinton, abandoning policies grounded in old Labour ideologies. To effectively reach wider audiences, new social democratic leaders courted the media and in so doing became effectively autonomous from the trade unions and political activist base of their parties [106]. Textual evidence from media sources suggest that Blair was publically distancing himself from the unions during that period and was instead pursuing a pro-business image. For example, in two televised interviews from the 1997 British General Election, Jeremy Paxman (JP) and Peter Sissons (PS) question Tony Blair (TB):

> *(JP)"Do you still consider yourself a socialist?"*
> *(TB)"I do in the sense of the values I don't share the idea that socialism's about some fixed economic prescription".*
> *(PS) "If Labour wins on Thursday it's a fourth victory for Margaret Thatcher, she said she'd bury socialism, you've completed that for her, you left all the principal landmarks she created in place" .*
> *(TB)"No I wouldn't agree with that at all. What I think is sensible however is that the Labour Party wants to take the country forward and it is New Labour and we don't want battles over public versus private sector, bosses versus workers, those are things of the past."* [115]

Such texts evidence Blair's departure from traditional socialist ideology towards his ambition for incorporating private capital, managerial techniques and business practices in the public sector. This new ideology was the political context in which FiReControl was conceived and legitimated as driving efficiency into the sector, yet the PAC report focuses the failure on the procurement and project management. The PFI element of FiReControl was

considered one of the most costly legacies of the project owing to the build of nine highly-specified regional control centres, each with 25 year leases, before the IT contracts were even signed [66]. However, in the 2011 final analysis of FiReControl as a failed project the PAC report concluded:

> *"The Department's management and oversight of the project was weak. The Department lacked the necessary expertise and experience to deliver the project and was over-reliant on consultants, whose performance was not managed effectively. … the Department failed to understand the complexity of the IT system but prioritised building the new control centre. So today we have nine regional white elephants, most of which have stood empty since 2007. For all future projects, the Department should follow proper project and programme management procedures and not take on projects without ensuring it has staff with the right business change, programme management and IT skills"* [66].

Whilst some blame may correctly lie with functional issues in the procurement and project management of FiReControl in relation to timing of contract awards, the drive to use the PFI mechanism formed part of a New Labour agenda and was legitimated and pushed from the highest political level. The cost of the centres reflected their size and specification which was not proportional to existing control rooms even scaled up as regional, resilient facilities. This perhaps suggests further planned reforms for their use, in accordance with John Prescott's regional government agenda, but any such plans not made explicit to the programme managers. Excerpts from key texts convey the emerging pattern of Blair's reform agenda, where efficiency is a dominant theme despite a lack of empirical evidence to justify its claims in public sector reform programmes. FiReControl was predicted on an efficiency agenda through the regionalisation and rationalisation of control rooms. The Bain report (2002), set up as an independent review of the fire service supports the new public management ethos for reform and efficiency. The report states 'we' are 'confident' and 'believe' that reforms will bring efficiency, but it lacks empirical evidence as to previous success of public sector reform, and does not provide the specific detail of how this will be achieved:

> *"Change is only worthwhile when the benefits exceed the costs. We are confident that, given the scope for reform, the move to a more modern Fire Service will more than pay for itself over time. In addition, we are confident that more lives will be saved, property losses will be reduced, and, most importantly, communities will feel safer as a result. The important message is for everyone to recognise both the need for change and the gains from doing so. Staying where we are is not an option, and we believe that reform will bring greater gains for everyone"* [100].

Further, the only specific recommendation in the Bain report in respect of the shared control room element of reform solution was that:

> *"All fire authorities which retain separate control rooms should be required to demonstrate to the Audit Commission and the Accounts Commission that their retention is likely to be cost effective against national performance standards. …The point has also been made that a move to a regional structure for the Fire Service, if it is to be coherent with other strands of the government's regional policy, should follow the establishment of the new structure rather than precede it. If new, directly elected, regional assemblies are created, it would make sense for regional fire authorities to be responsible to them. This is some way off; we therefore conclude that the benefits to be gained from increased cooperation and collaboration should be pursued within the current organisational structure, with amalgamation between authorities if appropriate or by mutual collaboration on a case-by-case basis"* [100].

In respect of specific control room efficiency solutions, the first Mott MacDonald report [99] had concluded that whilst a reduction of control rooms from 46 to nine was optimal, it was nevertheless problematic and unachievable. Barriers to implementation and restrictions on the potential for future joint/shared arrangements encouraged a compromised approach in which optimum efficiency and economy was balanced by a realistic and achievable goal. The report therefore recommended the rationalisation of fire service control rooms from 49 to 21 sub-regional fire controls [99].

Between 2000 and 2003 the pay dispute and 9/11 terrorist attacks occurred, which we have contextualised in the third stage of this analysis. The Bain report was published in 2002 and, as highlighted above, did not promote regionalisation solutions beyond increased collaboration within current organisational structures. However, what had been considered unachievable in the 2000 Mott MacDonald review of control rooms (that pre-dated the pay dispute and the 9/11 attack by around 12 months) was now considered the only option for reform to achieve efficiency across the fire service, as well showing a response to the new political driver; national security. Mott MacDonald report in their 2003 review:

> *"The last two years have seen significant changes to the environment in which fire and rescue services operate. The scale of the changes is significant and has led to an array of new requirements, which the fire and rescue service must meet… …This report concludes that the optimum solution to secure efficiency and effectiveness in the delivery of fire and rescue service control rooms to meet the requirements of the changed environment is through 'Vertical Integration' to form a regional arrangement. It is considered that the most appropriate regional configuration would be one matched to the Government Offices for the Regions. This accords with the government proposals for modernisation of the fire and rescue service as set out in the recent White Paper. A national strategy will be required to deliver Regional control rooms with appropriate statutory authority and funding to ensure a cohesive outcome"* [102].

Whilst each of the texts selected in our analysis focuses on efficiency, all but the final commissioned report [102] specify the control room configuration that claims to unequivocally deliver it. Despite there being no evidence base that PFI would drive efficiencies, it was fulfilling wider regional government agendas of senior ministers and was legitimated through political rhetoric and consultancy reports. Though the 'department' (DCLG) was blamed for poor management, a non-evidenced PFI solution was not the subject of any PAC inquiry. Here, we have briefly illustrated how oversight texts 'scrutinise' the project failure from the Department-down, and not Department-up, thus retaining a functional-level focus and obscuring the role of political ideological influences that frame such reforms from the very outset.

Stage Four: Conceptual Bridge

The final stage in the hermeneutic cycle presents a conceptual bridge or rhetorical counterpoint [116] to the meanings the government and associated government-funded agencies seek to produce in their defence of major public sector change projects. Our conceptual framework focuses on legitimacy in its varied forms to provide a richer explanation for the relationship between the texts and the contexts [103], throughout the life-cycle of the FiReControl reform project. In our case example of the critical hermeneutic method we specifically illuminate ideology and political rhetoric as legitimating devices that can secure public resources to further political agendas, and escalate commitment even in the absence of evidence. The interpretation of texts illuminates power relations and the party political agendas that the government was trying to protect.

Although various other agendas abounded, such as the FBU's modernisation package and pay deal, a part of which identified alternative proposals for efficiency savings, in the end the government held greater authority and potential to influence than the union and were more able to further their agenda. The government legitimated the reform of the fire service through emotive rhetoric of efficiency, and latterly of security and resilience. The fire fighter dispute and the terrorist threat were used to justify their new public management and modernisation agendas, both for the party's changing ideology as well as ministerial ambitions for regional management boards. Through legitimating devices of both ideological rhetoric and the concept of independent reviews, despite equally strong or weak arguments, it was Labour who managed to secure resources to mobilise a national reform project that was not evidence-based in its claims of efficiency or security. In the space of four years, solutions to efficiency varied considerably based on external world events, however, the power to implement reform rested with those who's authority was greatest to legitimate change; the government. The excerpts illustrate how powerful authoritative rhetoric was used to convey legitimacy to the planned changes or to de-legitimate alternative courses of action.

CONTRIBUTIONS AND CONCLUSIONS

The call for phronetic research asks us to consider four critical questions; 1) So what? 2) What can be done to make a difference? 3) Who gains and who loses, and 4) by which mechanisms of power? [59]. Our illustrative example in the limited scope of this paper opens debates on the policy prescriptions and strategic implications that emerge from the failed FiReControl project and the role of the lessons learned process. The legitimating role of UK public inquiries has long been an area of research, and early research in this area argued that the state does not so much act in the general public interest, rather it deliberately creates or redefines a public interest to protect particular, private interests [117]. Thus the need for legitimating becomes translated into a demand for both defining and justifying the authority of the state while at the same time maintaining an ideological agenda.

Our narrative brings to the surface New Labour's lack of sector-wide democratic negotiation and consultation in the development of far-reaching policies and reform projects. We highlight the ideological framing of the FiReControl project that sought to drive a range of political agendas, which the NAO and PAC reports fail to assess as part of the lessons learned process. The legitimating of FiReControl stemmed from a series of commissioned reports,

which despite a lack of empirical evidence, and lack of clarity as to regionalisation being the solution, were presented as expert opinion to inform decision making. It has been posited that experts are often hired not for their advice, but to signal legitimacy for a course of action [118]. The hire and re-hire of Mott MacDonald, both positioned as independent expert advice, can alternatively be viewed as a move to legitimate the regionalisation agenda. This enabled a generalised perception to be conveyed that the efficiency gains of FiReControl reform were legitimate – in other words, they were seen as desirable and appropriate within the socially constructed system of values, beliefs and definitions of the decision makers, and thus increased their power to act [72].

The contextualisation of different perspectives, for example the FBU and the Government, illuminates underlying issues and conflicts, which contribute further pressure to escalate commitment to a course of action. The transition from state to market-oriented policies and shifting paradigms of long-standing relations between Labour and the unions reveal the FBU's uncompromising commitment to traditional socialist ideologies that compete with those of New Labour. This in part, legitimates to the union's ideologically-loyal members, a reluctance to modernise on anything but its own terms, and not those of New Labour policies and entrenches conflict and ideologically-framed positions of both sides. Macro-level societal attitudes are also evidenced and these were exploited to further enforce the legitimacy of FiReControl. The heightened sense of insecurity post 9/11and increased expectations of the nation towards government preparedness reveals shifts in values and norms in respect of national security and resilience, hitherto, not the role of the fire service.

The problem of legitimacy extends further from parliament, into project delivery once projects are initiated. Throughout the project lifecycle, decisions and actions continue to be legitimated by functional silos of belief systems all influencing seemingly rational, taken-for-granted behaviour. At these later stages, the project has secured robust, multi-sourced legitimacy as commitment continues. Thus, if problems or crises develop within individually legitimated social realities (threads) of the project's coalition of firms, on their own may be of insufficient potency to de-legitimate nor therefore to influence decision making. Acknowledging the concept of a tipping point, if sufficient numbers of problems occur within the multiple social realities of major projects, there will be multiple crisis of legitimacy. Threads may begin to weaken and our metaphorical rope will begin to unravel and project survival is threatened. Since the project is nothing more than a collection of beliefs of what people say it is, failure is not an absolute truth [6], the survival of a project depends on there being sufficient belief in its legitimacy. Success and failure are therefore ultimately social. Whether or not a project is actually going to fail in its ultimate objective of reform, if it reaches its tipping point and experiences multiple crises of legitimacy, it ceases to command social support and fails when support is withdrawn [7]. In the retrospective analysis of a failed project, the robust rope of legitimacy that worked to create and maintain the belief system that kept it moving has long since unravelled and the functionalist view of cause and effect prevails.

In the quest for understanding why major reform projects fail, critical hermeneutics can help to reveal these influential relationship tangles, which may otherwise have been overlooked in the functionalist analysis of project failure. Certainly, we posit that the failure points extend far beyond poor procurement and project management. Critical hermeneutics emphasise that social reality is historically constituted. We argue that without such a critical and hermeneutic approach to understanding we cannot know how cultural messages are concealed and revealed, nor how the ambiguity of meaning allows for distortion and domination by particular groups or ideologies [61]. Whilst the pursuit of efficiency can remain the guiding purpose of public procurement projects, in the political realm where projects are initially legitimated into existence, the emphasis is on talk and rhetoric emphasising a future state, rather than action and actualised benefit in the here and now [89]. The disconnect between organisational change rhetoric and functionalist accounts are commonly found in organisational studies [118]. Our hermeneutically-analysed extract forms part of a wider study exploring the role of legitimacy and escalation of commitment throughout the full project lifecycle. The space constraints of this paper allow only an illustrative example of the hermeneutic technique to reveal ideological meanings transmitted at the outset of projects, and how they can be legitimated and sustained to enable action, thereby progressing with a project through continuous escalations, despite evidence of failure.

Major projects are distinctive features of modernisation combining large financial and human resources with technical innovation in temporary coalitions of firms [119]. The changing landscape of governance over the past 30 years had led to networked governments, which are subject to competition and market forces heightening the need for legitimacy in decision making around major public projects. The management of major projects presents a special challenge for executive politics and our understanding of government more widely [120]. Nevertheless, and despite their societal and economic impact, major infrastructure projects are less well understood by organisation and management theory than the social and economic processes they generally enable [119]. NPM policies are arguably more symbolic than practice-led and have been criticised as "part of the ritual and myth that helps to preserve the legitimacy of the system of governance", with "few consequences for performance" [121, p7-8] . Nonetheless, even though most reforms will never be completely successful or achieve their desired outcomes,

reforms are not entirely unsuccessful either and do accomplish some effects. While these effects are sometimes unexpected and paradoxical, NPM reforms continue to influence new ways of organizing for the development of alternative service delivery options.

In the case of FiReControl, there was considerable opposition and evidence-based challenge to the project including alternative solutions from the fire and rescue sector itself, where one may assume claims to knowledge are arguably greater than in Whitehall. However, without sufficient authority, individuals and groups cannot exercise sufficient power to legitimate such alternative courses of action. Public project failure at the rate the UK is currently experiencing is not sustainable [1]. Challenging the taken-for-granted process of government-commissioned 'independent' reviews, informing white papers, securing scarce resources to initiate ideologically-shaped reform projects on the grounds of efficiency are not working and should be rethought. To operationalise this concept decision-making processes that would legitimate both the character of a proposed public sector reform and the decision outcome should be subject to democratic scrutiny where the ultimate authority does not lie with ministers and the power to challenge is not singularly within their gift.

In this paper we set out to show how alternative research methods can reveal the influences of legitimacy, which can further our understanding of high—risk, major public procurement projects. Functionalist methods and government lessons learned processes overlook the ideological influences that frame, and sustain, legitimacy, yet it is these impacts that can considerable effect on seemingly rational actors escalating commitment to failing courses of action. If we are to make a difference to public procurement and project failure there is a need to understanding more about why, and by how much they fail, through continued escalation of commitment. Given that the rate of failure is high on political agendas, phronetic research can reveal more of the power and value issues to enable more effective suggestions towards what can be done.

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Interaction between EU public procurement law and national contract law in the framework of a regulated tendering procedure: the correction of errors in tenders

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I. Introduction, research question, method and structure

It is clear that the provisions on EU public procurement law – and the permissive provisions on EU public procurement of the national law of the Member States – govern the stage of the tendering procedures within the scope of the European directives (hereinafter: 'the Directives')[1]. (In the following these provisions are also referred to as public procurement law applicable on EU tendering procedures and EU public procurement law. These terms are used interchangeably.) At the same time, this regulated procedure culminates in the conclusion of a contract. From this perspective, it can be said that every tenderer participating will find himself in a bilateral pre-contractual relationship with the contracting authority prior to the conclusion of such contract. The further implication of this is that the law of obligations of each Member State will probably regulate this bilateral relationship in addition to and/or in interaction with the provisions on public procurement applicable to an EU tendering procedure. At this moment Dutch law is unclear as to what extent contract law still imposes duties upon the bidder and the contracting authority next to public procurement law, and as to how these areas of law would interact in the framework of an EU regulated tendering procedure. Therefore it is indistinct what the rights and duties of parties are during the tendering stage. This seems problematic because the objective of the Directives that regulate a tendering procedure is coordination of the procedures among the Member States and coordination seems impracticable if it is unclear what the precise rights and duties of the parties are.

This paper aims to test the premise if there are indeed such unclarities as regards a particular obligation of the contracting authority. The obligation I have in mind is the possible obligation of the contracting authority to give a tenderer the opportunity to correct an error in his tender. Assuming that Dutch contract law imposes such obligation upon the contracting authority next to public procurement law, this paper tries to clarify how Dutch contract law and public procurement law interact in the framework of an EU regulated tendering procedure concerning this obligation. More specific it is examined what the exact unclarities are with regard to the aforesaid interaction. The further aim is to formulate the questions that need to be answered in order to gain a clear understanding into the interaction in and mutual demarcation of the aforementioned areas of law. The research questions will be answered in the following manner.

First, to get a better understanding of the subject matter in general the issue of the interaction between public procurement law and the law of obligations of the Member States in the framework of an EU regulated tendering procedure will be elaborated upon (*para. II*). (In the paper written for the IPPC5 conference in Seattle[2] the issue of the interaction of public procurement law applicable to an EU tendering procedure and the contract law of the Member States was also addressed and problematised. In that respect we concentrated on the interaction during the *contract* stage, as opposed to the *tendering* stage being the subject of the paper at hand. The main purpose of the paper for the IPPC5 conference in Seattle was 'to determine whether the European Commission's implicit decision – namely: to leave out G2B contracts from its current policy and regulatory efforts in the area of European contract law – can be problematised from the perspective of the EU's objective to establish an internal market for G2B contracts.' (p.4).) As considered above, I have decided to study in depth one specific issue in which the unclear interaction between the two areas of law can be a problem, namely the issue of correction of errors in tenders. It is beyond the scope of this paper to analyse all the possible duties incumbent on the contracting authority and the tenderer during the tendering stage of an EU regulated tendering procedure and imposed by contract law next to public procurement law. (At this moment the author of this paper is preparing a PhD-research in which important examples of the interaction of public procurement law and the law of obligations during the tendering stage will be discussed.) Subsequently, in order to be able to

determine whether there is any room left for the contract law of the Member States – next to public procurement law – to impose an obligation upon the contracting authority to give a tenderer the opportunity to correct an error in his tender, and thus whether questions of interaction are at hand, a first analysis will be made to what extent public procurement law applicable to an EU tendering procedure itself regulates the correction of errors in tenders. For if this is indeed the case, there is nothing more to be discussed (*para. III*). However, assuming that public procurement law leaves some room for the law of obligations of the Member States to impose the said obligation, it is tried to establish by means of an analysis of case law whether and to what extent there are indeed unclarities as to how Dutch contract law and public procurement law interact in the area of correction of errors in tenders (*para. IV*). Finally, the questions that need to be answered in order to gain a clear understanding into the interaction in and mutual demarcation of the aforementioned areas of law are formulated (*para. V*).

II. Background: interaction between public procurement law applicable on EU tendering procedures and national contract law

The interaction between EU public procurement law and national contract law can be clarified at best from the perspective of the various interests of the different stakeholders involved in a tendering procedure. On the one hand, interests of the contracting authority are concerned, on the other, interests of the tenderers play a part. Examples of (such) various interests are: a quick and smooth completion of the tendering procedure, a limitation of the transaction costs and investments made in vain and, off course, the interest of a level playing field. The assumption is that public procurement law applicable on EU tendering procedures in the Netherlands protects only part of these interests concerned. As stated above, with public procurement law applicable on EU tendering procedures is meant, obviously, all the rules that must be taken into account when a tendering procedure is organised that falls within the scope of the Directives. First, there are the rules of the Directives (transposed primarily into Dutch national law in the Public Procurement Act 2012 ('Aanbestedingswet 2012')) and second, the additional national provisions of Dutch law applicable to the aforementioned tendering procedures (also primarily to be found in the aforesaid Act and in additional rules and policy). The rules of the Directives have in mind, first and foremost, the completion of the internal market. The second recital of the Preamble of Directive 2004/18/EC (hereinafter: the 'Classical Directive')[3] states that the provisions of Community coordination drawn up by that directive above a certain value are based upon 'the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.' Accordingly, for example, the interest of safeguarding a level playing field is guaranteed. However, the Act and the additional rules and policy do not merely pursue this and other objectives of the Directives, but aspire to protect some additional interests as well. (Some of these objectives can off course somehow be related to the objectives of the Directives but are not, that is to say: not directly by the rules of the Directives, safeguarded by them.) It follows from the explanatory memorandum of the Act that its provisions are also geared towards achieving the following objectives: improving access to public contracts for SME's, unifying the public procurement practice, cutting the administrative burden, facilitating innovation and sustainability, introducing an accessible complaints procedure, improving/ensuring that contracting authorities comply with public procurement rules and act in a professional manner.[4]

Accept for the more classical public procurement interests that are protected by EU public procurement law, as for example an interest as the level playing field, and the additional interests that the Act tries to cover (as enumerated above), there is one other category of interests involved in an EU tendering procedure which is not – at least not directly – being protected by the Directives or the Act. Examples of these interests are: a quick and smooth completion of the tendering procedure, a limitation of the transaction costs and investments made in vain. (I do realize that these interests are (indirectly connected) to the interests protected by the Directive 2007/66/EC (hereinafter: the 'Remedies Directive').[5] However, this directive sets requirements for the system of the judicial review of public contracts and does not contain material provisions concerning the behaviour of parties during the tendering procedure.) Because of the fact that the Directives and the Act do not protect these interests, at least not with explicit provisions, the safeguarding of these interests must be found elsewhere in the law of the Member States. For the tendering stage can be qualified as the pre-contractual stage of the contract being the aim of the procedure, it seems logical that the legal protection of the latter interests must be found in the national laws of obligations.

When conflicts arise during the carrying out of an EU regulated tendering procedure, questions on the interaction between EU public procurement law and national contract law need to be dealt with. In the Netherlands it is currently unclear in what way these areas of law interact and what the rights and obligations are that follow from the bilateral relationship between the contracting authority and a single tenderer in the framework of an EU regulated tendering

procedure. This unclarity seems to have several aspects. Firstly, one could ask to what extent these rights and obligations derive from public procurement law applicable on EU tendering procedures? This question follows the hypothesis that EU public procurement law only protects some of the aforementioned interests (i.e. establishing a level playing field among the tenderers and improving access to public contracts for SME's). Next, the question rises to what extent it is possible to fall back on the national laws of obligations of the Member States for the remaining 'not-protected' interests (i.e. preventing procedural delay and unnecessary transactions costs). Finally, it is unclear in what way EU public procurement law influences the national laws of obligations. Therefore, this is a question of interaction between the EU legal system and the national legal systems.

In my PhD-research I try to answer the question what the rights and obligations are that can be derived from the pre-contractual relationship between a contracting authority and a tenderer in an EU regulated tendering procedure, having regard to all public and private interests involved and with disregard of the fact whether or not the tendering procedure will eventually result in the conclusion of a contract. As mentioned above, this paper concentrates on one of the possible obligations (from the perspective of the contracting authority) and rights (from the perspective of the tenderer), namely the obligation of the contracting authority to enable a tenderer to correct his tender after the deadline for submitting the tender has expired. As stated above, this paper, assuming that Dutch contract law imposes such an obligation upon the contracting authority next to EU public procurement law, tries to clarify how Dutch contract law and EU public procurement law interact in the framework of an EU regulated tendering procedure concerning this obligation. More specific it is examined what the exact unclarities are with regard to the aforesaid interaction. The further aim is to formulate the questions that need to be answered in order to gain a clear understanding into the interaction in and mutual demarcation of the aforementioned areas of law. The research questions will be answered in the following manner.

III. To what extent is the correction of errors in tenders regulated by EU public procurement law?

In order to be able to determine whether there is any room left for the Dutch law of obligations to impose an obligation on the contracting authority to allow a tenderer to correct errors in his tender, the question needs to be answered whether and to what extent EU public procurement law regulates the correction of errors in tenders. For if EU public procurement law already deals with this exhaustively, there is nothing more to be discussed. Therefore, it will be analysed in the following to what extent EU public procurement law regulates the subject matter.

Both the EU regulation, as the Dutch regulation on public procurement, do not record a general stipulation on the correction of requests for participation and tenders but case law of the ECJ makes clear that contracting authorities should judge the requests for participation and tenders as received within the deadline for otherwise conflicts with the principles of equality and transparency will soon arise. (Only the 'Public Procurement Regulations for Works 2012' (het 'Aanbestedingsreglement Werken 2012') contains a special provision with regard to the correction of errors in the proofs of evidence in requests for participation. It follows from stipulation 3.13.7 of this Regulation that the contracting authority, in the event of such an error, gives the candidate in question the opportunity to correct the error within a period of two days, starting at the day of the request for correction. The Public Procurement Regulation for Works 2012 is a Dutch guideline that must be followed in the event of EU public procurement procedures.) (The analysis in this paper of the problems with regard to the correction of errors in tenders concentrates on the procedures in which the tenderer or the tender in general is being solely assessed on the request for participation respectively the tender, such as the open or the restricted procedure[6].) In principle it is not allowed to take into account alterations made subsequently. In short, in Storebaelt[7] the ECJ clarified that the principle of equality requires all the tenders, when submitted, to comply with the fundamental requirements of the tender documents. Only under these circumstances the tenders can be compared objectively. Next, in Walloon Buses[8] the ECJ stated that in case a contracting authority accepts an amplification made in an original tender by one specific tenderer, the tenderer concerned is given a preferential treatment above the other tenderers, contravening the principles of equal treatment and transparency.

Recently, the ECJ – in the SAG-case[9] – showed that these principles are not be interpreted that strict. The Court (when answering a request for a preliminary ruling on (shortly stated) how a contracting authority should react in the case a tender submitted is imprecise or does not meet the technical requirements of the tender specifications) starts from the basic assumption that – in the present case of a restricted procedure – a tender can not be modified after being submitted and states that it does not follow from any provision of the Classical Directive or from the principal of equal treatment or the obligation of transparency, that, in such a situation, 'the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.'

However the ECJ continues and says: 'None the less, Article 2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender.'

Next, the Court emphasises that the discretion thus enjoyed by the contracting authority must be exercised with *'an eye to the principle of equal treatment.'*[10] In addition, the Court draws up some guidelines to be taken into account by the contracting authority when giving the – post-submission – opportunity to correct or amplify details of a tender. In short; first, a request for clarification must be made only after the contracting authority has looked at all the tenders. Second, the request must be sent in an equal way to all tenderers which are in a same situation, unless there is an objectively verifiable ground available for justifying different treatment. Finally, the request must deal with all the aspects of the tender which are imprecise or do not meet the technical requirements of the tender specifications. The contracting authority is not allowed to reject a tender because of a lack of clarity in an aspect of the tender which was not covered by the request.

In an even more recent case – the Manova-case[11] – the ECJ *'confirms that the general principles for handling unclear or incomplete tenders, laid down by the Court some 18 months earlier in het case of SAG ELV Slovensko and Others [2012] WLR (D) 103, apply not only at the tender evaluation stage but also at the earlier pre-qualification and short-listing stage.'*[12]

The provisional conclusion that can be made is that the ECJ, in reaction to a request for a preliminary ruling, interprets EU public procurement law in such a way that EU public procurement law under certain circumstances allows the correction of errors in requests for participation and tenders in the short-listing and pre-qualification stage *and* in the tender evaluation stage.

IV. An analysis of case law: whether and to what extent are there unclarities as to how EU public procurement law and Dutch contract law interact in the area of correction of errors in tenders?

IV.1 Introductory remarks

It is clear from the above that EU public procurement law, under certain circumstances, allows the correction of errors in the short-listing and pre-qualification stage and in the tender evaluation stage. In the following paragraph it is tried to establish, by means of an analysis of case law, whether and to what extent there are indeed unclarities as to how Dutch contract law and EU public procurement law interact in the area of correction of errors in tenders. I have decided to analyse cases that were ruled after the decision of the ECJ in the SAG-case, obviously for the reason that the latter decision has made it more clear how EU public procurement law must be interpreted with regard to the authority of contracting authorities in this context. These cases are considered to reflect the problematic issues regarding both the contracting authority's (alleged) obligation to allow the tenderer to correct his tender and the unclear manner in which EU public procurement law and national contract law interact.

IV.2 The East Netherlands District Court, March 6, 2013[13]

The first case that will be analysed is a case of March 6, 2013 of the The East Netherlands District Court in interlocutory proceedings. The facts are as follows. In October 2012 the district water board 'Vallei en Veluwe' starts a restricted tendering procedure for the replacement of a dike. The case deals with a request for participation during the pre-qualification stage. The selection document states that requests for participation must comply with the requirements following from the document and must be handed in by duly completing the model forms provided with the said document. An incomplete form results in an exclusion from the procedure. One of the model forms concerns the evidence of the technical ability and asks for certificates of satisfaction with regard to five fields of technical expertise. For the field of expertise considering the maintenance of the water system, the candidate is asked proof of the fact that in the last five years he accomplished a project in which a water system is maintained during at least *one year continuous.* One of the candidates, Ploegam, declares in his explanation on the certificate of satisfaction given for the maintenance of the water system that the duration period of the project presented in the certifcate was *nine months*. In reaction, the district water board declares the request for participation of Ploegam invalid for the reason that the certificate of satisfaction does not respond to the requirement containing the water system being maintained during at least *one year continuous.* According to Ploegam this was an obvious error. By accident Ploegam reported the period in which the additional work was carried out and not the total period of work on the project. Ploegam starts interlocutory proceedings and asks the Court to declare his tender valid nonetheless.

The East Netherlands District Court first argues that indeed this is an obvious error and states that the district water board should have been able to deduce this from the antinomy of the model form in combination with the explanation provide by Ploegam. The error is objectively knowable for it could be deduced from the documents submitted. No right-minded tenderer would, on the one hand, by completing the model form declare that his certificate of satisfaction meets the requirements (being a duration period of one year continuous) and, on the other, undermines his own position by declaring that the certificate does not meet the requirements (by writing in the explanation that the duration period was nine months). Moreover, the error can be corrected simply and easily and the amendement in reality does not lead to the submission of a new tender. The Court emphasises that according to the ruling under the SAG-case this is not in opposition with community law.

Next, the Court argues that the principle of equal treatment – which also aims to guarantee that all reasonable informed tenderers exercising ordinary care have an equal chance at winning the contract – in the given circumstances amounts to an obligation for the district water board to raise the matter of the antinomy of the model form and Ploegam's explanation and to seek for correction on that point. This is particularly true for the district water board, shortly after the submission of the tender and long before the decision to declare the request for participation of Ploegam invalid, already knew of the error. This is shown by e-mails dated before the selection decision. In reaction to these e-mails it would have been relatively easy to get clarification in a short amount of time with regard to the reported duration period of the project referred to in the certificate of satisfaction. The Court concludes that the district water board was not allowed to declare the request for participation invalid.

To get a picture of the exact unclarities with regard to the question whether the Dutch law of obligations imposes an obligation upon the contracting authority next to EU public procurement law, and as to how these areas of law would interact in the framework of an EU regulated tendering procedure, we should analyse to what extent the above judgement is based on either EU public procurement law and/or Dutch law of obligations. Moreover, it must be examined what questions arise in this context. If one looks at the judgement from this perspective, it can be seen that the first part of the Court's decision is based on EU public procurement law. With a reference to the SAG-case, the Court argues in this part that there is a manifest error which can be corrected simply and easily and that the correction does not lead to any alteration in the terms of the tender. This is indeed in line with the SAG-case, where it is considered that EU public procurement law, and especially article 2 of the Classical Directive, 'does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender.' (Off course it is the case that the SAG-case only deals with the tendering stage in a restricted procedure and not handles about requests for participation in the pre-qualification stage. However, as described at the end of *para. III*, in the Manova-case it is confirmed that the general principles for handling unclear or incomplete tenders, laid down in the SAG-case, can be also applied in the pre-qualification and short-listing stage. The case at hand is dated before the verdict in the Manova-case was given.)

The next argument of the Court – namely: that the principle of equal treatment in the given circumstances amounts to an *obligation* for the district water board to seek for correction of the certificate of satisfaction – seems also to be based, at least primarily, on EU public procurement law. However, the additional argument used by the Court in this context that the obligation to seek for correction exists all the more since the district water board, shortly after the submission of the tender and long before the decision to declare the request for participation of Ploegam invalid, already knew of the error, can be derived from the Dutch law of obligations. This will be clarified in the following.

Starting with EU public procurement law, one could ask what can be deduced from this area of law with regard to the contracting authority's obligation *to seek for correction* in the event *of an obvious error in a tender that can be corrected simply and easily*? It seems that in the SAG-case the ECJ leaves this specific question unanswered. The ECJ does answer the more general question whether it follows from the Classical Directive – in case the tender submitted is imprecise or does not meet the technical requirements of the tender specifications (*without these errors being obvious or can be corrected simply and easily*) – that the contracting authority is under an obligation to *contact* the tenderer concerned. The ECJ argues: 'In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.' However, the question if such an obligation exists in the event of an *obvious* error, that can be corrected simply and easily, is offered no opninion on.

The underlying thought of the consideration of the The East Netherlands District Court that the principle of equal treatment in the given circumstances results in an ***obligation*** for the district water board to seek for correction, seems to be that Ploegam can be qualified as 'a reasonable informed tenderer exercising ordinary care' – an interest which is also safeguarded by the principle of equal treatment – even though he made an error in his tender and therefore should have had the opportunity to correct this error.

In the present case however the Court considers in an additional argument that the obligation to seek for correction exists all the more because the district water board, shortly after the submission of the tender and long before the decision to declare the request for participation of Ploegam invalid, already knew of the error. In this ruling the Court does not refer to EU public procurement law. This seems correct because according to EU public procurement law it is irrelevant whether the district water board already knew of the mistake. As said, that the district water board knew of the mistake is shown by e-mails dated before the selection decision. In reaction to these e-mails it would have been relatively easy to get clarification in a short amount of time with regard to the reported duration period of the project referred to in the certificate of satisfactory. These facts only seem to play a part in the bilateral pre-contractual relationship between the contracting authority and the tenderer (*i.e.* Ploegam). As stated above it seems logical that the law of obligations of each Member State (in this case the Dutch law of obligations) will regulate this bilateral relationship in addition to and/or in interaction with the provisions of EU public procurement law. According to Dutch law of obligations this bilateral pre-contractual relationship is governed by the principles of reasonableness and fairness. The behavior of the district water board and Ploegam must also be judged in light of these principles. While the additional argument of the Court is not a sine qua non for the outcome of the procedure (in other words: even when the contracting authority would not have known of the error, the judgement of the Court would have been the same and the obligation to seek for correction would have been based solely on the principle of equal treatment) it shows that the law of obligations can play a role in this context of an EU tendering procedure. However, what role and to what extent is not clear.

IV.3 The Gelderland District Court, May 7, 2013[14]

The second case that will be analysed is a case of May 7, 2013 of the Gelderland District Court in interlocutory proceedings. In November 2012 the Municipality of Arnhem starts an open procedure for the supply of waste containers and accompanying service. The specifications of the tender require a liability insurance with a minimal coverage of € 1.500.000 per event and a minimal yearly coverage of € 2.500.000. The insurance policy must be attached to the tender. It follows from a provision in the tender documents that the contracting authority is entitled to ask for clarification and seek for correction in the event a tender contains an error which can be corrected simply and easily. Mic-O-Data submits a tender but, by mistake, hands in an old insurance policy with insufficient coverage while she already had the possession of the new insurance policy with a sufficient coverage. The Municipality declares the tender of Mic-O-Data invalid. In reaction Mic-O-Data states *i.a.* – and also the most important issue in the case – that she made an obvious mistake by handing in the old insurance policy and that this mistake could be corrected simply and easily. Therefore the Municipality should have given her an opportunity for correction. The Municipality does not agree and Mic-O-Data starts legal proceedings.

The Court has to decide *i.a.* whether the exclusion of Mic-O-Data is justified without giving her the opportunity to correct the tender. (At least this is the part of the judgement that is relevant for the topic of the paper.) The Court agrees with Mic-O-Data and argues that the Municipality should have understood that there was something wrong with the fact that Mic-O-Data, being apparently aware of the content of the requirement for the liability insurance, submitted a policy that did not comply with the tender requirements. By submitting this policy Mic-O-Data did not show that she ***fulfilled*** the requirement concerning the liability insurance but, on the contrary, showed she did ***not fulfill*** the requirement. No right-minded tenderer would put considerable efforts in drawing up a tender and, at the same time, hand in a piece of evidence of the fact that he does not fulfill a requirement resulting in the exclusion of his tender. In the tender documents the Municipality reserved the authority to ask for clarification and seek for correction in case this correction could be made simply and easily. The Court rules that under these circumstances 'a good contracting authority' was obliged to ***ask for clarification*** which would have resulted in Mic-O-Data being able to show at once that she fulfilled the requirement already before the deadline of submitting the tenders and that she, by accident, handed in the old insurance policy. Therefore it was without a doubt that Mic-O-Data made a mistake that could be corrected easily. According to the Court, the Municipality was (also) obliged under these circumstances ***to seek for correction*** of the tender of Mic-O-Data. In addition the Court argues that the correction would not lead to a new tender and thus, by giving the opportunity to correct, the Municipality would not act contrary to the principle of equal treatment. Furthermore the Court emphasises – with reference to the SAG-case – that enabling Mic-O-Data to correct the error is not in opposition with community law. Moreover, in the event that Mic-O-Data would not be given the opportunity to

correct the tender, notwithstanding the fact that she actually met the requirements of the tender documents (Mic-O-Data already possessed the new insurance policy) the 'winning' tenderer would take advantage of the mistake of Mic-O-Data. This would frustrate a fair competition between the tenderers and would be contrary to the principle of equal treatment. The Court concludes that the Municipality wrongfully did not give Mic-O-Data the opportunity to correct her tender and was not allowed to declare the tender invalid.

When analysing this case one can see that in the first part of the Court's judgement it is argued that the error made is *obvious* and that the Municipality had the ***authority***, on the basis of the tender documents, to ask for clarification and seek for correction. This seems to be based on, and – as argued above – in line with EU public procurement law. The same goes for the additional arguments which the Court constructs in order to provide for a basis of the Municipality's obligation to ask for clarification and to seek for correction. The law of obligations is not being referred to in these arguments. But it is interesting to see that the Court explains why it has the opinion that the principle of equal treatment in this case results in an obligation of the contracting authority to give the tenderer the opportunity to correct his tender. The argument of the Court that, when not giving Mic-O-Data the opportunity to correct the tender, the 'winning' tenderer would take advantage of the mistake and this would be contrary to the principle of equal treatment, is not very convincing. For when a mistake is made in a tender, another tenderer would probably always take advantage thereof. More interesting to see is that the Court considers that 'a good contracting authority' in the given circumstances was obliged to ask for clarification. Why this is so, is offered no explanation on. This norm could have been filled in by arguments deriving from the pre-contractual reasonableness and fairness. However, the Court keeps silent about this.

IV.4 Opinion 67 of the Public Procurement Experts Committee

At last an analysis is given of an opinion, not yet published, of the Public Procurement Experts Committee (in Dutch: the 'Commissie van Aanbestedingsexperts') (hereinafter: the Committee). (Article 4.27 of the Act provides for a statutory basis for extra-judicial public procurement complaints review by an independent body: The Public Procurement Experts Committee. This statutory-based extra-judicial complaints review system does not substitute the system of judicial review of public procurement cases by the ordinary courts. Neither does it prevent a complainant from bringing his complaint before the court at any stage of the public procurement process, whether or not the Committee has been addressed beforehand. The main objective of offering extra-judicial review is to lower the threshold for those complainants who encounter difficulties in bringing their complaints before the ordinary courts. In addition, rather than being an alternative to judicial review by the courts, complaints review by the Committee is intended as a means to deal with public procurement complaints in a satisfactory manner before such complaints are brought before the court.) The facts are the following. (The parties are anonymised in the next description for at the date this paper will be submitted, the Opinion in question is not yet published.) A contracting authority starts an open procedure for (the closing of) a framework agreement with one party with regard to the carrying out of maintenance work on the lighting system of the contracting authority. The tenderers have to offer unit prices for certain products, but it is not yet clear what quantities of these products will eventually be ordered by the contracting authority under the framework agreement. In the tendering procedure the contracting authority requires the tenderers to price fictional quantities in their tender. These fictional quantities are stipulated in the tender documents. Preparing the tenders in this manner results in tenders with fictional prices which can easily be compared. However the quantities priced are fictional and have no relation whatsoever with the quantities that will eventually be ordered once the framework agreement is concluded. In addition to the provisons of the Public Procurement Regulations for Works 2012 are declared applicable on the tendering procedure. One of the tenderers – who offers the lowest tender – makes a mistake by using the wrong fictional quantities for the preparation of his tender. As a result of (*i.a.*) this, his tender is declared invalid by the contracting authority. The tenderer files a complaint (*i.a.* about this issue) with the Committee. The Committee deals with the complaint as if the tenderer states that the contracting authority wrongfully did not give him the opportunity to correct the mistake made in the tender. The opinion of the Commitee states that after the tender is submitted, in principle, no alterations, initiated by either the contracting authority or the tenderer, can be made in it. According to the opinion, this would be contrary to the principles of equal treatment, non-discrimination and transparency. However, according to the SAG-case, this principles does not stand in the way of the correction or amplification of details of a tender where appropriate, on a exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such an amendment does not in reality lead to the submission of a new tender. Next, the Committee considers that in this case the correction would not lead to the submission of a new tender but would result in all tenders to be comparable with regard to price. (Because the correction would consist of formating the tender with the right fictional quantities, without making a chance in the offered unit prices.) Furthermore, the economic interests of the other tenderers in terms of competition would not be harmed. Thus, the Committee concludes firstly that giving the tenderer the opportunity to correct his tender, under the given circumstances, is in line with EU

public procurement law. Then, the Committee states that the next question it has to answer is whether there is also an *obligation* for the contracting authority to give the tenderer this opportunity. The 'Public Procurement Regulations for Works 2012' does not deal with such an obligation. The Committee is of the opinion, however, that this void in the rules applying to the legal relationship between the parties can – having regard to the nature of the relationship and the interests involved – be supplemented with an obligation for the contracting authority to allow the tenderer to correct his tender on the basis of the principles of reasonableness and fairness. In addition the Committee balances the interests of both parties and explains, on the one hand, that the tenderer has an legitimate interest by getting the opportunity of correcting the error in the tender and, on the other, that the interest of the contracting authority is not harmed in any way when the opportunity is given.

When analysing this opinion the first thing that attracts the attention is that – after it is concluded by the Committee that in the given circumstances, EU public procurement law does not prevent the contracting authority from seeking correction, the ruling that the contracting authority has an *obligation* to seek for such correction is based on the Dutch law of obligations, to be precisely: the concept of reasonableness and fairness. This differs from the two cases ruled by the ordinary courts which were analysed above. In these case the foundation for the contracting authority's obligation is found in one of the principles underlying EU public procurement law, namely the principle of equal treatment.

V. Questions that need to be answered

In this last paragraph I will try, on the basis of the analysis of the case law made in *para. IV*, to formulate the questions that need to be answered in order to gain a clear understanding into the interaction in and mutual demarcation of the aforementioned areas of law.

On the basis of the above analysis of cases it can be argued that there is a lack of clarity with regard to the ambit of public procurement law applicable on EU tendering procedures. The first question that needs to be answered in this context is whether – under certain circumstances – EU public procurement law can result in an *obligation* for a contracting authority to give a tenderer an opportunity to correct his tender (as the judges in the above mentioned first two cases seems to think)? As already stated above, if EU public procurement law itself regulates the correction of errors in tenders, there is nothing more to be discussed. The reasoning behind the first two judgements of the ordinary courts seems to be that whenever giving an opportunity to correct an error in a tender does not lead to a violation of the principle of equal treatment, this same principle can provide for a legal basis for the contracting authority's obligation to seek for correction. However, the conclusion that EU public procurement law itself can serve as the basis for such an obligation seems not yet an established opinion. There are valid arguments both for and against this conclusion. Especially the line of reasoning followed in the first judgement seems well-considered. The Court considers that also when a tenderer made a mistake in his tender, it can be argued, under certain circumstances, that he acted as 'a reasonable informed tenderer exercising ordinary care', in which case one could argue that the tenderer fulfilled his obligations derived from EU public procurement law and that he should be given the opportunity to correct an obvious error in his tender. This reasoning seems rational. The reason for this is that, as has been argued[15], almost every submitted tender would probably contain such an error, or at least there is a high incidence of inaccurate offers in daily practice. Moreover, in this context one could argue that it would enhance the risk of arbitrariness – and thus be contrary to the principle of equal treatment – not to impose an obligation on the contracting authority. For in the absence of such obligation he could, in the event that a certain tenderer displeases him – who has a good chance of winning the tendering procedure – search for an error in the tender in question and exclude the tenderer from the tendering procedure. It can be argued *against* the abovementioned reasoning that when a tenderer makes a mistake that was not made by the other tenderers it appears that the lack of clarity of the tender is attributable solely to his failure to exercise due diligence in the drafting of the tender, to which he, like other tenderers, is subject (this is the line of reasoning followed in the SAG-case in paragraph 38) and to accept an obligation grounded on the principle of equal treatment then comes across as a bit contradictory. Wouldn't it be more obvious to use arguments in this context that can be derived from the law of obligations? Next, if it is possible to conclude that EU public procurement law can provide for an obligation of the contracting authority to give a tenderer the opportunity to correct an error in his tender, it must be ascertained very precisely what the conditions are under which such an obligation can be accepted. And if in those cases the law of obligations is considered to be able to play a role as well – whether or not additional – it must be ascertained what that role could be. Furthermore, it needs to be determined if there are also circumstances in which the obligation can be deduced from the law of obligations solely (conform the opinion of the Public Procurement Experts Commitee) and, opposite to the above, whether and to what extent EU public procurement law can also play a role in those cases?

On the basis of the analysis of the abovementioned case law the questions formulated in this paragraph seem to be the most pressing questions that need to be thought through and answered in order to gain a clear understanding into the

interaction in and mutual demarcation of the aforementioned areas of law. Answering these questions seems relevant for only then we will know what the rights and duties of parties are during the tendering stage with regard to the correction of errors in tenders. This being indistinct seems problematic – especially if courts of other Member States encounter similar difficulties in applying both contract law and EU public procurement law rules when solving conflicts in tendering procedures – for as stated in the introductory paragraph, the objective of the Directives that regulate a public procurement procedure is coordination of the procedures among the Member States and coordination seems impracticable if it is unclear what the precise rights and duties of the parties are.

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RE-EXAMINED E-PROCUREMENT IN DECENTRALIZED-INDONESIA'S LOCAL GOVERNMENT PROCUREMENT SYSTEM

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ABSTRACT

E-procurement is an important instrument to prevent corruption in goods and services procurement budget. Indonesia has been implementing the e-procurement project since 2008 based on Presidential Decree. President has been stipulating annual order (presidential instruction) in which this has to be obeyed by all ministries and local governments to procure their budget through e-procurement mechanism. However, until 2012 fiscal year, this research found that only around 10.26% of central government institution procurement budget, including ministries and 21, 10% of local government procurement budget did procure through e-procurement method. The research question is how are local procurement governance in responding central government procurement policy? How they do handle with local politics in managing local procurement? This research focus on four local governments in Indonesia namely Jogyakarta city, Tangerang City, Kutaikartanegara Regency and Riau Island Province. The research method is combined qualitative method and quantitative one in order to answer research question in-depth. This research finding concluded that regulation, leadership and procurement institution, regulations, and procurement policy are challenging factors to make "status quo" e-procurement. The local procurement agencies have to deal with local politicians in dealing with procurement decision in different political context.

Keyword: e-procurement, corruption, local procurement governance

Introduction

In 2008, the Indonesian government created **INAPROC** in order to deliver goods and services procurement electronically. In five years, there have been increasing numbers of e-procurement instruments: the number of system providers went from 11 in 2008 to 491 in 2012; service providers went from 3 in 2009 to 43 in 2012; provincial coverage increased from 9 in 2008 to 33 in 2012 and user agencies increased from 11 to 731 user agencies in between 2008 and 2012. This trend was followed by the number of tenders issued through e-procurement. In 2008, there were only 33 tenders and this number increased to 119.797 in 2012. INAPROC claimed that there was a savings of 10,89% in 2012.

Until now only a small amount of research about Indonesian e-procurement has been done. Kodar (2010) found that the implementation of e-procurement at Yogyakarta Municipality in 2009 was visible but not accountable. Nightishaba, et al (2012) found that committee and the procurement of goods and services providers to the implementation of e-proc system have a difference in perception between the users of e-procurement supplier of goods/services and the procurement committee. Utama (2009) found in the experience of Yogyakarta city that strong leadership, underlying laws/regulations/policies, available resources (human, budget, infrastructure), as well as changes in management had an influence on the smooth process of implementing e-procurement. Nevertheless there are also some other factors involved, such as influential support from legislators, the benefits of the application, and guidance from the central government. There are all factors affecting the implementation of e-proc, in addition to the commitment that comes from implementing elements.

The research done by some researchers above is insufficient to figure out e-procurement implementation in Indonesia since it was launched in 2008. This study is a continuation of my previous research that discusses the influence of leadership in the implementation of the strategic plan in the government sector, including both local governments and the national government. My interest is to see how the factors affect the e-procurement institution, how they affect the leadership, and how they affect the implementation of e-procurement policy in Indonesia. Thus, through this research I want to strengthen my scientific knowledge in the field of public organizations, especially in Asian countries, and to contribute to the body of knowledge of the public organization theory.

The Committee for the Monitoring of Local Autonomy found that only 62% of the regency /city (*kabupaten/kota*) level has implemented e-procurement in different levels of implementation. The Executive Director of the Committee Monitoring the implementation of Regional Autonomy (KPPOD) Robert Endi Jaweng says that the situation is not in accordance with Regulation No. 54/2010. According to him, the regulation requires the entire K/L/D/I [Ministries/Agencies/units of Work Device region/other Institutions] to be already implementing e-procurement at the end of 2012 at the latest. 'Even in the Moluccas, all districts/cities do not have e-procurement. In West Papua 9% [*Kabupaten/Kota* that are implementing e-procurement], whereas in the provincial level has not been implemented it yet, ' he explained to business, on Sunday (7/10/2012). Along with the authority given to regional governments, however, these authorities have not been balanced with accountability, there for the cases of corruption in the local government. In line with the majority of the theoretical literature, we argue that the monitoring of bureaucrat's behavior is an important determinant of the relationship between decentralization and corruption (Lessman and Markward, 2009).

One of the causes of corruption is the lack of accountability of the procurement of goods and services in the local government. The study of Indonesia Procurement Watch on793 respondents of government goods and services providers in Jabotabek (Jakarta, Bogor, Tangerang and Bekasi) found that 92,7% respondents had bribed government officials, while it was only 1.3 percent said that they never practiced bribery. Studies conducted by the Anti-Corruption Agency in 2012 of Aceh's goods and services procurement showed similar phenomena. This study also found that the number of alleged incidents of corruption inprocurement and the complexity of the procurement process did not affect the willingness to appoint procurement committee chairmen. Based on the survey, only 34.2% of respondents are unwilling to be appointed as Chairman of the Committee on procurement. Concerning e-procurement, most respondents answered that the new system and the integrity of the human resources were not yet ready.

In addition, Gordon (2007) said that there is always a bias in the study of empirical e-procurement research. The researchers do not address the market shaping, contestability, and shared services. The literature also has a weakness in the saming of e-procurement process in the private sector and the public sector. The public sector has a lot of political interests compared with the private sector. Another weakness in previous studies was that the e-procurement strategy focused on the operational procurement as opposed to strategic procurement decision making. Thus, it is reasonable that corruption in the case of goods and services procurement in Indonesia started from the planning through the actuating done by the politician, even though the e-procurement has been done. There are more opportunities for corruption in the planning process, for instance ministers, politicians, or senior officers may plan the unwanted project for their private interests (Neupane, et al, 2012). Research problems which will be answered in this research are what the policy, institution and regulation, system, infrastructure, resources and human resources of e-procurement in local government? How is the relationship between procurement managers and politicians at the local government level? What is the influence of policy, institution and regulation, system, infrastructure, resources and human resources of e-procurement on e-procurement efficiency and effectiveness in the perceived e-rocurement local government manager To look at the dynamic e-procurement implementation at local level, researchers investigated relationships between variables such as leadership, human resources, planning and management, policy, regulations, infrastructure, standardizations, private integration and systems of e-government procurement on the efficiency and the effectiveness of e-procurement. The research sample consisted of 120 procurement officials in four local governments.

Theoretical Framework

Thai (2001) stated that procurement in a complex system (Checkland and Scholes, 1999, p. 19) or a system which works by itself (Childs, Maull, &Bennett, 1994; Childs, 1995; Dror, 1971; Kock & Murphy, 2001;Lineberry, 1977). Institutional arrangements may be organized so as to limit the opportunities for corruption, or to render such opportunities less profitable (Ogus, 2003). The government consists of an executive branch, a legislative branch,

and of the implementer of e-procurement himself". Thai (2001) mentions that the executive's duties in procurement are as follows:

- To complete and to add the policy which has the form of law and the procedure of goods and services through the executive's order;
- To improve and to maintain the policy which has the form of law and the procedure of procurement;
- To decide whether the fulfillment of the needs of the program should be done by the government or given to a third party.

What has been done by the executive is certainly in the framework of setting up a policy or regulation in implementing e-procurement. Thai (2001) mentioned established ***procurement policies and regulation*** which work together with legislative. Thus, Thai (2001) describes in box 2 that the next procurement system is The Policy of Procurement. Scrapper el al (2006) explained that "strong regulation in an e-procurement system was created to minimize unexpected discretion and out of the risk limit", and Thai (2001) explained that the regulation toward this procurement of goods and service is to:

Box (1) is policy and management. In democratic countries, procurement is done by an executive unit, usually a president, a prime minister, a governor, a mayor, or a regent who has reponsibility to run public procurements which may include, among others:

- Supplementing and augmenting statutory procurement policies and procedures through executive orders;
- Developing and maintaining statutory procurement policies and procedures; and
- Determining whether to meet program needs by in-house performance or by contracting out (Thai,2 001).

Decentralization or centralization are becoming important issues in e-procurement management at the national level. Coulthard and Castleman (2001) stated that a decentralized approach such as Australia's may maintain agency and line manager flexibility and authority but fails to:

• Provide adequate direction on how objectives will be achieved

• Maximize the advantages of a whole of government approach

However, centralization of procurement allows a procurement unit to determine whole of government or whole of agency purchasing patterns and to 'bundle' or aggregate these purchases and increase the purchasing power of the Government (Coulthard and Castleman, 2001). The UK Government has adopted this approach and established a central agency, the Office of Government Commerce, following the recommendations of the Gershon (1999) report. Gershon (1999 in Coulthard and Casthleman, 2001) in his review of UK civil procurement found:

- Decentralist and delegated authorities had no common framework and coherence, lacked consistency, and provided insufficient aggregation to take full advantage of the market.
- There was a clear need for a central body to provide appropriate aggregation and co-ordination. Current arrangements according to Gershon 'lacked the "clout" to lead Government procurement in the 21stCentury' (1999: 5) and

There were no common measurement systems of procurement across government. Gershon (1999: 9) reported that 'the complete absence of any such systems is the finding that gave me the greatest concern during the course of the review'. The objective of the implementation of e-procurement in the public sector is reformation process of goods and services procurement. From the various studies done based on the experience of the countries around the world, the implementation of e-procurement is to prevent or to reduce the level of corruption. Neupane, et. Al (2005). E-procurement can improve the efficiency over traditional procurement methods (Chang, 2011 and Hanna, 2010). The process of goods and services procurement electronically has obviously omitted the use of paper for the providers or the budget users. The providers just upload all documents by the existing website without coming to the office. E-procurement can also reduce the less necessary projects (Achterstraat, 2011). With e-proc, only the projects needed by the people need be sold at auction. However, this assumption is only valid in the economically advanced countries. In developing countries, many projects are proposed by politicians for their personal interests (Murray, 2007).

Leadership and E-procurement

Much previous research on e-procurement showed relationships between leadership and organization innovation, particularly the application of information technology in government organization. Addressing the issue from the angle of technological diffusion, MacManus (2002) found that leadership is a key factor endorsing the

implementation rate of public e-procurement systems and consequently offered a cautious and incremental perspective on their diffusion. Coggburn(2003) conducted an exploratory study to understand the political, socioeconomic, demographic, and geographic factors affecting the adoption of procurement reforms. Wahid (2012) also found that leadership is an important factor affecting e-procurement institutionalization process in developing countries. The top management teams (steering committees) must involve the project manager, any consultants working with the committee, and agency staff to develop an implementation strategy (ECOM, 2002). In this regard, considerable attention and support needs to be provided by senior management to ensure that the procurement reform has been well understood in the agency (S&A, 2003). Furthermore, the executive management team is responsible for setting the vision and goals, bringing about collective commitment for change in process and organizational structures, and formulating the policies and strategies necessary to put an e-procurement initiative in place (WB, 2003).

Proposition 1: The high level of top management support is positively associated with the efficiency and effectiveness of e-procurement initiatives.

Human Resources and E-Procurement

The adoption of e-procurement in government requires the support of human resources. More capable human resources affects the speed of adoption of e-Procurement. Henriksen and Mahnke (2005) said the public managers need sufficient resources and the mandate of the political leadership to successfully adopt E-Procurement. Political structures needs to be considered as much as the economic rationalities to better explain E-Procurement adoption. Apart from IT Sophistication, organizational factors only moderately influence the adoption of E-Procurement, but Employee Acceptance (EA), Financial Resources (FRs), Political Commitment (PC) and Centralization (CE) are the strongest determinants of E-Procurement adoption in Germany (Veit, et.al, 2012).The OGC (2002) recommends that increasing change in underlying processes requires more learning and effort on the part of users. Consequently, some researchers(Hyoung Lim, 2010) and (Moon, 2005) found that the lack of technical, personnel, and financial capacities are perceived to be major barriers to the development of e-government in many municipalities of USA.

Proposition 2: The high degree of human resources program is positively associated with the efficiencyand effectiveness of an e-procurement initiative.

Planning and Management

E-procurement projects in many countries need clear plans, support, and well-prepared management systems. A UNPAN report (2012) noted it is therefore vital to e-government transformation that governments appoint an official with real authority across departmental and ministerial boundaries to facilitate strategy and decision-making regarding the country's ICT architecture, and to assist agencies in their effortsto run more effective and efficient programs. Therefore, a clearly defined e-Procurement strategy not only emphasizes the importance of e-Procurement in the public sector but takes into consideration major institutional changes from the procurement process perspective as well as from the organizational perspective (WB, 2003).

Proposition 3: A clear plan and management execution of an e-Procurement implementation strategy is positively associated with the efficiency and effectiveness of an e-procurement initiative.

Policy and Regulations

Thekey pointof public procurement is policy and regulation on procurement. Clearly at the public procurement policy level, there is a fundamental and accepted differencebetween public procurement and private sector procurement (Murray, 2007). Since the public sector has different characteristicsfrom the private sector, public procurement is mainlya process of political decisions on how the government gets public goods and services at efficient costs. Contrary to Europe, Asia has not yet adopted a specific e-procurement regional policy or legal framework. Nevertheless, elements for legal validity of e-procurement can already befound in the "e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure". However this instrument is not compulsory. Instead, it serves only as a guideline. At the national level, many Asian countries suchas China, Malaysia, Philippines and the Republic of Korea, have undertakenmassive reform of their public procurement legal

environment as part oftheir national e-government action plan(UN ESCAP, 2006),(Vaidya, et al., 2009).Inpublic procurement,public procurement managers need to insulate and protectthemselves against the possible conflicting demands of various stakeholders (Ancarani, 2009; Purchase et. al., 2009). Also, interms of application of rules a wide variation was found and there a sons for these variations were heavily driven by a hierarchical downward flow of verbal and non-verbal instructions based on varying degrees of interpretation of respective rules and standard procedures(Khan, 2012). In sum, Macnus (2002) said that the public sector's regulatory restrictions and organizational dimensions are the biggest deterrents to e-commerce.

Proposition 4: The regulations and policy support is positively associated with the efficiency and effectiveness of an e-procurement initiative.

System Integration and E-Procurement

In Taiwan, the limited integration of e-government creates repetitive information building, inconsistent information content, and information security problems (Chiang and Hsieh, 2007). Government propose the integration system required gradual reform to integrate complex online systems and databases. It is also critical to link the e-Procurement system to the financial management system in order to facilitate the process of online payment to suppliers (WB, 2003). Given its disruptive nature, national state-wide e-procurement should be done by an independent new agency with resources, processes, persons and values different from those of the incumbent procurement officers (Baharona, et. al, 2012),it is necessary for purchase transactions to be carried out through an electronic ordering transaction support system (Vaidya, et al., 2009).

Proposition 5: The high degree of system integration ispositively associated with the efficiencyand effectiveness of an e-procurement initiative.

Infrastructure and Standarization

For many developing countries, the information infrastructure is the main problem for e-procurement initiatives. Based on Soekiman and Sapoetra's(2010) research finding in Lampung Province, Indonesia, the most five influential barriers in e-procurement implementation are (1) planning; (2)infrastructure, (3) standardization, (4) enthusiasm and (5) security. The other study found that the reliability and capability of the organization'sinfrastructure (particularly network connectivity) has a direct impact onthe operational performance of the e-procurement system(Croom& Brandon-Jones, 2009, (Engström, et al., 2009), (Vaidya, et al., 2009), Ha &Coghill, 2006)

Proposition 6: The degree of infrastructure quality is positively associated with the efficiencyand effectiveness of an e-procurement initiative.

Discussion

In this section**,** we try to explore the unique practices of e-procurement in three local governments in their responses to national regulations. How do local governments implement their e-procurement programs in their local contexts? We have chosen four local governments with a variety of e-government programs, namely Jogyakarta City in Jogyakarta Special Province, Tangerang City in West Java Province,and Kutaikartanegara Regency in East Kalimantan and Riau Island Province. Jogyakarta city, the capital city of Jogyakarta Special Province, has successfully won an e-government award since 2009, granted jointly bythe Ministry of Information and Telecommunication and Economist Magazine of Indonesia. This city is considered to have successfully implemented smart city governance supported by information technology.

Tangerang city, a second research case city, has also successfully earned an e-government achievement in four times from same ministry. This city also has been granted as an "unqualified opinion" in its financial report by the National Audit Board (BPK) six times since 2008. Meanwhile, Kutaikartanegara regency is in the early stepsof

developing an e-government program and was recognized as an ***Information and Communication Technology (ICT) Pura*** in 2012, considered to be a local government having good e-readiness to e-government.

Regulations and Institutions of Public Procurement

Looking at the institutions involved in the procurement, it is fair to say that fragmentation and decentralization of institutional procurement occurs. Each region has authority to conduct its own procurement, and there is no enforcement to implement the e-procurement. National Procurement Agency (LKKP) is an institution which is responsible for e-procurement, based on the Presidential Decree No 54, 2010.

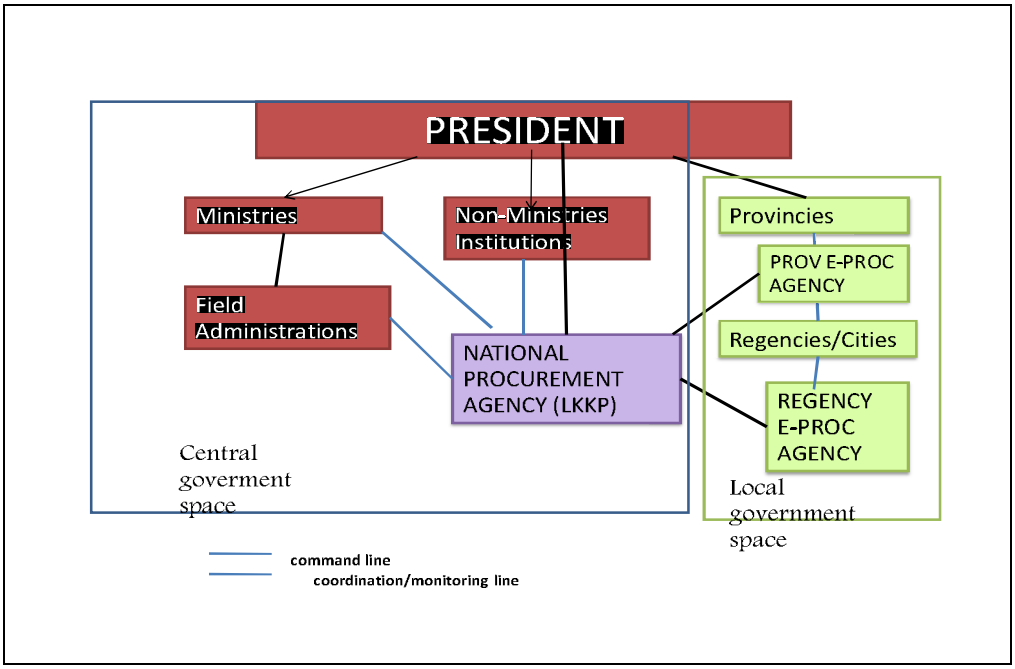

Fig. 1. Fragmented Central and Local Procurement System Within the Executive Branch

Each ministry, non-ministry institution, and regional government can set up an independent Procurement Service Unit which is separated from the organization units which make the budgets. This separation function is aimed to avoid the collusion and the autonomy of the procurement process. Each Institution which is called ULP (Procurement Service Unit) is created based on Minister Decree or Head of non ministry institution and regional head. Yayan Rudianto's (2011) study on legal format mentioned that based on the President Decree No. 54 – 2010, that National Procurement Agency (LKKP) is the only non-department institution in Indonesia which has the authority to improve and formulate the policy of government goods/services procurement. Concerning the question of what is the relation between the President and National Procurement Agency with the Procurement Service Units in the ministry institution like, Rudianto said that:

First, the relation of the President . This relation is as clear as command lines. The tasks and function in carrying out the goods/services procurement in K/L/D/I is carried out by ULP. ULP is a government organization unit which

functioned to carry out the goods/services procurement in K/L/D/I permanently, independently or jointly with the existing unit. K/L/D/I has to have ULP (Procurement Service Unit) which is able to give service/guidance in goods/service procurement sector.

Second,the three-way relationship between **the President and province and regency/city.** This relationship uses two mechanisms at once, which are a functional mechanism and a deconcentration mechanism. In the functional mechanism, the function of government goods/services is carried out by a Procurement Service Unit (ULP). This relationship doesn't implicate the institutional improvement of the National Procurement Agency entirely (4 deputies), but there is a possibility for the deputy which has the similarity in technical, that is Deputy of Law and Protest Solution. The level of this unit is below and responsible to the governor, the duty, function and the authority are constant, the organizational structure is integrated in the existing ULP, either /D/ province creates and independent unit or joined to the existing unit, the National Procurement Agency has just to adapt the relationship between the President and **/D/** residency/city. The relationship is based on the mechanism of decentralization. The President is not as free to act as the governor, because most of the government business which had been handled by the government has been handed over to the region (regency/city).

Each local government canset up an autonomous e-procurement institution (LPSE) responding to the annual Presidential Instruction on Corruption Prevention Action. Each local government has to achieve procurement of local budget at 40% of its total budget**.**

Table .1. Regulations and Procurement Independent Unit

	Yogyakarta City	Tangerang City	Kutaikartanegara
Decree	Mayor Regulation No 84 Year 2010	Mayor Regulation No. 40 Year 2010	Regent Regulation No. 2 Year 2012
E-procurement start	2010	2010	2012
Background	Presidential Regulation and NPA Decrees	Presidential Regulationand NPA Decrees	Presidential Regulationand NPA Decrees
E-procurement status	Autonomous E-procurement (LPSE)	Autonomous E-procurement (LPSE)	Autonomous E-procurement (LPSE)
Unit	Under Secretary	Under Information and Communication Agency	Under Information and Communication Agency

We can look at data on the beginnings of these three local governments'e-procurement projects in 2010 with autonomous e-procurement models. Mayors' or regents' (head of local government) regulation is a legal basis for implementing e-procurement projects.The legal standing of such projects is presidential regulation (No. 54 Year 2007) and National Procurement Agency Decrees.

The city Yogyakarta had a Procurement Service Unit (ULP) since the year 2009 with the consideration of the existence of a) unpleasant procurement of goods/services handled by Local Government Secretariat andthe units of work; b) Procurement Committee still could be intervened by the structural leadership; c) The high number work packageslocal government agencies d) limited number of certified procurement Ccommittee and e) is required to standardize the procurement document. Legal basis for the establishment of the ULP is the Mayor Regulation of Yogyakarta No. 91 in 2008 about the Procurement Services Unit (Procurement Unit). In 2008, the ULP Government of Yogyakarta is attached at the City government Secretariat Area Development Control Agency with membership consisting of the person in charge, the Director, Manager, and members who shared in procurement team.

Meanwhile, Tangerang Citygovernment set up a Procurement Service Unit in 2010 based on Mayor Regulation No. 40 Year 2010. The main objective of the unitis to prevent corruption in good and service procurement purchasing. This unit wasrecognized by the National Procurement Agency in 2011 and 2012 based on its having the highest proportion it's of local budget purchased through e-procurement.In contrast to the case of Yogyakarta City which is under the City Government Secretariat, the procurement service unit in Tangerang and Kutaikartanegara is managed by Information and Technology Agency with echelon IV. However, the independency of the procurement unit is likely as high as in Yogyakarta City. In Kutaikartanegara, the procurement unit is managed by the Information and Communication Agency, which has 420 procurement officials.

Organization and Resources

The Independent Procurement Unit of Jogyakarta city is a permanent unit established by the Decree of Mayor. This unit is attached to the Control and Monitoring Section at the Secretariat of City Government,which isheadedby a head (echelon III) and supported by deputies and a procurement team. Currently, there are 45 certified procurement officers. IT infrastructure capacity consists ofthe internet at a speed of 2.5 Mbps and an intranet environment in Yogyakarta City Government, as well as an IBM System x3650M2-72A server, Debian Linux Operating System, 8 GB of memory and two 300 GB hard disks. The Independent Procurement Unit has been facilitating from within an office building and recruiting procurement officials from different city agencies, so they may not fully do the procurement job.

It is highly desirable to be able to dig beyond these histories and their resources, we try to investigate the proportion of local government expenditure purchased by e-procurement system. The higher levels of procurement in local expenditure are more organized by the local government. In other word, there is a significant role that can be seemingly done by a mayor or a regent to pressure their subordinates to obey procurement regulation. It is fair to say that the compliance of three local governments to President Instruction is higher than central government institutions. They have made good efforts to make goods and services procurement more accountable and transparent in their respective areas. Jogyakarta city is a "good boy" in doing e-procurement for almost 100% of its budget in both 2011 and in 2012. Another study found that the great improvement of Yogyakarta city in purchasing almost one hundred percent its budget through e-procurement was driven by the mayor and followed a process of a typification process.

Beyond this, we try to investigate some variables affecting procurement process at local level. There are some actors in procurement watch who have become essential in controlling public expenditure, namely civil society, the media, academic institutions, public commission and oversight boards. The exploration of these matters will be analyzed in the next section. In 2008 the efficient auction amounted to 8.23% and it has continued to increase every year. In 2009 there were 13.8%, in 2010 was 15.29%, 2011 was as much as 15.6% and in 2012 was 16.09%. This increase shows that the auction there is already well. The types of procurement of goods and services from the year 2008 to 2012 are as follows:

Primary data from the respondents was collected using a crosssectionalsurvey conducted in the five local governments of Indonesia. Therandomly selected sample was comprised of 230 elementsrepresenting procurement management units [3]. Before thecommencement of the survey both focus group held discussion (FGD)meetings and pre-testing of the measuring instrument. Inboth exercises, the procurement practitioners were involved to enablethe assessment to have face validity. Such pre-field deploymentresearch tasks allowed for the study's questionnaire to be improvedby either rewording or deletion of the items found to be ambiguousduring the pilot phase. The pilot study, which involved 30procurement practitioners, facilitated the improvement of theresearch instruments as well as the determination of the reliability ofthe scale items. Response from the final survey involved 150 fullycompletedquestionnaires, 25 incomplete questionnaires and 33unreturned questionnaires.

Validity and Reliability Assessment

The questionnaire was refined via several rounds of experts' reviews and pre-testings before the actual distribution took place. For content validity purposes, an extensive review of the literature was undertaken to gain an understanding of each construct and its items, and to ensure that no important dimensions were neglected. 10 e-procurement practitioners and 10 academicians/researchers participated in this process. Each item on the questionnaire was reviewed for its content, scope, and purpose. Their feedback resulted in several modifications to the items. Two rounds of pre-testings were carried out to ensure that the instrument was well designed and contained items that really measure the constructs.

Table 2 Validity and Reliability Test

Item-Total Statistics

	Scale Mean if Item Deleted	Scale Variance if Item Deleted	Corrected Item-Total Correlation	Squared Multiple Correlation	Cronbach's Alpha if Item Deleted
p1	26.8667	5.844	.576	.	.914
p2	26.8000	6.372	.680	.	.894
p3	27.1333	5.913	.808	.	.879
p4	27.1667	5.868	.847	.	.875
p5	27.1667	5.868	.847	.	.875
p6	26.8667	6.257	.680	.	.894
p7	27.2000	6.303	.659	.	.896

Table 3. Descriptive Statistics

No			Tangerang				Yogyakarta				Kutaikartanegara				Riau Island			
No.	Aspect	N	Min	Max	Mean	SD	Min	Max	Mean	SD	Min	Max	Mean	SD	Min	Max	Mean	SD
1	System E-GP	30	44	55	47.9	5.16	44	55	49.6	4.07	44	55	49.0	4.49	47	41	55	3.32
2	Regulations	30	42	51	44.2	2.09	40	55	45.0	3.81	41	55	45.6	4.27	46	39	55	3.94
3	Infrastructureand Web Service	30	38	50	41.1	2.99	40	50	45.6	3.85	38	46	40.2	2.14	45	31	55	5.94
4	Planning and management	30	36	45	40.0	4.07	30	45	39.9	4.16	36	45	40.5	4.00	38	25	44	3.82
5	Leadership	30	31	44	38.4	3.51	31	45	38.3	3.08	34	45	40	3.24	39	30	40	3.3
6	Human resources	30	35	45	38.1	2.51	37	44	39.6	2.01	37	44	39.2	1.95	38	29	45	3.82
7	Standard	30	31	41	36.2	1.60	31	45	36.9	3.20	36	45	40.5	3.56	38	31	55	3.57
8	Policy	30	27	40	34.5	4.04	20	40	34.3	4.74	30	40	33.7	3.57	36	21	44	4.86
9	Private Integration	30	30	40	33.4	3.41	30	40	35.4	3.16	34	40	37.5	2.29	41	24	47	5
10	Efficiency and effectiveness	30	27	35	29.4	3.15	27	35	31.5	2.85	27	35	32.0	3.01	29	18	35	3.66
	Valid N (listwise)	30																

Table 4 Pearson's Correlation Coefficient

	Yogya karta	Tange rang	Kutai Kar te nagara	Riau Island
Leadership	0.046	0,438	0,174	0.151
Human Resources	0.448	-0,049	0,400	0.209
Planning and Management	0.098	0,520	0,419	0.14
Policy	0.070	0,171	0,097	0.508
Regulations	0.464	0,151	0,153	0.364
Infrastructure	0.091	0,494	-0,086	0.761
Standardization	0.101	0,191	-0,045	0.622
Private Integration	0.023	0,708	0,196	0.632
System of E-GP)	0.374	0,625	0,368	0.644
R-Squared				

The table above presents the bi-variate correlations of this study's measures. Most of the relationships were not significant and negative at the different local setting. In Yogyakarta City, human resources, regulations and laws, e-procurement system were positively related to effectiveness and efficiency of e-procurement (correlation coefficient ranged from 0.378 to 0.468).Meanwhile in Tangerang City, leadership (0.438), planning and management (0.52), infrastructure (0.498), private integration (0.708) and e-GP system (0.625) were positively associated with dependent variable. In third case of Kutaikartanegara regency, human resources, planning and management and E-GP system were positively related to effectiveness and efficiency of e-procurement. These variables showed statistically significant (t-test) $p<0.05$ and correlation values ranged from 0.38 to 0.418. However, in Riau Province, policy, infrastructure, standardization, private integration and system e-procurement were linked positively to the dependent variable.

To investigate the relationship betweenthe independent variables and dependent variables, a regression test was used. In Yogyakarta case, the test was significant on ten variables, and there was only one variable positively related to effectiveness and efficiency of e-procurement, namely regulation and policy. This study actually starts from two questions. First, we focus on confirming that traditional variables actually affect the efficiency and effectiveness of e-procurement. Second, we try to answer why some variables have no effect on the dependent variable. Throughout the test, the impact of all independent variables on efficiency and effectiveness of e-procurement were not statistically significant at anyof the local governments. Although this differences does tell us the relative effectiveness of the e-procurement initiative.

Regulations and Policy

These results give us a hint that there might be human resources, regulation and e-GP system which will become influencing factors in Yogyakarta. For example, Huruholt& Wahid (2008), E-procurement initiatives need to ensure

a long-term commitment of resources, and to unify different factions. There is a digital gap between the Committee and the procurement of goods/services providers. However, this gap is not outrageously wide, but it must be addressed and bridged by e-procurement system (Nightisabha, et al., 2009). From the regression test of the case of Yogyakarta revealed that only one variable that influence on the effectiveness and efficiency of e-procurement, namely regulation and policy. Test results prove this analysis results in the previous chapter that shows that the main weaknesses of the implementation of e-procurement is a legal vacuum or less strong legal basis that became the foundation for implementing procurement at the local level. One of the vacuums in e-procurement regulation is public watch regulation in order to prevent corruption in public purchasing. "one of (the) factor(s) causing deviation of procurement isthe vacuum of regulation on surveillance done in whole procurement phases and processes, so it createsthe potential state budget loss or misuse"stated by Said Iskandar, West Kalimantan province activist".

In line with above statement, Transparency International interviewed some businessmen and confirmed the conclusion:

> Participants agreed that decentralization has made procurement much less transparent. They noted that many of the provinces and local governments have different procurement regulations, which are not consistently applied. Moreover, on the provincial and local level, responsibility and reporting duties are not very clear. The representative of NPPO noted two problems at the provincial and local level: 1) there are many different interpretations of the procurement rules and 2) there is political pressure to favor certain bidders. NPPO is drafting a national procurement law but it is not expected to become law until 2014 or 2015 (TI, 2011)

Human Resources, Standard, Private Integration and System

In Kutaikartanegara and Tangerang, human resources are an important issue that affects the effectiveness of e-procurement. The main difficulty faced by the local governments is the ability of officials of the procurement and the reluctance of civil servants to be procurement officials, and the ability of the provider in information technology (Nitisgabha, et al., 2009).In both regencies, information technology issues are perceivedto be influencing factors on e-procurement effectiveness.Interviewing the key persons involved in a procurement unit revealed some important information. On e-procurement policy, they said that:

> "We did support the e-procurement policy to prevent corruption at our local government. You can seethat our budget expenditure involved an increase ofuse of the e-procurement-mechanismyear by year".
>
> Head of Procurement Unit in Tangerang city said that:
>
> > Our challenge is how to get a good provider according to the real administrativecondition that they upload in the e-procurement site. So, the problem is the proof of their documents in procurement process.

This means that e-procurement systems do not guarantee governments will get good private providers.

Infrastructure and Small Medium Enterprises in Riau Island Province

As mentioned in Chapter 4, one of the difficulties in doing Indonesian e-procurement is diverse infrastructure conditions from one island to another. In the variable significant test, infrastructure, standardization, private integration and system e-procurement were related positively to the dependent variable. The most challenging e-procurment in Riau Island Province is electricity supply that often causes problems in the procurment process (Interview, *on 9 November 2013).* Electrical conditions frequently lessen the performance of e-procurement in the new province in Indonesia. The procurement officials said that the system often suffered damage and inhibited the process of auction. In addition, the systems integration factor became a problem, which is important for the implementation of e-procurement, since the absence of the same standard in e-procurement system and the lack of good monitoring of the NPA cause serious problems. One of the problems faced is data about blacklisted companies

which can still participate in e-procurement and construction project bidding. For example,in the fiscal year 2013, PT Persada Pillar won the construction of the Building of Malay Culture.

` Another issue in e-procurement is the open competition between local companies and incoming companies from other provinces. The Head of Construction Development Institution stated that province and city/regency government should prioritize local companies to win local government project (Interview, 21 November 2013). Similar to the Coulthart (2001) findings in Australia, e-procurement had serious effect on small and medium enterprises' access to local government projects. Because e-procurement project had the lack of strategic direction it is also shown in the insufficient attention to the stated objective of increased SME access or e-Commerce adoption.

In sum, we can see that the decentralized e-procurement system in Indonesia may make the different epics of a story depending on the conditions of its locality. Yogyakarta city and Tangerang city have more advanced governance practice (at least based on the indicators of their achievemen on financial audit report awards and procurement awards) face the more advanced issues regarding with human resources, regulation and private integration system. In the other local government, Riau Island Province (and maybe other local government) faces difficult infrastructure conditions. Actually, the e-procurement position and condition in a decentralized-system are relatively independent of the concurrent local governance; they follow primarily from the nature of the policy, infrastructure, leadership, human resources, and private readiness. As noted earlier, the relationship between National Procurement Agency and Local Government Procurement Agency is missing link. The main task of NPA is to supervise the local government procurement, but has not authority to impose sanction. Thus, the performance of local governments' e-procurement is determined by the local government itself.

E-Procurement and Corruption

Concerning decentralized e-procurement implementation in Indonesia, we found that there are forty reports (40)on e-procurement research. This number is certainly not able to represent a large population. By taking into account that the early implementation of e-procurement in Indonesia most recently started in 2012 so we can realize that the number of e-procurement research is still limited. However, at least we can get an overview of the extent to which e-procurement which had been implemented in diverse of time and the model in various agencies of the central government and the local government that might encourage a decrease of corruption of goods and services procurement. By reviewing the trend of increasing number of e-procurement units, only 11 units established in 2008, 63 units in 2009, 274 units in 2010, followed by an increase of approximately 300% in 2001 when the total number of units was 630, and then doubling in 2013.

Fig.2.depictshow the public e-procurement technology performance can help to reduce corruption in forty e-procurements. Ministry of Finance, Jogyakarta City, Tangerang City and Surabaya City are four interesting examples to increase transparencyandaccountability in public procurement. The city of Surabaya, the first city to implement e-procurement, awarded the recognition from the Anti Corruption Agency (KPK) of the succeeded city in preventing acts of corruption through the procurement of goods and services. In 2007 the agency conducted evaluation research onthe e-procurement implementation found that:

1. The embryo of the first e-marketplace in Indonesia is used by more than 3,450 Vendors and 43 units in the government city of Surabaya. It recorded a daily average of 50,000 web hits and 82,395 visitors, with many packagesbeing auctionedand all packages above 50 million transacted through electronic procurement.
2. In 2004, the auction process as much as worth Rp. 182,86,661 billions.
3. In 2005, the auction process work packages worth Rp. 1603,413,38 Billions
4. In 2006, the auction process as many as worth Rp. 290 Billions.
5. In 2007, until May 2007, the auction process as much as worth Rp.350 Billions worth of 196.28 job package.
6. The best model of Government e-Procurement Service could be implemented in central and regional government agencies. The e-procurement service obtained the ISO 9001: 2000 Quality ManagementSystem ISO 27001: 2005 and Information Security Management System. The impacts of the e-proc implementation in Surabaya are as follows: a) the reduced budget corruption opportunities; b)increased employment opportunities to young entrepreneurs; c). increased budget efficiency; and) increasing public trust on public procurement.

However, most of e-procurements that had been studied were to achieve efficiency and faster and easier processes of procurement rather than transparency and accountability. This is supported by Independent Monitoring Commission (LPI) in Makassar commissioner's findings were able to detect "sophisticated" practices

implying collusion, such as subprojects with different types of work and locations bundled into a single package (seemingly to limit competition), bids with simple mistakes in their cost proposals (so the company would knowingly be disqualified, and the perception of more bidders would be inflated), and proposals that added items beyond the scope of work (and hid these unneeded additions by lack of detail in quantities and costs) (E. Rahman, 2012). Commissioners also found two bidders for a contract that had the same owner.Through its field network, LPI was also able to identify problems in contracting, such as road segments not built to specifications, volumes of supplemental food not delivered, substandard school furniture, and contractors receiving their final payments before completing work. The mayor responded to these reports by calling together department directors and pressing them to follow up on the findings. Encouragingly, the Department of Public Works heeded the call and negotiated with contractors to finish faulty infrastructure projects.

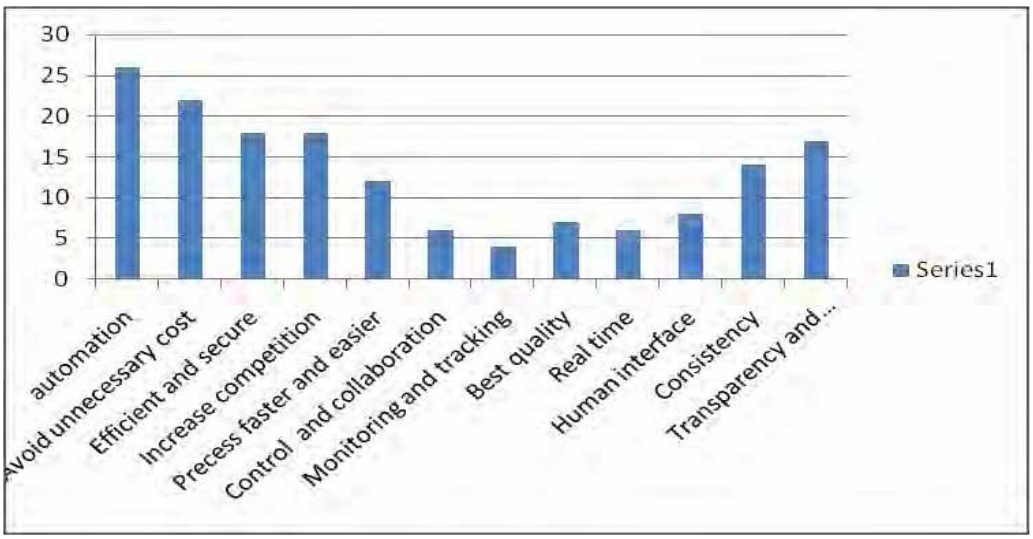

Fig.2. Anti Corruption Factors of E-Procurement

There have been 40 studies done on e-procurement conducted in forty different government organizations. Those researchers revealed that the automation (in terms of procurement process automation) has been the greatest result achieved, followed by a decrease in unnecessary costs associated with paper, and increased competition because all parties from outside the region can compete in becoming a supplier. Kusuma (2012) and Pujiati (2010) studies found that e-procurement system applications in private/government firms has a positive effect on time efficiency. 76.7% government/private firms are categorized in the fast category in access to e-procurement sites. The ease in access to e-procurement sites is a primary advantage of conducting goods/services transactions online. E-procurement systemsmanaged by government/state firms give goods and services supplies processes good security for related relations.

As mentioned by Bawono in his research that the procurement committee agreed that e-procurementof goods/serviceswas more efficient than before:committee said that 85% (pre tenders), 83,75 (tenders),% and 86,56% (post tender) and providers stated that e-proc making to be more efficient of 74,86% (pre tenders), 66,73% (tenders) and 73,68% (post tender) (Bawono, 2011).Another investigation showed thate-proc can accelerate the auction process.The number of auctions completed less than 45 days was about 50% of the whole package which was announced via the E-Procurement System. The percentage of total auctions completed between 45-60 days is 26% while beyond day 60the percentage was 23% (Sumadilaga and Pujiono, 2011). E-procalso increases competition, asdemonstrated by Mulyono's study in Pontianak. Construction project bidding done by Public Work Agency in Pontianak City can easily be followed by all construction companies in the city of Pontianak by utilizing the e-procservices (Mulyono, et. al, 2011).This study analyzes the implementation of e-procurement policy in PLN for realizing efficiency and transparency, as well as the problems which are encountered in the implementation of e-procurement (Rahayu, et. al, 2011).

Interestingly, the procuring game was redefined after e-procurement implementation in Yogyakarta city and Tangerang city. Information asymmetry was reduced by information technology. Interest groups, associationsof

companies and media now had access to procurement process and could use this information from website to push for a more transparent process. The Head of the Planning Agency inTangerang City said that:

> *"After implementing e-procurement, we (budget-owned agency) could not control whowon the bidding. Because, the procurement agency is a very independent unit that we could be not interfere with. And also the all bidders could look at the procurement process from the e-procurement website. Before implementing e-procurement, the budget-owner agency had the bidding winner, therefore procurement processes were the only justification for it."*

The head of the Procurement unit in Tangerang city stated that:

> *Through the e-procurement mechanism, itis difficult to intervene in procurement decision making processes due to all steps beingrecorded. It is too risky to change the decision because NPA systemsare always connected with Tangerang's e-procurement site. In the early implementation, local politicians tried to intervene in the procurement process, but they could not do it. In the end, they supported the e-procurement process.*

These statements of Tangerang city officials confirmed that there are some external environmental factors importantly affecting the "local politician behavior regarding the procurement process". Those factors are local politics in Tangerangand Yogyakarta. The following interview was done with local politician of Yogyakarta council below:

> *"We, as a local council institution, only had political control on procurement process. Legally local council members were not permitted involving in goods and services purchasing.In Yogyakarta, local councils could not intervene withprocurement process due to intense public watch dogs"*

The political positions of NGOs may be strong in Yogyakarta Special Province and can face head-to-head to local parliament. The strong institutions of society are also indicated by the survey results from Partnership Indonesia in 2012. The interaction of the arena is already well underway. It can be concluded from the communication between the arena that the process is going well and the availability of forums that bring together representatives has the functions of each arena. The forum is between the local council and the bureaucracy, the government and the community, the government and the economic community. The forums were convened on a regular basis in an effort to absorb the public aspirations for policy makers. Even though there was high public participation in the forums, it was unfortunately considered an ineffective method. The forums were attended by under-represented groups(IGI, 2013).

The principle of transparency in the province of DIY is better than any national average for all arenas. The bureaucratic arena has the highest index value, i.e. 9.09 (very good), which is higher than the national average of 5.05 (enough). The government area followed with a 7.97 value (good), which is better than the national average on 4.58 (tend to be bad). As for the arena of civil society and economic community, both have the same index value i.e. 6.40 (tend to be good), both higher than the national average at 6.28 (likely both) in civil society arena and 5.80 (enough) in the economic community arena. Meanwhile, according to Mohammad Faried Cahyono-DIY IGI Investigators said that DIY gained value at 6.80 and was above the national average: 5.67.This means that the good performance in principles of transparency, accountability, participation, fairness, effectiveness and efficiency in the arena of government, bureaucracy, civil society, and the economic community. One of bureaucratic transparency achieved a value of 10. Another factor assessment is the ease in accessing public documents through the official government website.

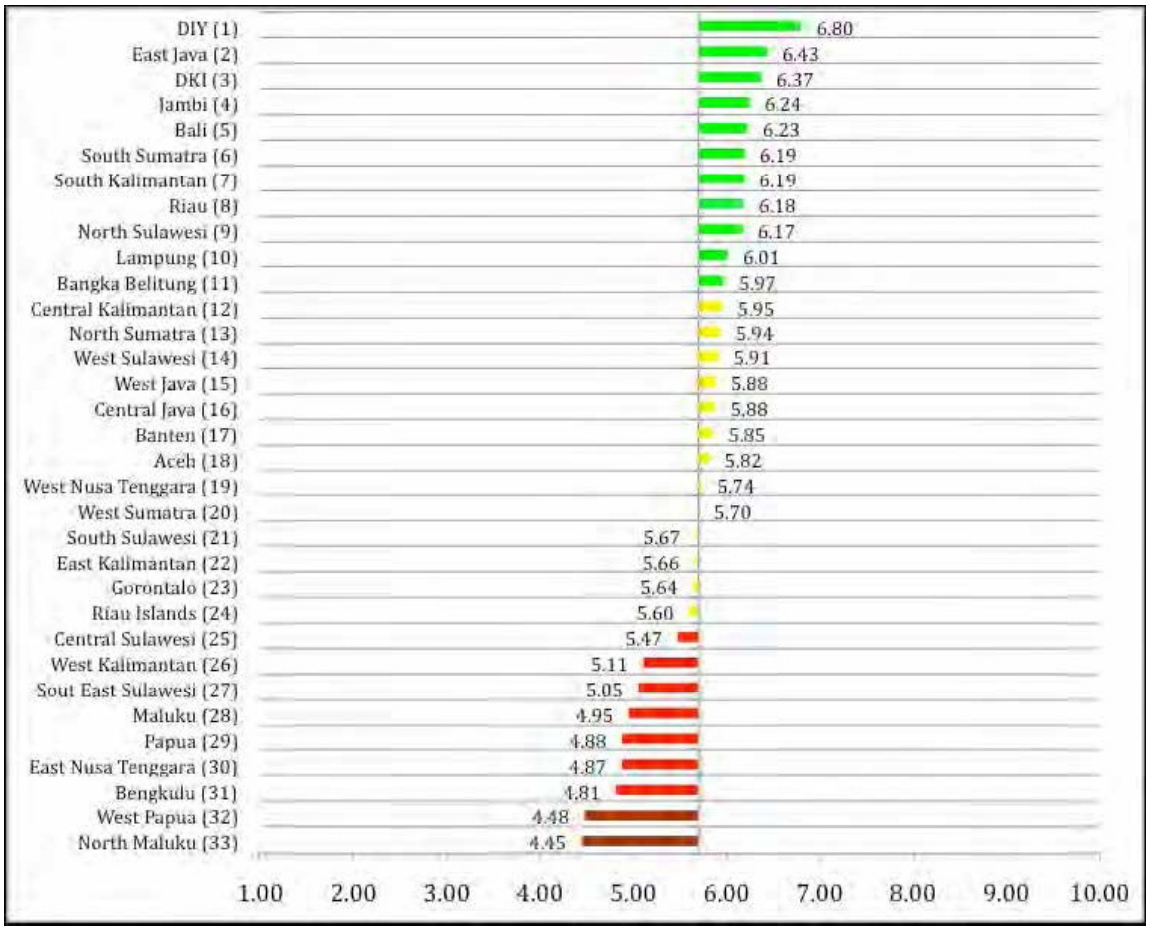

Fig.3.Provincial Governance Index 2013
Source: Governance Index Report, Indonesia Partnership Program, Jakarta, 2013.

Indonesia Governance Index (IGI) definesgovernance as the process of formulationand implementation of rules, regulations, anddevelopment priorities through interaction amongexecutive and legislative branches and bureaucracywith participation from civil society and economicsociety. IGI is aimedat measuring the performance of Government(political office), Bureaucracy, Civil Society, andEconomic Society against certain principles of goodgovernance, namely participation, transparency,fairness, accountability, efficiency, and effectiveness.

The case of public procurement exercising control over agents is much more complicated. Firstly, there is no homogenous group of principals to monitor the actions taken by the agent. Instead there is a diverse collection of principals, composed of interests represented by pressure groups influencing politicians and the general public. The first consists of ex ante measures, which will often take the form of administrative procedures integrated into the domestic public procurement regulation. The second takes the form of ex post oversight, which will be mostly external to the procurement regulation and consist of ministerial control, the existence of superior authorities or commissioners and judicial review (Sourdy, 2007). In Yogyakarta Special Province, Local Ombudsman Institute acts an oversight control institution to control the procurement process through information technology.

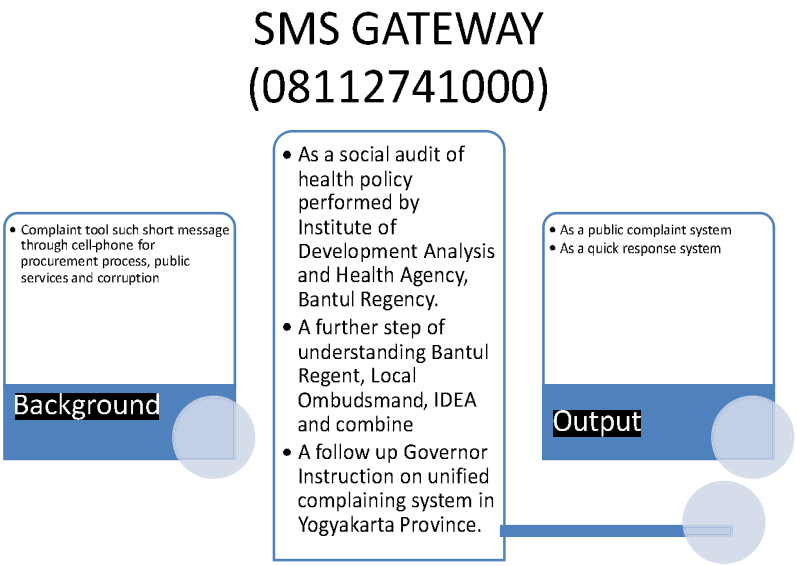

Fig.4. Oversight Control on Public Procurement in Yogyakarta Province

However, political commitment to health and education budgets was the lowest compare with other provinces. Those showed the ratio of girls to boys, and it shows that in the special region of Yogyakarta (DIY) girls receive only 8.6 years, whereas the minimum requirement for compulsory educationis nine years andthe health budget allocations per year areonly IDR 5.807 per resident. This fact is contrary to the magnitude of the operational costs of the bureaucracy, i.e. overhead at DIY is about 96% of the cost of the total program. As a consequence, the principles of fairness and efficiency in the arena of government get the lowest value when weighed againstother principles.

The results of the IGI assessment of all provinces in 2012 show that the average score for the performance of the provincial governments in transparency is considered **Poor** (4.58) with a slightly better score for performance of the Bureaucracy that shows a **Fair** score of 5.04. The scores indicate problems in accessing public information – such as non-confidential government documents - in most provinces in Indonesia.Fig above reviews the gap between accountability and transparency in Riau Island Province

Another analysis on Yogyakarta and Tangerang local politics concerns whether the competition amongst political parties in local councils is high or low. The most important indicator to measure the degree of competitiveness is the holder of the executive wing and the legislative wing. There are two types of local government in the current local government in Indonesia, namely the divided local government system and the unified government system. In the divided government system, the mayor/regent/governoris from one party, but the majority of local parliament is dominated by another party. In the unified local government system, the mayor/regent/governor is from the majority party holding the local parliament. We assume that competition amongstpoliticians in the divided local government systemis stronger than in the unified one. What is the effect of political competition on procurement process?If competition between political parties and between councils is effective,then local service producers may already be highly efficient (Boyne, 1998).

In Yogyakarta city, Haryadi Suyuti - Imam Priyono (mayor and vice mayor) nominated by Indonesia Struggle Democratic Party (PDIP) and Golkar Party won the popular vote at 48, 34 percent (42.5% in city parliament) defeated Hanafi Rais - Tri Harjun Ismaji (Fitri), mayor candidate of National Mandatory Party (PAN), Democratic Party (PD), United Development Party (PPP), Gerindra Party Hanafi Rais - Tri Harjun Ismaji (Fitri). Meantime, in Tangerang city, mayor candidate Wahidin Halim and Arief Wismansyah supported by twelve political parties: Partai Golkar, PDI Perjuangan, PPP, PAN, PKPB, Partai Demokrat, PDS, Partai Bulan Bintang, and PKNU won popular vote at 72.73%. In fact, the thesis of political competition is not valid in two city cases because Yogyakarta and Tangerang city classified as an unified government system.

Riau Island Province Procurement: The Dynamic Local Politics

TheRiau IslandProvince, with Tanjungpinang as the capital, is the newest province of Riau Province. Its territory includes 2 cities and 5 regencies. Tanjungpinang City,Batam city, Karimun Regency,Lingga Regency, Natuna Islands regency, and Anambas Islands Regency. Administratively, Riau Province has 59 districts and 351 sub-districts. Its areaof251,810.71km squared is dominated by sea, which consists of 241,215.30 km (95,79%). The remaining,4,110,595 miles (4.21%) is land that is spread out among the 366 large and small islands,of which 40% have not yet been named and populated. Among the thousands of islands, 19 of the outermost islandsare directly adjacent to the another country(Malaysia or Singapore) that is prone to security issues, social welfare issues, and environmental sustainability issues.

From all over the arena or governance aspect, the application of the principle of transparency of the Bureaucratic Arena only amounted to 2.34 (bad). While the highest index was obtained by the Government Arena in applying the principles of efficiency getting score on 8,19 (good). The research showed the index governance ofRiau Island Province value to be 5.60 (enough),0.10 lower than the national average index whose value is 5.70. Riau Island province'sindex value placed it at the 24th positionout of the 32 provinces. The bureaucratic Arena'slowest index was of 2.34 (bad), which is earned in the transparency category. This index is big gap from the national average of 5.04 (enough). The highest index was obtained by the Economic Community Arena, at 5.50 (enough). If compared to the national average, all arenas in the province hada lower index of the principle of transparency(IGI, 2013).

It is interesting to look at the configuration of the local politics in term of political parties winningthe general elections in 2009. Of the 45 seats in the local parliament, the Democrat Party and Golkar Party each gained control of 15.56% (7 seats), the PDI-P and the PKS have each 13,33% (6 seats) and 11.11% (5 seats), the PPP has 4 seats (8,89%), Partai Indonesia Baru has 3 seats (6,67%), and the Hanura get two seats or 4.44%), and the other five parties have 1 seat each. In other words, province of Riau Islands controlled politically by the PartaiDemokrat, the Golkar party, PDI-P and PKS. Meanwhile in the executive wing, the Governor and Deputy Governor, Mohammad Respationo and Sani Soerya, candidacy of the PDI-P won local election vote after getting 23.2% of the vote from 621,847 votes in the 2010's election.

In some local governments of Indonesia, a bigger representation in local parliament means more political power in controlling their local budget. Thus, the point to be emphasized is that the decentralization process in Indonesia has largely been hijacked by special interests that have little to gain from local a governance characterized by greater accountability to local communities, transparency, and the like (Hadiz, 2011). Therefore if we analyze e-procurement implementation as a policy execution, it is better to explore theoretical frameworks rather than technical ones (technocratic one) in terms of information technology as such. Vedi R Hadiz (2011) tried to look at the weaknesses of neo-liberal approach in decentralization policy.Hadiz (2011) moreover said that decentralization is unlikely to produce the kind of technocratic 'good' governance idealized in the neo-institutionalist scheme. This is most vividly illustrated by the rise of political gangsters and thugs — perhaps the ultimate in predators — in the leadership of parties, parliaments and executive bodies at the local level (Hadiz).

As mentioned in the before, the capture theory tries to look at elite behavior regarding scarce economic resources. Pearsson (2010) mentioned that researchers and policy makers now seem to agree that the failure of contemporary anti-corruption reforms are not so much the result of a lack of resources as of the absence of stakeholders –including government, civil society, non-governmental organizations, and ordinary citizens – willingto act as "principals" and, as such, to enforce existing laws and policies (Riley 1998; Robinson 1998;Kpundeh 1998, 2004; Johnston 2005; Amundsen 2006; World Bank 1994).Early studies took a pessimistic view of the potential of collective action to overcome problems, such as elite capture. As a prevention policy to curb corruption, in e-procurement implementation, all actors could have roles as a principals. The public, for example, play both an agents and the principals in term of oversight control.

Referring to collective action theory done by Mansur Olson, the analysis on the dynamic relations amongst actors is very interesting to address. Mancur Olson (1965) theorized that groups of individuals with a shared interest will not act on behalf of that interest. Rather, he posits that since 'members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common group objectives unless there is coercion to force them to do so' (Olson, 1965: 2). According to Olson, the problem is that there is no incentive for all to share the cost of collective action. Instead, he argues, each member of the group prefers that another member pay the entire cost — hence the 'free rider' problem. Olson does concede, however, that small groups are not only quantitatively,but qualitatively different from large groups, and that with smaller groups the free rider problem is reduced. Moreover, Ostrom's(1990) work takes issue with the conceptualization of the free rider problem and other difficulties associated with collective action. Where previous analysts had limited the possible responses to the

collective action quandary to either control by a strong central government or regulation through a system of private property rights, Ostrom presents a third option: individuals can have agency to create their own agreements, institutions and systems of management, which have the capacity to change over time and prevent tragic outcomes. Through a series of case studies of small-scale common pool resources (CPRs), Ostrom examines how in various contexts a 'group of principals who are in an interdependent situation can organize and govern themselves to obtain continuing joint benefits when all face temptations to free-ride, shirk, or otherwise act opportunistically' (Ostrom, 1990: 29).

By using the Ostrom's model, it may assume that the local politicians, bureaucrats, and private companies in Riau Provinces organizes and govern themselves to obtain benefit from "e-procurement" regulation. They did preparation from the budget planning until project procurement announcement in site.

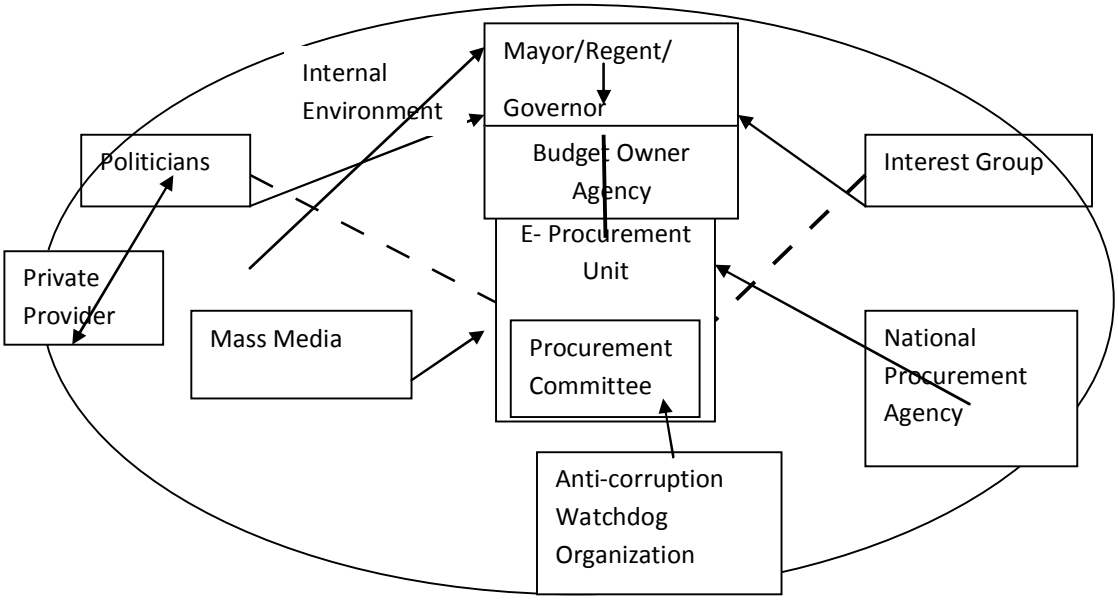

Fig. 5.Political Configuration in Local Procurement

In Fig 5 above, there are some actors who have an interest in local procurement. Mayor/regent/governor is the key person who has authority to use the local budget. Under his/her leadership, she/he proposesa budget draft to the local council in order to get the council's approval. The budget debate in the local parliament normally occurs from August to November every year. In the discussion of the budget in the local parliamentoccur politician budget proposed by members of parliament to executive partners. If it is not approved by the executive, the parliament will not approve the proposed budget plan. The process of corruption at the budget planning level is publicly known in the Riau Islands province.TheGetuk, a corruption watchdog organization in Tanjungpinang, found the seminal case as follows:

> *There were two local parliament members, Rizky Faisal of Golkar Party and Iskandarsyah of PKS party, who were alleged to be middlemen in the Education Agency and the Health Agency, Riau Island Province. Therefore, the e-procurement mechanism was only a justification to meet the procurement rule. YusriSabri, aanti corruption activist saidthat he had strong evidence to prove his allegation. He added moreover that those agencies, private company providers, and local parliament members collaborated to arrange a billion rupiah project. Even YusriSabri said that a private company had provided Rp. 600 million for success fee of Rp. 13 billion's project (Batamcom, 2013/October 16).*

Another investigation done by Suparman, the Head of Local Transparency Organization, Batam City, promulgates the other case. This case shows how the e-procurement process is designed to guarantee a winning candidate through violation of procurement procedure.

A maintenance road project in Batamwas announced through e-procurement site. But, the bidding document on October 13 2012 had never been done by the procurement committee. Bidding evaluation occurred on 30 October 2012,the same day thebidding document was opened. The bidding document could not be downloaded or uploaded through the e-procurement site. And the objection period from 2 November to 7 November 2013 was unavailable. Suparman alleged that PT. Paten Agriutama as a project winner being get early agreement with procurement committee to win the project. In the project implementation, the road cement did meet the required specification of cement quality.(2013/February 2, Bakin News).

Those cases revealed that e-procurement in remote areas and the far-reaching control of NPA is facing transparency problem. Through public goods and services purchases via e-procurement, all actors organize themselves in order to obtain their interests. This will, however, alsoimply a simplification of the opportunities for corruption (Soreide, 2002). Again, confidential information is an attractive commodity, in many cases worth a significant bribe (Soreide, 2002).Pearsson, et al (2010) also found in Kenya and Uganda that the collective action problem of corruption is not as one sided as it may look. Even actors higher up in the hierarchy – such as low-level public officials and political elites – seem to feel a pressure to passively support the corrupt game rather than actively taking part in it for their own private, absolute gain.

Business deals in e-procurement may be happened in which a private company tries to lobby budget officials and procurement officials and get political support from politicians in local parliament. In turn, they lobby procurement committees in order to win the bidding.(Interviewer P.3. Nov/2013/14)

The absence of standardized monitoring also occurs at auctions in the case of Batam Agency in Riau Islands. In the case of auctions that occur, the decisions of the committee are not obeyed by the owner's budget official, so the auction was won by one of the companies which was not running. There are indications that the desired second-order functions from official commitments. Corporate winners then asks the claim to owner official but is not addressed properly. In this process it can be said that there is no system of control and monitoring from the NPA, so there are many cases of irregularities in the procurement of goods and services via e-procurement which are not resolved.

However, the survey of the Anti-Corruption Agency(KPK) on corruption prevention revealed that the role of the community in the prevention of corruption is quite low. Certainly, every government unit generally delivers the media and complaint mechanisms in optimizing customer satisfaction. Of 1125 respondents, only 45.8 percent of service users know there is a media complaint, while 10.2% of the service users had complained (KPK, 2012). Moreover, the respondents were asked about their actions on corruption, which revealed that there is variation in answers as follows:

a. Not doing anything without any reasons.
b. They felt that they did not have authority to do and they felt useless.
c. Not doing anything and just to pray.
d. They did not do anything, because they did not care. They said there was some institutions that dealing with.
e. They did not do anything, because there were too few of them.
f. They did know what to do and to whom to report.

Conclusion

The fact above shows that some anti-corruption policies under the principal-agency theory is a failure of reforms or are also not so much the result of a lack of resources as of the absence of stakeholders –including government, civil society, non-governmental organizations, and ordinary citizens – willing to act as "principals" and, as such, enforce existing laws and policies (Pearsson, 2010; Riley 1998; Robinson 1998;Kpundeh 1998, 2004; Johnston 2005; Amundsen 2006; World Bank 1994). In decentralized procurement of Indonesia, public participation is very important to prevent the misuse of local budgets. Decentralization may be particularly successful where there is local capacity and high levels of participation (Hanna, 2011). Decentralization can reduce corruption by bringing the accountability for program implementation to the effectiveness of anti-corruption policy.

Lack of public knowledge on the procurement of goods and services is likely a common fact and even some of those who are still considered the winners of an unworthy company are commonly accepted. A survey conducted by the Anti-Corruption Agency on public perception of corruption found interesting findings especially with regard to goods and services procurement. Responding to the whether the act of public officials as procurement

committee inwinning the their closed-family company despite the offer not the best, 20.9% (in a 2010 survey) and decrease to 16.7% (in a 2011 survey) of respondents said this was not corruption and 6.58% (in a 2010 survey) and increased to 11.2% (in a 2011 survey) of them did not know (KPK, 2011).

Similarly another finding on gratification in the procurement process shows the degree of public awareness on corruption. In both the 2010 and the 2011 survey there were 52.5% and 52.7% of respondents which said the gratification in procurement process was not corruption. 32.2% of respondent said they did know of any corruption or *conflict ofinterest* in procurement process (KPK, 2011).

Having more information on different perspectives on public awareness on potential corruption in procurement process, we can summarize a differentstory, in either a success story or a failure story of e-procurement to prevent corruption. Certainly, Riau Island Province, the newest local government, the public participation and public capability in public policy is still developing and immature. This province needs time to build its community capacity.

A crucial question arising is whether, there been significant sub-national variation in the e-procurement implementation, we are witnessing the better performance of local government in doing e-procurement project. By observing three cases of procurement above, we try to build the theory of joint project between central government and local government is built on a simple model of local implementer, which I capture as a repeated prisoner's dilemma game between a central government as an enforcement agent and the implementer (Osborne, 2000). The presence of a strong local government policy to e-procurement will not in itself secure implementation. In other word, the local government needs to secure support from the central. However, if the central government remains indiscipline then prosecution is much less likely and dependent on the extent of local government discipline.

		Central Government Discipline		
		Weak	Strong	None
Local Government Obedience	Weak	Unlikely	Possible	NA
	Strong	Possible	Likely	NA
	None	NA	NA	NA

Fig. 6. Theory

Figure 6.captures this game with static payoffs; it shows that in a one-shot game both players will obey and receive but that they could neglect. This simplifies the dynamic formation of local government and central government alliances by assuming that the game is played. Each of government can either discipline or neglect in term of President Instruction on e-procurement implementation. If central government do discipline way then local government prefer to neglect.

		Implementer	
		Discipline	Neglect
Enforcer	Discipline	2,2	0,3
	Ambivalent	3,0	1,1

Fig 7. Prisoner Dilemma

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Extra-Judicial Complaints Review: First Experiences of the Dutch Public Procurement Experts Committee

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1. Context, objective and structure of this paper

Article 4.27 of the Dutch Public Procurement Act 2012 ('Aanbestedingswet') provides for a statutory basis for extra-judicial public procurement complaints review by an independent body: The Public Procurement Experts Committee ('Commissie van Aanbestedingsexperts'), hereinafter referred to as: 'the Committee'. This statutory-based extra-judicial complaints review board does not substitute the system of judicial review of public procurement cases by the ordinary courts. Neither does it prevent a complainant from bringing his complaint before the court at any stage of the public procurement process, whether or not the Committee has been addressed beforehand. The main objective of offering extra-judicial complaints review is to lower the threshold for complainants – particularly SME's – who encounter difficulties in bringing their complaints before the ordinary courts. This objective is mainly achieved by issuing – free of charge – non-binding opinions on complaints. In addition, rather than being an *alternative* to judicial review by the ordinary courts, complaints review by the Committee is intended as a means to deal with public procurement complaints in a satisfactory manner *before* court proceedings, if any, are started.

The Committee became operational on 1 April 2013, when the Dutch Public Procurement Act 2012 entered into effect. The Committee received 70 complaints in the period from 1 April 2013 to 1 March 2014. The objective of this paper is to provide the reader with information on the purpose (*paragraph 2*) and the organisation (*paragraph 3*) of the Committee, and to explain the design of the Committee's complaints procedure (*paragraph 4*). In doing so, we will share the experiences we have gained with this procedure so far, by providing data regarding complaints that were received and processed by the Committee. We will conclude this paper by making some observations regarding the practical impact the Committee seems to have had in its first year of existence (*paragraph 5*).

2. Purpose and tasks of the Public Procurement Experts Committee

The Dutch Public Procurement Act 2012 is the result of a long-term debate on the objectives and the content of public procurement regulation in the Netherlands. The most important goal the Act brings about is that it implements in Dutch law – again – the European Directives on public procurement, including the Remedies Directives [1]. In addition to this, the Act aims to achieve additional policy goals that – although related to the domain of *public procurement* as such (*e.g.* the specific protection of economic interests of SME's; the promotion of socially responsible public procurement; and the promotion of professional public procurement) – have not been the object of stringent European public procurement *regulation* (yet). One of these additional policy goals involves the elimination of some disadvantages of the system of judicial review of public procurement cases by the ordinary courts.

As is the case in many Member States of the European Union, starting legal proceedings before the ordinary courts is a costly and time-consuming business in the Netherlands. This particularly goes for SME's operating in the market of public contracts. It is true that the procedures offered by the Dutch ordinary courts for reviewing the award of public contracts – as well as the legal remedies available to economic operators for breaches of EU public procurement law – are in accordance with the Remedies Directives. However, as has been pointed out by the Minister of Economic Affairs in his explanation to the draft of the Public Procurement Act 2012, particularly SME's are reluctant to start legal proceedings in matters of public procurement [2]. The reason why SME's experience a threshold in this respect can be found in the high costs incurred when starting a lawsuit, and the well-known saying: "don't bite the hand that feeds you". The primary consequence of this threshold is that an SME will frequently experience a double dissatisfaction: it will not only see the public contract slip through its fingers, but at the same time sense the frustration of not being able to make its complaints heard in a satisfactory manner. The Minister has argued that the further consequence of this is that the relevant contracting authorities will not be informed on complaints, if any, hence preventing them to improve their tendering procedures in the future [3].

Having regard to the aforesaid policy reasons, art. 4.27 of the Dutch Public Procurement Act 2012 now imposes a duty upon the Minister to establish a Public Procurement Experts Committee for the purpose of independent complaints review in matters of public procurement. Prior to the coming into force of the Act, a working group under the aegis of the Ministry of Economic Affairs was instructed to advise on the purpose and tasks of the Committee and to elaborate on the practical and regulatory conditions under which the Committee would have to carry out its tasks. Having regard to the final report of the working group [4], art. 2(1) of the Decree of the Minister establishing the Public Procurement Experts Committee, hereinafter referred to as: 'the Decree' [5], specifies the purpose of the Committee as: 'to contribute to the resolution of public procurement complaints by processing them quickly, carefully, and accessibly. The Committee is also intended to improve the level of professionalism of public procurement practices and to bring about a learning effect at enterprises, contracting authorities, and special sector companies' [6]. Given this purpose, the Committee's duties are twofold: mediating between parties involved in complaints; and issuing non-binding opinions on complaints [7].

3. Organisation and status of the Public Procurement Experts Committee

Art. 3(1) of the Decree states that the Committee shall consist of *at least* a Chair and a Vice-Chair. At present, the Committee consists of a Chair and a Vice-Chair *only* [8] who have been appointed by the Minister for a maximum term of two years and may be re-appointed [9].

In order to properly perform its duties, the Committee may engage the services of one or more experts who shall be independent and unbiased in performing their work for the Committee. [10]. Shortly after the Committee was established, 90 experts were selected by the Chair and Vice-Chair on the basis of their special expertise, knowledge, or experience of a specific area of public procurement law or government procurement, or their technical proficiency relating to a specific sector [11]. The names of these experts, as well as the information regarding their professional background, has been published on the Committee's website [12]. The experts are subject to a Code of Conduct with regard to the work they perform for the Committee [13]. If the Committee involves experts in the processing of a complaint, it must inform the parties of the experts' names. In appointing experts to process a specific complaint, the Committee may only appoint experts who have declared themselves to be independent and unbiased in accordance with the Code of Conduct [14].

Whether a complaint will be processed by the Chair and/or the Vice-Chair alone or by the Chair and/or the Vice-Chair with the support of one ore more experts, is a decision to be taken by the Committee [15]. Until now, the Chair and the Vice-Chair have dealt with most of the complaints – 70 in total – submitted to the Committee. In 5 instances, the Committee has engaged the services of an expert. In one case, even two experts were engaged.

The office and records of the Committee are physically located in the buildings of the Ministry of Economic Affairs. Apart from this practical relationship between the Committee and the Ministry, there is also a formal relationship between them. Firstly, the Minister has the power to appoint, re-appoint, suspend and dismiss the members of the Committee [16]. Secondly, he finances the Committee's budget (€ 210.000 *per annum*), provides the Committee with an administrative office, and puts staff at its disposal [17]. Thirdly, before 1 March of each year, the Committee has to publish a report accounting for its work of the previous year and must send a copy of this annual report to the Minister. In addition to this, the Minister will evaluate the Committee's performance before 1 April 2015 [18].

Despite this formal relationship between the Minister and the Committee, art. 3(2) of the Decree warrants the autonomy of the Committee by stating that its members shall be independent and unbiased. The independency of

the Committee is also reflected by the fact that the administrative office that has been put at its disposal by the Minister, is to report exclusively to the Committee [19].

4. The Public Procurement Experts Committee's complaints procedure

4.1 Preliminary remarks

The Committee has established its practices in writing in the Rules of the Public Procurement Experts Committee (hereinafter referred to as: 'the Rules') pursuant to art. 6(1) of the Decree [20]. The Rules deal with matters regarding the Committee's competence (*paragraph 4.2*); the definition of complainants (*paragraph 4.3*); the submission of a complaint (*paragraph 4.4*); the Committee's refusal to process a complaint (*paragraph 4.5*); the choice between mediation and the issuing of an opinion (*paragraph 4.6*); the procedure of processing a complaint as such (*paragraph 4.7*); and the interference between a complaint procedure before the Committee and legal proceedings before the ordinary courts (*paragraph 4.8*). We will elaborate on these matters below.

4.2 When is the Committee competent to process a complaint?

As was explained above, the primary objective of the Committee is to contribute to the resolution of public procurement complaints. Art. 1(c) of both the Decree and the Rules defines the notion of 'complaint' as: 'an expression of dissatisfaction by one party regarding the acts or omissions of another, to the extent that such acts or omissions fall within the scope of the Dutch Public Procurement Act 2012'. Practice shows that this definition particularly prevents the Committee from dealing with a complaint if it relates to a tendering procedure for which a contract notice was published *before* 1 April 2013.

Complaints submitted in total	70
Complaints outside the scope of art. 1(c) of the Rules	7

Figure 1: Complaints beyond the Committee's competence.

As regards the substance of complaints that have been submitted so far, the definition of art. 1(c) of the Decree and of the Rules hardly limits the Committee's competence. Figure 2 shows the variety of 'acts' and 'omissions' the Committee has considered – albeit implicitly – to 'fall within the scope of the Dutch Public Procurement Act 2012' for reason that they amounted to a violation of a provision under the Act. These 'acts' and 'omissions' have been retrieved from the complaint forms (*see paragraph 4.4*) that the Committee received in all 70 complaints that have been submitted between 1 April 2013 and 1 March 2014. Hence the figure includes 'acts' and 'omissions' that occurred in complaints *outside* the scope of the definition – referred to in art. 1(c) of the Decree and the Rules – for reason that they involve a tendering procedure for which a contract notice was published *before* 1 April 2013.

'Acts' and 'omissions' referred to in 70 complaint forms	106
Choice of tendering procedure	7
Choice of economic operators in the event of negotiated contract without prior notification	4
Formulation and/or application of exclusion criteria	6
Formulation and/or application of criteria regarding economic and financial standing and regarding technical capacity and ability	9
Formulation and/or application of technical specifications and conditions of contract	16
Formulation of contract award criteria	22
Contract award decisions	11
Setting and/or application of time limits	7
Inadequate communication contracting authority	11
Improper behaviour contracting's authority's advisor	3
Other	10

Figure 2: Substance of complaints.

Although it has not been tested yet, an 'act' or 'omission' is considered *not* to fall within the scope of the Dutch Public Procurement Act 2012 if it would merely involve the breach of a public contract that was concluded following a public tendering procedure. An 'act' or 'omission' would, however, meet the definition of art. 1(c) if it would amount to a substantial modification of a public contract without a new procurement procedure [21]. A general restriction follows from art. 8(4) of the Rules, stating that complaints may not be submitted regarding the *general* public procurement policy of a contracting authority. The Committee has not yet tested this provision.

4.3 Who can complain?

According to art. 7(1) of the Rules, complaints may be submitted by (a) economic operators that wish to acquire public contracts; (b) industry organisations that act on behalf of one or more economic operators; and (c) contracting authorities. So far, the Committee did not have to deal with complaints submitted by contracting authorities yet. This seems to confirm the criticism that was expressed towards the preliminary report of the working group when it advised the Minister of Economic Affairs to include the possibility for contracting authorities to submit a complaint. Critics argued that contracting authorities do not feel the need to be able to submit complaints.

The bulk of all 70 complaints received by the Committee so far have all been submitted by economic operators that wish to obtain public contracts: (potential) candidates and (potential) tenderers. Practice shows (see figure 3) that a vast majority of complainants are SME's.

In a few cases, complaints were submitted by industry organisations acting on behalf of one or more economic operators that wish to acquire public contracts. Submitting a complaint via an industry organisation allows an individual economic operator to remain anonymous and to circumvent the restriction of art. 7(3) of the Rules that prohibits the submission of anonymous complaints.

According to art. 7(2) of the Rules, subcontractors may submit complaints regarding contracting authorities, but they cannot submit complaints that relate to their relationship with a principal contractor. They idea is that the former type of complaints can in principle involve the 'act' or 'omission' of a contracting authority falling within the scope of the Dutch Public Procurement Act 2012, whereas the latter type of complaints can not. However, the Committee has not yet tested this provision either.

Complaints submitted by individual economic operators Complaints submitted by industry organisations	66 4
Complaints submitted by SME's Complaints submitted by major economic operators	60 10

Figure 3: Complainants.

4.4 How to submit a complaint?

Submitting a claim to the Committee is not only free of charge [22], it also requires hardly any formalities to be fulfilled. According to art. 9(1) of the Rules, a complainant must submit his complaint electronically using the complaint form on the Committee's website [23]. The complaint must contain the name and address of both the complainant and the contracting authority, as well as a description of the complaint. The complainant must clearly state what the complaint regards. He must also substantiate the complaint and include all of the relevant information needed to adequately process the complaint. The form must also include a statement by the complainant concerning a remedy for the complaint.

In the event that a complaint is not sufficiently substantiated and documented, the Committee may refuse to process it [24]. The Committee's opinions on complaints that have published so far, however, show that the Committee does not hold on very strongly to these requirements. The Committee is willing to objectively interpret the statement of complaint in order to establish what 'act' or 'omission' within the scope of the Dutch Public Procurement Act 2012 is the object of the complaint. By the same token, the Committee does not require that the complaint must be substantiated by referring to specific provisions of the aforesaid Act or to any by-laws pursuant to the Act. Instead, the Committee will try to establish itself the relevant provisions that might have been violated by the contracting authority, having regard to the (interpreted) statement of complaint. Only in the – rare – cases

where the statement of complaint is too vague, or where it has been documented in an insufficient manner, the Committee will regard the aforesaid requirements not to be fulfilled. And even in such cases the Committee has shown a willingness to allow the complainant to restate his complaint and/or to furnish additional documents.

4.5 When will the Committee refuse to process a complaint?

Even if a complaint fits the definition of art. 1(c) and meets the requirements stated in art. 9(1) *jo.* 8(2) of the Rules, the Committee can decide not to process it. It can do so either for general policy reasons or for specific reasons related to the non-observance of formal requirements in the case at hand.

According to art. 10(1)(b) of the Rules, the Committee may refuse to process a complaint if processing the complaint would not sufficiently serve to fulfil the Committee's purpose. This may also be the case if the expectation arises that there will be few or no opportunities for the Committee to fulfil its role. Art. 10(1)(c) of the Rules states that the Committee may decide not to process a complaint if the relative relevance the Chair attributes to the complaint submitted makes processing it impossible, given the number of complaints already being processed. Up till now, the Committee has not refused to process a complaint on the basis of any of these policy grounds.

According to art. 8(3) *jo.* art. 10(1)(a) of the Rules the Committee must refuse to process a complaint regarding which judicial proceedings have been instituted or a court has rendered a judgment. So far it has not occurred that the Committee had to decide to refuse a claim for the aforesaid reason. It has occurred, however, that a complainant decided to start a lawsuit regarding an issue that was already the object of a complaint submitted to the Committee. Art. 11(6) and 11(7) of the Rules deal with this particular situation, which we will discuss in *paragraph 4.8* below. This is not a situation where the Committee can *refuse* to process the complaint (at all). Instead, the Committee will have to *suspend* its processing.

The Committee's practice shows that the most important ground for refusal is to be found in art. 8(1) *jo.* 10(1)(a) of the Rules: a complaint will only be processed if the contracting authority has been notified of the complaint and has been afforded a reasonable term to respond to it. The obvious reason for this rule is to be found in the purpose of the Committee described in *paragraph 2* above. A quick, careful, and accessible resolution of public procurement complaints, in combination with an improvement of the level of professionalism of public procurement practices, can only be achieved by encouraging the parties involved to discuss and resolve the complaint as much as possible between them. Resolving a complaint either by the Committee or by an ordinary court is considered to be *ultimum remedium*. The corollary of this is that the complainant must be stimulated to notify the contracting authority of the complaint prior to submitting the claim to the Committee.

Figure 4 shows that a considerable amount of complaints within the Committee's competence have been refused for reason that the complainant did either not notify the contracting authority or – in cases where he did so notify – did not afford the contracting authority a reasonable term to respond to the complaint. These complaints include the ones that involve a situation not adequately dealt with by the Rules. In the situation we have in mind, the complainant has sent a notification to the contracting authority of – what he subjectively regards to be – a complaint in the sense of art. 1(c) of the Rules. Having regard to the context and the wording of the notification, however, the contracting authority did not have to perceive the notification – from an objective point of view – as a complaint in the aforesaid meaning. What has happened in such situations is that the complainant, in his notification to the contracting authority, did indeed express certain concerns regarding the tendering procedure at hand but failed to make sufficiently clear that this expression of concerns was to be understood as a notification of complaint in the meaning of art. 8(1) of the Rules. In situations like these, the Commission has refused to process a complaint on several occasions.

Complaints submitted in total *and* within the Committee's competence (see figure 1)	63
Complaints refused: no prior notification to contracting authority at all	10
Complaints refused: contracting authority is not afforded reasonable time to respond	6

Figure 4: Refused complaints.

When the Committee refuses to process a complaint, the complainant must be notified of the reasons for this refusal pursuant to art. 10(2) of the Rules. In this notification the Committee always advises the complainant to remove the reason for refusal by (adequately) notifying the contracting authority of the complaint and by affording the latter a reasonable term to respond to the complaint. In addition the Committee advises the complainant to resubmit the complaint, in the event that the aforesaid notification does not result in a resolution of the complaint between the parties. Complainants have followed this advise on several occasions, which eventually resulted in the resubmission of 8 complaints. These complaints have been taken into account in figure 6 (see *paragraph 4.7*) in the calculation of the 'Complaints submitted in total *and* within the competence of the Committee (see figure 1) *including* complaints resubmitted after refusal (see figure 4)'.

4.6 Mediation or issuing an opinion?

Once the Committee has decided that it will process a complaint, it will have to take a further decision pursuant to art. 11(3) of the Rules whether to first attempt to mediate between the parties in order to reach an amicable solution, or to start immediate proceedings to issue a (non-binding) opinion. So far, the Committee has tried to mediate between the parties only once. In the end, that particular complaint had to be processed by issuing an opinion after all, given that the mediation attempt turned out not to be fruitful. The reason why the Committee has been very reluctant to process complaints by means of mediation, up till now, is that many complaints require a rather technical application of rules of public procurement law to the facts of the case. The parties involved do not have differing opinions as to these facts: they differ as to the interpretation of the rules and/or their implication of the facts that lie between them. In addition to this, starting a bilateral mediation in the middle of a (EU) regulated public tendering procedure might provoke complaints – or even lawsuits – from other economic operators having an interest in the said procedure. To cut a long story short: the Committee picks its occasions to try mediation as a means of processing public procurement complaints very carefully.

4.7 How to process a complaint?

If the Committee decides to process a complaint for the purpose of issuing an opinion, the complainant and the contracting authority will be notified of that fact and provided with a brief description of how the rest of the procedure will be carried out [25]. The Rules do not provide for detailed provisions as to how to carry out the procedure. Instead the Rules instruct the Committee to apply well-known general principles. Firstly, the Committee must observe the principle of hearing both sides of an argument when processing a complaint [26]. Secondly, the Committee must strive to strike an adequate balance between processing speed and the due care that must be exercised throughout the procedure [27].

The Committee's standard application of the first principle is that the complaint form, as well as additional documents to which the complainant refers in that form, is sent to the contracting authority together with a request to respond to the complaint. Upon receipt of that response, the Committee will send it to the complainant together with any documents to which the contracting authority has referred in his response. Up till now, it has not occurred that the Committee has requested the complainant to react on the contracting authority's response. It occasionally occurs, however, that the Committee requests additional information, either from the complainant or from the contracting authority pursuant to art. 11(4) of the Rules. Art. 9(2) of the Rules requires the Committee to treat all information exchanged as confidential, to the extent that the information contains any confidential or commercially sensitive materials.

At this stage of the procedure, and based on the information it has gathered, the Committee will render an opinion in writing regarding whether or to what extent the complaint is justified [28]. The Committee will do so in accordance with the second principle mentioned above: it will strike a balance between processing speed and due care. In practice, this means that the Committee will give priority to complaints where time is of the essence. These complaints involve tendering procedures where time limits – either for the receipt of requests to participate or for the receipt of tenders – have not expired yet. The same goes for complaints involving tendering procedures where the standstill period required under art. 2a(2) of Directive 2007/66/EC, for the purpose of effective review of a contract award decision taken by the contracting authority, has not expired yet. The Committee's track record so far shows that if time is of the essence, complaints are processed faster than in the absence of pressing time limits.

Complaints processing days when time is of the essence	30
Complaints processing days when time is not of the essence	72

Figure 5: Complaints processing days.

Once the Committee has rendered an opinion, it has to notify both the complainant and the contracting authority of it [29]. In all cases in which there are possibilities for doing so, the Committee must provide the parties with recommendations for resolving the complaint in addition to the opinion rendered [30].

Since its first year of existence, the Committee has issued an opinion in 26 complaints, comprising a total of 51 issues to be resolved. The Committee was still processing 11 complaints per 1 March 2014, whereas 7 complaints were suspended and 3 others withdrawn at that date.

Complaints submitted in total *and* within the competence of the Committee (see figure 1) *including* complaints resubmitted after refusal (see figure 4) *Total amount of issues*	47 *102*
Opinions on complaints rendered in favour of complainant *Total amount of issues* Opinions on complaints rendered in favour of contracting authority *Total amount of issues* Opinions on complaints rendered partly in favour of complainant and partly in favour of contracting authority *Total amount of issues in favour of complainant* *Total amount of issues in favour of contracting authority*	9 *11* 4 *6* 13 *15* *19*
Complaints still being processed Processing of complaint suspended by Committee: complainant has started interlocutory proceedings in ordinary court Processing of complaint suspended by Committee: contracting authority is investigating tendering procedure Complaints withdrawn	11 4 3 3

Figure 6: Opinions rendered.

According to art. 12(2) of the Rules, opinions and recommendations issued by the Committee are not binding. Hence it is for the contracting authority to decide whether and to what extent he will observe the Committee's findings. As will be explained in *paragraph 4.8* below, however, a complainant can use the Committee's opinion, rendered in his favour, as an argument for legal proceedings against the contracting authority before the ordinary courts.

According to art. 13(1) and (2) of the Rules, the Committee may publish opinions on complaints, either in full or in an abridged version of the original opinion, in anonymised form on its website. With the parties' consent, the opinion may be published including the names of the parties involved [31]. The Committee may forego publishing an opinion if, in the Chair's view, it will not improve the professionalism of, and/or offer a sufficient learning effect to, contracting authorities and/or economic operators [32]. On 1 March 2014, 13 out of 26 opinions rendered were published in full on the Committee's website [33]. The reason why not all 26 opinions were published at that date has to do with the fact that contracting authorities are reluctant to give their consent for publication in the event that the tendering procedure has not ended yet [34].

4.8 Public Procurement Experts Committee or ordinary court?

One of the key decisions an economic operator will need to make in the event of a public procurement complaint is whether to submit that complaint to the Committee or to start interlocutory proceedings before an ordinary court. Both options have their advantages and disadvantages. First of all, having a complaint processed by the Committee is free of charge. In addition, legal costs can be reduced given that the procedure does not require the involvement of qualified lawyers. Costs can further be reduced for reason that the procedure hardly requires any formalities to be fulfilled. Another advantage involves the swift handling of complaints by the Committee, although practice shows

that ordinary courts are also able to deal with complaints in interlocutory proceedings in a relative short period of time. Finally, what a court in interlocutory proceedings *cannot* do – contrary to the Committee – is to call upon experts, and to provide the parties in the case at hand, as well as practice at large, with recommendations. The obvious disadvantage of submitting a complaint to the Committee is that it cannot give a binding ruling, unlike an ordinary court [35]. Another disadvantage – to be discussed further below – is that the submission of a complaint to the Committee does not suspend the tendering procedure that is the object of the complaint [36].

A complainant cannot have the best of both worlds by starting parallel proceedings before the Committee and an ordinary court at the same time. As was explained in *paragraph 4.5*, art. 8(3) *jo.* art. 10(1)(a) of the Rules compel the Committee to refuse to deal with a complaint regarding which judicial proceedings have been instituted or a court has rendered a judgment. By the same token, if a complainant requests an ordinary court for an interlocutory ruling in a matter that is already the object of a complaint submitted to the Committee, the parties must immediately notify the Committee thereof pursuant to art. 11(6) of the Rules. According to art. 11(7) of the Rues, the Committee will then have to suspend its processing of the complaint until the court has rendered judgment (see also figure 6). Contrary to this provision, the Committee may decide to resume processing a complaint if a request to that effect is jointly submitted by both parties or the adjudicating court, provided that the court suspends its hearing of the matter. The Committee has, however, not gained experience with this procedure yet.

What a complainant *can* do, is to submit a complaint to the Committee in order to obtain an opinion in his favour, whereupon he can request an interlocutory ruling from an ordinary court and support that request by referring to the Committee's opinion. Practice shows, however, that complaints are often submitted during the standstill period required under art. 2a(2) of Directive 2007/66/EC.

Complaints submitted in total	70
Restricted procedure: contract notice is published, time limit for the receipt of requests to participate has not expired	4
Restricted procedure: selection of candidates completed, time limit for the receipt of tenders has not expired	12
Open procedure: contract notice is published, time limit for the receipt of tenders has not expired	13
Time limit for receipt of tenders has expired, notice of award decision has not been communicated	6
Notice of award decision has been communicated, standstill period has not expired	22
Standstill period has expired, contract has not been concluded	1
Contract has been concluded	4
Contract has been prolonged without prior tendering procedure	4
Other	2

Figure 7: Time of complaint submission.

According to art. 9(3) of the Rules the submission of a complaint to the Committee does not suspend the tendering procedure that is the object of the complaint. This puts a high pressure on the complainant's decision whether or not to submit the complaint to the Committee. The obvious risk is that – in the event the Committee turns out not to be able to process the complaint before the expiry of a relevant time limit, particularly the standstill period referred to above – the complainant will be barred from requesting an interlocutory ruling from the court. Practice shows that this risk has already caused complainants in 4 complaints (see figure 6) to abort the procedure before the Committee and to bring their complaints before the ordinary courts. On the other hand, in order to control the aforesaid risk, the Committee can request the contracting authority to postpone taking a decision in the tendering procedure until the Committee has issued its opinion [37]. Although contracting authorities are not obliged to comply with this request, the Committee's experience is that they are prepared to do so in half of the relevant amount of complaints.

5. Conclusion: some observations on the impact of the Public Procurement Experts Committee

To conclude this paper we would like to share a few observations regarding the practical impact of the Committee during its first year of existence. These observations are based on our day-to-day experience as Chair (Janssen), Vice-Chair (Jansen) and Secretary (Muntz-Beekhuis) of the Committee. We would like to emphasize that these

observations are not based on a thorough impact assessment. Such an assessment will have to be carried out by others, on the Ministry of Economic Affairs behalf, early 2015 [38].

First of all, we can see that the amount of cases dealing with issues under the new Public Procurement Act 2012, and brought before the ordinary courts since 1 April 2013, is relatively small – approximately 25 cases [39] – in comparison to the amount of complaints that have been submitted to the Committee since that date – *i.e.* 70 complaints – involving similar issues under the new Act. It is too premature to draw conclusions on the relation, if any, between the substantial decrease of the amount of cases brought before the ordinary courts – in comparison to previous years, when it was not unusual to have 150 to 200 published interlocutory rulings *per annum* – and the mere existence of the Committee. There may be other reasons for that decrease, such as the fact that both economic operators and contracting authorities are still in the process of getting familiar with public procurement procedures under the new Act. Nevertheless, the difference between the total amount of complaints submitted to the Committee, in comparison to the amount brought before the ordinary courts, is quite amazing.

Secondly, economic operators inform us that they are sometimes successful in managing to accomplish that contracting authorities – simply by mentioning that they contemplate the submission of a complaint to the Committee – reconsider their tendering procedures. We also occasionally experience that contracting authorities show a willingness to do so once a complaint has been submitted to the Committee. By the same token, we received feedback from some contracting authorities, explaining that they decided to follow the Committee's opinion that was issued in favour of the complainant.

Thirdly, and finally, we have recently experienced that a complainant, following the issuing of a favourable opinion by the Committee, decided to start interlocutory proceedings for reason that the contracting authority refused to act upon the opinion issued. Subsequently, the court ruled in favour of the complainant by following the line of reasoning it found in the Committee's opinion [40].

References

[1] Directive 89/665/EEC, Directive 92/13/EEC, and Directive 2007/66/EC.

[2] *Kamerstukken II,* 2009/10, 32 440, nr. 3, p. 10.

[3] *Kamerstukken II,* 2009/10, 32 440, nr. 3, p. 11.

[4] See the final report (in Dutch) of 7 March 2013 on Processing complaints in public procurement (*Klachtafhandeling bij aanbesteden*), published at http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2013/03/07/klachtafhandeling-bij-aanbesteden.html

[5] Decree Establishing the Public Procurement Experts Committee (*Instellingsbesluit Commissie van Aanbestedingsexperts*) of 4 March 2013, Stcrt. 2013, 6182 (hereinafter referred to as: 'the Decree').

[6] Art. 2(1) of the Decree. See also art. 2(1) of the Rules of the Public Procurement Experts Committee (hereinafter referred to as: 'the Rules').

[7] Art. 2(2) of the Decree. See also art. 2(2) of the Rules.

[8] Art. 7 of the Decree. See also http://www.commissievanaanbestedingsexperts.nl/over-ons/voorzitter-vicevoorzitter

[9] Art. 3(4) of the Decree.

[10] Art. 4(1) and 4(3) of the Decree. See also art. 4(1) and 4(3) of the Rules.

[11] Art. 4(2) of the Decree. See also art. 4(2) of the Rules.

[12] http://www.commissievanaanbestedingsexperts.nl/over-ons/experts-overzicht. See also Art. 4(4) of the Decree and art. 4(5) of the Rules.

[13] Art. 4(4) of the Rules.

[14] Art. 11(2) of the Rules.

[15] Art. 11(1) of the Rules.

[16]Art. 3(4) and 3(5) of the Decree.

[17]Art. 5(1) and 5(3) of the Decree. See also art. 5(1) of the Rules.

[18]Art. 8 of the Decree. See also art. 8 of the Rules.

[19]Art. 5(2) of the Decree.

[20]http://www.commissievanaanbestedingsexperts.nl/indienen-klacht/reglement-commissie-van-aanbestedingsexperts The Rules have been translated in English and are available from the authors upon request.

[21]Compare art. 72 of the Directive of the European Parliament and of the Council on public procurement, COM 2011(0896) adopted on 15 January 2014.

[22]Art. 9(4) of the Rules.

[23]http://www.commissievanaanbestedingsexperts.nl/indienen-klacht/klacht-indienen

[24]Art. 8(2) *jo.* art. 10(1)(a) of the Rules.

[25]Art. 10(3) of the Rules.

[26]Art. 11(5) of the Rules.

[27]Art. 10(3) of the Rules.

[28]Art. 12(1) of the Rules.

[29]Art. 12(3) of the Rules.

[30]Art. 12(1) of the Rules.

[31]Art. 13(4) of the Rules.

[32]Art. 13(3) of the Rules.

[33]https://www.commissievanaanbestedingsexperts.nl/klachten-die-zijn-afgehandeld-door-middel-van-een-advies

[34]Art. 13(4) of the Rules.

[35]Art. 12(2) of the Rules.

[36]Art. 9(3) of the Rules.

[37]Art. 9(3) of the Rules.

[38]Art. 8(2) of the Decree. See also art. 14(2) of the Rules.

[39]Calculation based on the amount of rulings in interlocutory proceedings, published at 1 March 2014 on the Dutch national court case website www.rechtspraak.nl.

[40]District Court of Gelderland 24 January 2014, ECLI:NL:RBGEL:2014:454 (BAM/Gemeente Zevenaar).

ISLAMIC SHARIA PERSPECTIVE AND LEGISTLATION OF TRADE AND PROCUREMENT COMPARING WITH THE CONVENTIONAL RULES

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Abstract

Trade is one of the most important and the oldest transactions in the history. Countries cannot be strong and dependent, unless their economic, social and political relations are very good. Trade process have played an active role not only in the movement of money and goods, but also in the convergence civilizations, cultures, religions among peoples and nations, where the primary role has centred on the flow of goods, capital, human resources and services. This paper tends to focus on comparison of trade under Arabic legislation and to compare it to that of western based economies. A large number of companies make use of the concept of for commercial purposes. The Islamic religion defines Sharia law that governs the financial transactions .The law prohibits the acceptance of specific interest and fees on money lending and the application or Riba denotes that any excess monetary consideration should be done with due consideration. The study here thus tries to correlate different factors affecting the adoption of e-procurement by businesses that follow these Islamic laws of banking and trade.

This papers hopes to begin the debate that there are differences in trade, and as such differences in procurement and thus differences in e-procurement when a seen through alternative lens. The paper aims to illustrate the characteristics of e-commerce from an Islamic economic perspective. The current study also explains the meaning of regular and electronic commerce in the Islamic world view by comparing this with the western culture and its modern perspectives.

Knowledge has shown over a period of one thousand years that the Islamic religion provides us a whole range of systems for social life that differs to current western democracies. There are systems for transactions, family, economy and other life issues even including war system .

This paper will discuss background to trade procurement and e-procurement from an Islamic point of view. This paper will begin a discussion of how to define procurement from a cultural viewpoint in the same way that it has been defined from an economic point of view.

Keywords: *Public procurement, Islamic trade perspective, E-procurement, E-commerce*

Background

The Quranic verses and hadith are clear on the explanation of every single thing belongs to the daily life issues of people not only Muslims. Allah said in the Quran in Surratt Alanam '38' [1] (*We have neglected nothing in the Book*), which means all thing has been explained in the Quran. The gifts of Allah Almighty make Islamic legislation valid for every time and place. No problem either small or large has been ignored or not explained within the Quaran. Although this seems to counter any discussion of the pragmatics of economic life, within this process lies the foundation of economic life for 1.6 billion people in the world today.

The rules of Islamic legislation are based on one of the four assets which are: The Quran first, secondly the vitae 'Sunnah' of the Prophet Muhammad (Allah blesses him and gives him peace), thirdly any consensus of scholars and scientists, fourthly and lastly the measurement which will be more explained later.

According to [2] , Islamic economics is "the 'economic system,' on the one hand, and 'the economic analysis thereof,' on the other" (p. 52). Trade is one of the most important and the oldest transactions in the history and its importance has increased in recent centuries as exemplified in figure1.

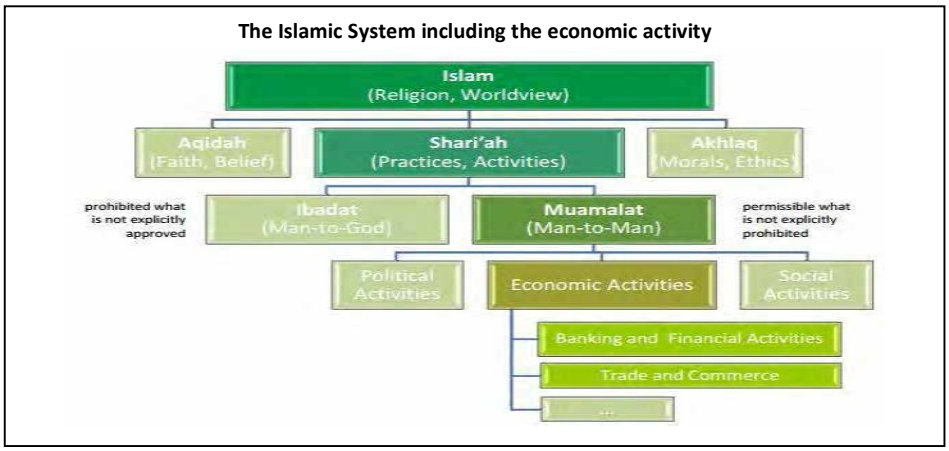

Fig. 1. The Islamic System Source: [3]

In starting this paper we are hoping to explore the question

What are the implications/opportunities when applying Islamic rules and legislation of e-commerce?

The question has arisen due to the development of legislation in a number of countries dealing with the Islamic banking systems. In December 2012 at Dublin City University said [3] that there are many current debates of applied Islamic banking in European countries, including Ireland. He also explained that the debate about the application of the term 'Riba' (interest in Islamic banking) may be an influencing factor in the development of e-commerce.

Experience has proven a long ago through balancing of the conditions of communities and cities that the Islamic religion provides us a whole range of systems for virtuous life suitable for each country and time. In other words according to [4]

> ''Although there is a great deal that is common among the worldviews of most major religions of the world, particularly those of Islam, Christianity, and Judaism, it may not be possible to say the same about the worldviews of Islamic and conventional economics. The worldviews of both disciplines are radically different''.

If Islam can be shown to be capable of providing fruitful vision to illuminate the modern conscience, then all mankind and not only Muslims, have a stake in the outcome [5].

The trade process played an important role in the convergence between civilizations, cultures, religions among peoples and nations, where the primary role has centred on the flow of goods, capital, human resources and services role also in the movement of money and goods. Trade has passed through several stages.

Firstly trade in antiquity has been known since primitive families decided to allocate their daily activities rather than focusing on the same activity. Some of them focused on farming and getting crops, and some of them focused on fishing for the purpose of obtaining meat and so on. Groupings developed their skills in one of these areas and traded surplus production to another family and what later became known as barter was in many ways the first acts of procurement. Then slowly evolved with development of time by widgets and increasing of people until the time of the ancient Egyptians, Phoenicians, Babylonians and Greeks who exchanged trade across the Mediterranean, but these exchanges were limited [6].

Secondly trade in the Islamic state**,** in that time, Muslims were very careful to create large and competitive markets only in their home and neighbouring countries. The Prophet Muhammad was Keen to travel his companions in the corners of the earth to search for their livelihood, to be active in trade. This led to the traits being associated with Islamic trade such as sincerity and honesty. Islamic trade also helped and gave safe passage for traders from a non-Muslims background. Muslims used the normal roads and camels due to lack of knowledge of the sea until the government of Caliph Muawiya (661-679 AD). He was the first to use marine routes for trading. Muslim countries increased many commercial activities between themselves India and China. The trade included silk fabric, Damascus weapons, Cordoba skins and Fragrances from Africa to a wide range of countries [6].

A large number of Muslim and Arab scholars made valuable contributions over the Islamic centuries, including Abu Yusuf (d. 798), al-Mas'udi (d. 957), al-Mawardi (d. 1058), Ibn Hazm (d. 1064), al-Sarakhsi (d.1090), al-Tusi (d. 1093), al-Ghazali (d. 1111), al-Dimashqi (d. after 1175), Ibn Rushd (d. 1198), Ibn Taymiyyah (d. 1328), Ibn al-Ukhuwwah (d. 1329), Ibn al-Qayyim (d.1350), al-Shatibi (d. 1388), Ibn Khaldun (d. 1406), al-Maqrizi (d. 1442), al-Dawwani (d.1501), and Shah Waliyullah (d. 1762),. For a brief account of some of these contributions, such as [15], [18] , [16] , and Siddiqi (1992). These described the economics of trade and the rules of buying (procurement) and selling

Thirdly after the collapse of Roman civilization, Europe experienced a dark that lasted many centuries as a result of the chaos and conflict has had a negative impact on European trade, where there was a limited role in the exchange and agriculture with the exception of some exchanges between Italy and the Islamic countries. In European Renaissance and after industrial revolutions technology played a prominent role in the flow of wealth and the complexity of needs than the impact on the trade routes of domestic and international, increased sophisticated to our time and that began to emerge in which the beginning of change for trade traditional to electronic commerce [7].

One of the positive characteristic is for the **'**society**'** by increasing the competitive capability and products because of the easy access to customer centres, also for the international delivery and it is unique for the quick dealing between the buyers and suppler. E-commerce in theory should create more job positions in the small and medium business SMEs which can become connected with the global markets. The e-commerce also gives transparency for a better and easier service. It helps the investors and businessmen doing their job by applying the e-government in the society [8].

Ecommerce is said to make significant cost savings through structural changes in productivity and delivery of government information and services [9]. Procurement defined in terms of activities such as, the purchasing function, storage, transportation, quality control and invoicing. The use of technology at each of these stages is in essence the "e"ing of trade [10].

There are however many materials are not allowed in certain countries, such as sex movies, weapons and others that harmful to the humans in particular those within the Islamic influence. Therefore it has not been taken into account when advertising and promotion of these goods the boundaries of religion and traditions that exist within conservative societies. The use and permanent development of Internet services requires in many cases a well-developed infrastructure and large financial commitments. The issue for many Islamic states is that there are well developed trade systems built up over one thousand years, but that the infrastructures that are being imposed are western in orientation and are odds with the current and traditional systems.

Islamic businessmen must ensure that they strictly followed the Islamic principles of conducting business. It is important that there should be clarity in communication avoid interest (Riba') and ensure that all the pillars of Islamic contract are met [11]. Mainly the (Riba) is forbidden from Allah as per hadith of prophet Muhammad said *'God has permitted trading and forbidden usury'*.

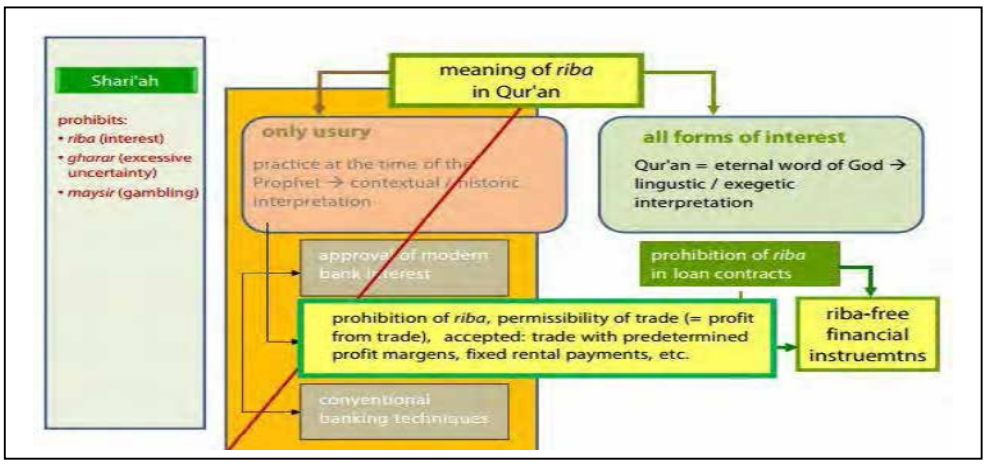

Fig. 2. Disputes about the Meaning of Riba [14]

The debate that may ensue is that although e-commerce is well developed in western society there is a risk that the transactions themselves may not meet the strict Islamic principles. This is especially through where large public contracts are at stake.

There is also a perception that non-Muslims traders are interested in gaining money regardless of the way of getting it even if harm many others from society, but the Islamic legitimacy urges to do trading under a limitation of morality. This is particularly well debated in public since the financial troubles of 2008.

The Islam religion encourages trade as per in the Quran in Ayah 20,Surrt Almozaml [1] "*The others were searching in the earth seeking the grace from Allah*'' which means searching in the earth to walk and navigate from place to place for the purpose of trading with all nations.

In addition prophet Muhammad (Allah bless him and give him peace) inspire his friends to be in a good manner in trading as he said in hadith (*Any Muslim trader who well behave, loyalty, honesty will be with prophets and saints and martyrs on the Day of Resurrection*). Likewise Ayah 29, Surratt Annesaa in Quran said [1] (*O ye who believe, do not consume your monies among yourselves unjustly*).

Basically, all legislation including the Islamic rules as according to the Quran [1], are seen to be supporting the interest of people in all times and places.

However in many cases the transactions between people are only for money. These transactions may in many case interest rights with others such as the transmission of property compensation and contract. The basis in Islamic law is the economic interest (Almaslaha) which endorses the principle known as fetching benefits. There is an issue that this may be not addressed through current western commerce.

There is no doubt that Islamic legislation based on taking into account the public interest (Almaslaha) in all human transactions because its purpose is to bring happiness and freedom [12]. The measurement of all the interest is derived from the alliance human nature and considered this custom innate measure of humanitarian law and the basis of creating. This interest is one of the most important foundations in the e-commerce applications. According to Alshatebi,

> ''one of the famous scholar in Islamic legislation', cautioned the need for caution and taken it to consider the consequences and business avoid prohibits where text that an asset sale is necessary and prevent prejudice, ignorance and prevent the sale of zero except of impurities''

All these topics would not be legitimate transactions unless based on forensic evidence which in Islamic are Al Qur'an Alkarem, the vitae of the Prophet

The Ijma' is (consensus of imams or scholars) and the last, fourth, and accurate one is the 'qiyas' analogy because not everyone can make it. The following figure 3 shows the fundamental resources of Islamic legislations, more than thousand four hundred years ago.

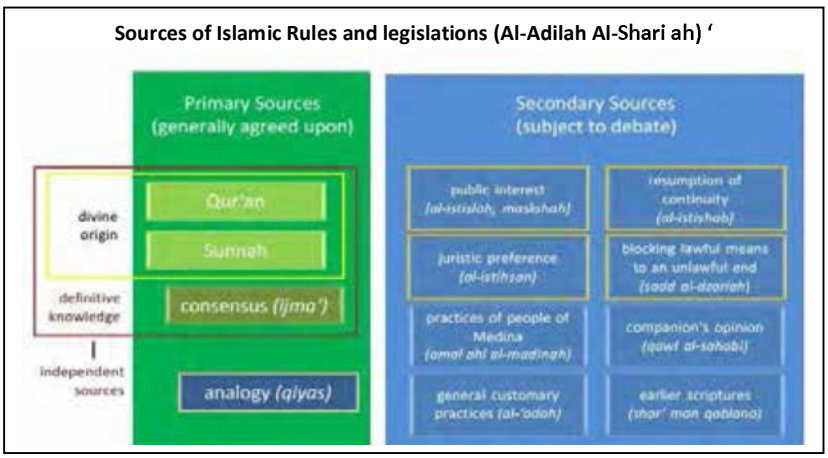

Fig. 3. Sources of Islamic Rules and legislations [14]

The legislative and cultural systems differ between Western economies and Islam both in how to they place and in their terms and provisions or even their effects. For example, some

The two forms of Riba in 'Buyu' trading in the Islamic context; is 'Riba-al-nasiah' or Ribawi Financial claims based on fixed and pre-determined return such as conventional interest rates. The other form is 'Riba-al-fadl' involves unfair trade, market manipulation or trade under duress [17]. Riba Duyun which is lending or borrowing has also two forms, one is Riba 'Al-Qard' or credit that is known as interest on loans in recent age, and the other one is Riba Al-Jahiliyyah that is known as interest on loans in late age. (See figure.4 below, classification of Riba)

Muslim societies are a living example of the debilitating effects of interest-based finance. The most sadly reflected in just about every country in the world, with daily-ballooning interest payments to the World Bank, International Monetary Fund, and other industrialized nations' agencies; notably, at low rates of interest. For

those who claim that interest-based development actually works this way is relevant 'Debt is an efficient tool. It ensures access to other peoples' raw materials and infrastructure on the cheapest possible terms. The price inflation and increased market instability, the usual concomitants of a highly leveraged economy, affect poor and rich countries are similar. Additionally, poorer, debtor countries typically find their currencies devaluing as they struggle to repay loans in their creditor's currency. The realistic alternative to debt is the one already employed to good use in successful Western economies: equity, upon which most Islamic finance products are based. In comparison to debt, equity provides the most resilient and least damaging source of capital for individuals, businesses, and economies. Besides the ravaging macroeconomic effects of debt, problems also appear at the level of the individual.

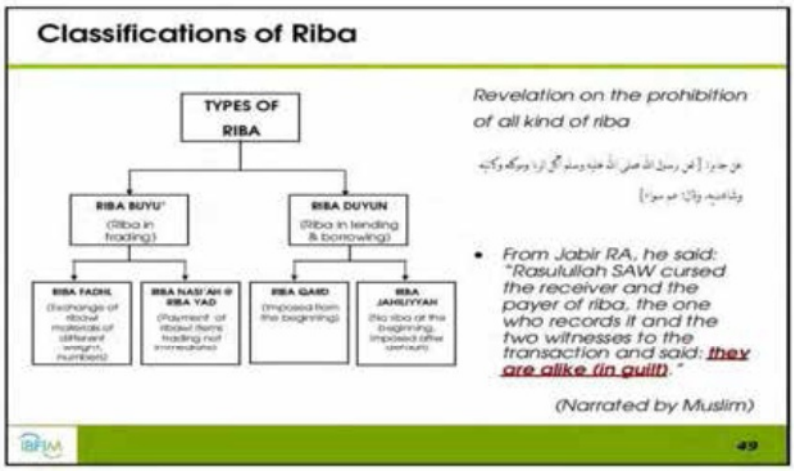

Fig.4. classification of Riba source: [13]

There are legitimate grounds a person involved in trade should possess, one of those legal ethics and controls. Islamic moral concept gives primary importance to moral values, human brotherhood, and socio-economic justice and does not rely primarily on either the state or the market for realizing its vision [4].

In theory, obviously, Islam stands for maximum transparency and is against corruption, but apparently quite a number of Muslim countries suffer from widespread corruption or "cronyism" as a milder form, often found in Asia and Africa. Some of e-procurement campaigns in Europe (addressing the public sector), the basic aim was not only to reduce transaction costs and to gain speed, but also and in particular to gain more transparency. The rationale behind the transparency objective was not so much a better informed choice of the buyer, but also and maybe even foremost to prevent illegal practices. Illegal practices could mean cartels on the supply side and corruption on the demand side.

It is not sure whether it is a matter of culture, but there seems to be a significant difference between Northern and Southern countries in Europe with regard to such practices – how widespread they are and how accepted or tolerated they are by the authorities and by the "average man on the street". If, for example, corruption is widespread, not too many executives, managers, civil servants etc. would really be interested in much more effective transparency. This may be a "cultural" factor for the acceptance and introduction e-procurement techniques in the semi-public companies and other agencies. There are several institutions that deal with corruption globally, and country rankings with regard to the degree of corruption are available from the web.

Conclusion

This study has provided an overview of the role of trade, commerce and e-commerce plays from both the Islamic and western perspective. This paper should be viewed as providing an introduction, literature and historical of trade and thus e-commerce (purchasing is the basic transaction that underpins commerce). It should not be viewed as a complete or comprehensive documentation of all research activity within this area but rather an opening of an area that needs much research and investigation in the future. This would have been an insurmountable task to accomplish given the volume of academic publications in this field. There are many topics and subtopics within the research field that could be the subject matter of a single paper. This study is the first step in a research project aimed at developing a framework for Islamic e-procurement, particularly in relation to the e-procurement in Europe or the western countries in general. The focus of the paper was not be on the acquisition and installation of e-procurement systems, but rather on how the Islamic legitimacy of e-procurement can be used, strategically, to support all activities and ensure success by avoid deal with Al Riba.

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Room for improvement the effectiveness of the Remedies system for public contracts: Lessons learned from the Spanish case

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ABSTRACT The Public Procurement Directives are intended to ensure that public contracts are awarded in an open, fair and transparent manner, allowing economic operators to compete for business on an equal basis, and Contracting Authorities and Entities to obtain the best quality and price for their purchases. Specific remedy procedures were introduced to make sure there were effective and rapid procedures for review of contracts falling within the scope of those Directives. These review and remedy provisions were thoroughly revised with effect from the end of 2009. Some earlier provisions which had not proved useful were abolished and several new provisions introduced. A standstill provision gave bidders time to ask for a review before a contract was signed. National review bodies were given the power to render contracts "ineffective" under certain conditions. These review bodies were also allowed to impose alternative penalties such as fines or cutting short the duration of a contract. Four years later it is time to analyse if those revised review and remedies provisions have been effective, specially the pre-contractual Remedies because of its potential to prevent or quickly correct infringements of the Public Procurement Directives, before it is too late. Spain has introduced into public procurement Law a new remedies procedure in 2010. The main features of this new procedure are a standstill period of 15 days after the conclusion of the contract, and the creation of independent Authorities to solve the complaints. These features have improved the effectiveness of the Remedies system from the previous experience, but it is also true that its strong points may be better exploited, to increase the effectiveness of the Remedies system for public contracts and convert it, perhaps, into the paradigm of a new model for the protection of "good contract administration". There is still room for improvement regarding the active legitimization for the access to this special procedure, the only "facultative" nature of the remedies procedure, the "fragmented" nature of the system, only available for contracts falling within the scope of those Directives, the control over the execution phase of the contracts (i.e. modifications), or the independence of the review Authorities and its splintering at regional and local levels.

THE REVIEW PROCEDURE IN THE FIELD OF PUBLIC PROCUREMENT

Best known, among the sources of European Law on public procurement, are the European Directives that coordinate the procurement procedures for the award of public contracts (2004/17/EC and 2004/18/EC, both of 31 March 2004, relating to contracts in special sectors and to public works, public services and public supply contracts, respectively).[1] Less well-known but no less important are Council Directives 89/665/EEC of 21 December 1989, and 92/13/EEC of 25 February 1992, which have the respective purposes of coordinating the laws, regulations, and administrative provisions that refer to the application of review procedures for the award of public works, public services and public supply contracts as well as the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. In reality, Directives 89/665/EEC and 92/13/EEC aim to guarantee the effective application of Directives 2004/18/EC and 2004/17/EC, such that they may be said to constitute the guarantee of their efficacy.[2]

However, the prescriptions of the "review" Directives have only very recently been introduced in the Spanish legal order. We may recall that Law 13/1995 of 18 May, on the contracts of Public Administrations,[3] even though it amended Spanish domestic legislation in line with the legal order of the European community, did not incorporate the content of Directives 89/665/EEC and 92/13/EEC. This decision was justified – as indicated in its Explanatory Memorandum–

"because the review material that constitutes its objective lies outside the contract legislation of the Public Administrations. With regard to the first (Directive 89/665/EC) moreover, because [the Spanish] Legal Order, in different procedural rules in force, already complies with its content".[4] This could hardly be further from the truth. The administrative and judicial review procedures offered contractors certain mechanisms that were formally acceptable for them to defend their interests and rights. However, this formal guarantee was not real.[5] The European Court of Justice (ECJ) made this clear when, in its Judgment of 3 April 2008 (Case C-444/06), it convicted the Kingdom of Spain precisely because it understood that Spain had not fulfilled its obligations under Directive 89/665/EEC "by failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion".

Perhaps in anticipation of that conviction, the Explanatory Memorandum of Law 30/2007 of 30 October on Public Sector Contracts (LCSP)[6] changed its tone with regard to the need to transpose Directive 89/665/EEC, and introduced a novel *special administrative review in the field of procurement* (Article 37) and some circumstances for nullity (Article 32). In parallel, Law 31/2007 of 30 October, on contracts in the water, energy, transport, and telecommunications sectors (LCSE)[7] regulated a system of claims in the contract awards procedures in the water, energy, transport, and telecommunications sectors (Articles 101 and following). However, following the approval of both these legal instruments (let us remember, on 30 October 2007), another regulation (Directive 2007/66/EC of 11 December) was approved, which introduced substantial modifications to Directives 89/665/EEC and 92/13/EEC. Sufficient evidence of the need to incorporate the contents of the new European regulation is found in Law 34/2010 of 5 August, in modification of Laws 30/2007 of 30 October, on Public Sector Contracts, Law 31/2007 of 30 October, on contract procedures in the water, energy, transport and telecommunications sectors, and Law 29/1998 of 13 July, in regulation of the Contentious-Administrative Judicial Authority for the amendment of the two latter laws in compliance with community regulations.[8] Law 34/2010 introduced some important modifications in the regulation of the special review procedure – which are maintained in the present regulation of that special review contained in arts. 40 and following of Royal Decree 3/2011, in approval of the Amended Text on the Law of Public Sector Contracts – (TRLCSP),[9] among which we can highlight its facultative nature (the initial regulation was considered preclusive), and the empowerment of an independent, specialized body to decide on the remedy (initially, the body empowered to conduct the review was the same contracting authority that had issued the legal acts that were placed under review).[10]

The final result is a complex system of "contract and administrative justice", in which we find mechanisms of administrative protection that function even before completion of the contract.[11] These pre-contractual mechanisms include, for example, the special administrative review in the field of public sector contracts and a prior claim in the field of contract procedures in the water, energy, transport and telecommunications sectors. Following the conclusion of the contract, further administrative protection is ensured by means of the question of nullity, without overlooking the possibility of recourse to jurisdictional routes, as an alternative to these special administrative routes, or subsequently, once the aforementioned reviews and claims have been remedied. As we shall have the chance to see, this system has meant undoubtable improvements, in order to guarantee formal and substantive remedies for the public contracts awards procedure, but it is also true that its strong points may be better exploited, to convert it, perhaps, into the paradigm of a new model for the protection of "good contract administration".

FUNDAMENTAL ASPECTS OF THE SYSTEM OF CONTRACT REVIEWS.

From the standpoint of fundamental law, the special system of protection in the field of procurement is characterized by the necessary specialization of the members of that body, and by the independence of the review body that decides on the legal remedies in the review procedures, and other claims and questions of nullity that are brought before it.

Within the constitutional system of the separation of powers, the Central Administrative Tribunal for Contractual Appeals [*Tribunal Administrativo Central de Recursos Contractuales*] was established to hear applications for review procedures in relation to the General Administration of the State [*Administración General del Estado*].[12] This state body is composed of a President and two spokespersons appointed by the Council of Ministers for a minimum period of six years, during which they can not be removed from office (except on the grounds of resignation, serious breach of duty, or disqualification). In addition to their status as civil servants, a career specialization over a period of at least fifteen years is required to serve on the Central Administrative Tribunal, preferably in the field of Administrative Law directly related to public contracts.

Various Autonomous Regions have created their own review bodies with similar attributes, some of a collegial nature (Madrid, Aragon, Castilla y León, Navarre and Catalonia), others with a single-member (Andalusia and the Basque Country). Other Autonomous Regions, however, have preferred to empower the Central Administrative Tribunal to decide on the remedies in the review procedures of their contracts, subscribing to the relevant convention to that effect. Up until the present, this "conventional" solution has been chosen by the Autonomous Regions of Extremadura, La Rioja, Castilla La Mancha, Murcia, Cantabria, the Balearic Islands, Comunidad Valenciana, Galicia, Asturias, and the autonomous cities of Melilla and Ceuta. These Autonomous Regions pay out 500 euros for the first twenty reviews that are referred to the Central Administrative Tribunal, and 350 for each subsequent review, as compensation for the costs involved in the review procedure. In addition, if documents are included in a co-official language in the contract dossier that has to be submitted to the *Tribunal Administrativo Central*, the Autonomous Region should attach the Spanish translation of those documents to the originals and assume the cost of their translation.

The Seventh Interim Provision [*Disposición Transitoria Séptima*] (TRLCSP) (that arises from the second interim provision of Law 34/2010) applies to those Autonomous Regions that have not chosen any of the above options (the Canary Islands). It specifies a subsidiary regime that empowers the review bodies previously in charge of establishing the legal remedies to continue performing this duty, a circumstance, for some authors, which means that the review loses its full potential.[13] In other words, the "spirit" of Article 37.4 LCSP lives on in its original wording that maintains the competence of the contracting authority to settle the dispute (when it is a question of contracts from a Public Administration), or the head of the department, body, entity or organism to which the contracting body is attached or which oversees it in some way (if not a Public Administration or similar). However, under such circumstances, the procedure for conducting reviews will follow the provisions of Articles 42 to 48 TRLCSP. In addition, when the decisions are not totally in favour of a review, or, if they are in favour, when other interested parties instead of the appellant would have appeared in the proceedings, the decisions will not be executory until they are firm sentences or, if subject to appeal, until the competent jurisdictional body has taken a decision on their suspension.

The regulations of the Spanish autonomous regions also define legal remedies applicable to review procedures, questions of nullity and prior claims that are lodged in the context of local municipal corporations. In this regard, two different models may be noted. The first may be qualified as "unified", (followed by the Community of Madrid, Aragon, and Castile-Leon), in which the competence of the regional body that is established to take decisions on reviews, questions of nullity, and prior claims, also extends to similar decisions in relation to contracts with the respective local municipal authorities. In other words, the body in the autonomous region exercises a "*vis atractiva concursus*" over the applications for review that are lodged in relation to the contracts of local municipal authorities. This "unified" model is also followed in autonomous regions that have empowered the Central Administrative Tribunal for Contractual Appeals [*Tribunal Administrativo Central de Recursos Contractuales*] with the legal remedies for review applications that are lodged in relation to regional government contracts. The same conventions contemplate the competence of that review body to remedy the applications for review that are lodged in relation to the actions of local municipal corporations, the headquarters of which are within the territory of the relevant autonomous region. The second model could be described as a "multiple" model, in that it permits local entities to create their own independent bodies to settle reviews (a model followed in the Basque Country, Andalusia, and Catalonia[14]). However, among the Autonomous Regions that have opted for this second model, we can in turn distinguish between those that establish the subsidiary competence of the regional review body in the case of local entities that have not established their own review bodies (Basque Country and Catalonia) and one other autonomous region (Andalusia) where no subsidiary competence of the regional review body is foreseen, but where competence for the legal remedy may be assigned to the regional review body, once an appropriate convention has been signed.

THE PROTECTION OF "GOOD ADMINISTRATION" IN THE FIELD OF PUBLIC PROCUREMENT: ACTIVE LEGITIMIZATION IN THE SPECIAL REVIEW PROCEDURE

The establishment of special review procedures in the field of public procurement responds to the need to ensure that the contracting authorities comply with community legislation and its principles during the tenderer selection phase and the award of the contract. At stake is the right of all citizens to good administration or a guarantee of "good practice" (cf. Article 41 of the Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02), which, within contract procedure, principally arises in the form of impartial and fair treatment of the tenderers, the reasoning behind the decisions that the contracting bodies take in relation to tenderers, and compensation for any loss that might have been suffered.

The instruments that makes this right to good administration effective is precisely the system of specific reviews in the field of public procurement, hence the need to guarantee access to the interested parties. This question of legitimization or access to review procedures in the field of public procurement is considered in Article 1.3 of Directive 89/665/EEC. According to this provision, "The Member States shall ensure that… the review procedures are available, …, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement."[15] The Directive therefore establishes a rule of minimum standards for access to review procedures, which define the "interest in obtaining" the contract and that covers "at least" the tenderers. However, further parties may not be excluded from the review procedure if, apart from having a particular interest in obtaining the contract, they invoke the right to good administration of the procedure on the basis of other interests. It is precisely that interpretation which may be drawn from the TRLCSP, which accepts the imposition of the special review procedure in contracting matters for "any legal or natural person whose legitimate rights and interests may have been harmed or who may have been affected by the decisions subject to review"[16] (Cf. Article 42). That connection with a right or a legitimate interest is nevertheless an obstacle to understanding that we face a "public action" which can protect any interest in terms of the mere legality of the procedures.

Precisely in view of that "broad legitimacy", the bodies that oversee the good administration of the awards procedures for public contracts have opened review procedures, not only following an application from the tenderers, but also from professional and business associations (all entities with no interest in obtaining the contracts under review), on the understanding that those entities held legitimate collective interests that merit the protection of the special review procedure and when their scope of action and their areas of activity coincide with those in the contract. On some occasions, an application for review has even been accepted from a tenderer whose social purpose lies outside the activities specified in the contract, which would in principle represent *a priori* a reason to disqualify it from tendering for the contract. For instance, in a case in which a set of administrative terms and conditions were contested, the Administrative Tribunal of Public Procurement [*Tribunal Administrativo de Contratación Pública*] of the Autonomous Region of Madrid did not consider the prior circumstances sufficient to reject the legitimacy of the appellant, given that the appellant's incapacity to contract could always change (if the case arose) through the formation of a UTE (temporary business consortium solely for the duration of the public contract) with another tenderer (Resolution No. 20/2011). In short, the interest in obtaining the contract is not defined as a condition for access to the review procedures, as the system of protection is of a subjective scope that goes beyond the tenderers.

The question of access or active legitimization of the appellant was the subject of an interesting and unique debate at the time of the case that prompted the Decision of the Administrative Tribunal for Public Procurement [*Tribunal Administrativo de Contratos Públicos*] of Aragon, No. 44/2012 of 9 October 2012. The case concerned a challenge to a set of specific administrative clauses in the terms and conditions approved by the local municipal council of Zaragoza. This procedural question, concerning the legitimization of the appellant, was the subject of specific treatment by the Tribunal, which also included the dissenting opinion of one of the Tribunal members – a circumstance unheard of, in as much as, at present, it is the only Decision of these special review bodies that includes a dissenting opinion, contrary to the majority view of the other members of the tribunal. In that particular opinion, as well as understanding that the specific interest of the councillor in the action was groundless, as "whatever legitimate rights or interests have been harmed or may be affected by the Administrative Terms and Conditions" could not be discerned, the author of the dissenting opinion questioned whether the special review procedure in contracting matters may be used by someone "outside the business world, the market of public contracting". The majority opinion among the members of the Tribunal was, however, contrary to the above thesis and acknowledged the legitimization of the councillor, on the understanding that the link between the procedural question of legitimization and the right to effective legal protection countered any restrictive interpretation of its scope. That legitimacy of the special review procedure in relation to the aforementioned contracting matters was therefore accepted.[17] The doctrine set down by the review body in the autonomous region of Aragon is, in this case, perfectly aligned with the jurisprudence of the Constitutional Court and the Supreme Court, which, in the specific case of councillors, has established that "an *ex-lege* legitimacy exists that specifically applies, by reason of the representative mandate from their electors, to elected members of the corresponding municipal corporations, to challenge the acts or the actions of those councils that contravene the legal order. It is not a question of legitimization based on an abstract interest in legality, but of a legitimization that arises directly from the status of elected representative that the councillors of a municipal corporation hold, insofar as may concern us here, which is turned into a concrete interest – one may even speak of an obligation – to oversee its proper administration, as the sole means, in turn, of achieving the satisfaction of the needs and aspirations of the neighbourhood community".[18] This is why "councillors, because of their status as members – not of a body – of the Council, which is, in turn, the body of governance and administration of the municipality… are legitimised to challenge

the action of the local municipal corporation to which they belong, because of the specific interest held in the proper conduct of that corporation on the basis of their representative mandate".[19]

This special legitimization of the members of local councils, according to the Tribunal in Aragon, is not only applicable through the judicial contentious-administrative channel, but also through the administrative channel (both ordinary and special), and therefore "legitimization in the special review procedure in the field of procurement may not be separated from what is recognized for ordinary appeals, for reconsideration and contested decisions, as they share the same administrative nature, but of course with stronger guarantees for swift and independent action, so that the possible legal infractions that occur in the selection procedures will meet with an effective response."[20]

The case presented above is only one example of how "good administration" may be safeguarded through the system of review procedures in the field of public procurement. In short, as pointed out by *Ponce Solé*, strengthening the principles of objectivity and impartiality with regard to administrative action, which implies guaranteed access to a system of safeguards provided by an independent body, is a way of reinforcing the obligations of good administration and, therefore, of contributing to the administrative decisions under review in the area of special review procedures and nullity actions, so that they strengthen the other principles of good administration (interdiction of arbitrary decisions, efficiency, and economy in the management of public funds) and properly safeguard, in brief, the right of the affected parties to good administration. After all, guaranteeing good administration is one way of preventing bad administration.[21]

SOME ASPECTS THAT WEAKEN THE EFFECTIVENESS OF THE PRE-CONTRACTUAL PROTECTION SYSTEM

Regardless of its strengths, which will be analysed in the final section, the present system of special review procedures in the field of public procurement still offers room for improvement as regards its effectiveness as a system for the protection of "good administration".

A system of facultative reviews

An initial possibility for the improvement of the system would be to give the "star" instrument, the special review procedure in the field of public procurement, an obligatory rather than a facultative nature. That facultative nature was introduced through Law 34/2010 that amended Law 30/2007, surprising even the Council of State that scrutinized the draft law in its pre-legislative phase.[22]

The facultative nature of the special review procedure in the field of procurement implies the *de facto* opening of a two review routes (special administrative and judicial), in order to contest decisions taken within the contracting procedure. Such a circumstance, which appears acceptable from the Community point of view, is not free from practical difficulties, taking into account the procedural differences related to the choice between the administrative and the judicial route. From these procedural differences, the one that is most clearly noticeable is the maximum period for the submission of applications: in the case of the special review in the field of public procurement, 15 working days, calculated in different ways according to the act that is contested; and, in the case of seeking a contentious-administrative review procedure, two months from the day following the publication of the provision that is contested or from the day following notification or publication of the act that ends the administrative proceedings, were they necessary.

Likewise, differences may be observed with regard to the effects that arise, under European law, from seeking the review procedure (whatever its class). Thus, first of all, Article 1.1. para. 3 of Directive 89/665/EEC (following its modification by Directive 2007/66/EC) refers to the guarantee that the decisions adopted by the contracting authorities may be reviewed in an effective manner and, in particular, as swiftly as possible, under the conditions established in Articles 2 to 2f of the Directive, when those decisions may have infringed Community Law in the field of public procurement or the national rules transposing that regulation. Effectiveness is also required with respect to the execution of decisions adopted in the review procedures (Article 2.8 of the Directive). Evidence of those guarantees relating to the effectiveness and the swiftness of the review procedure may found in Article 2.3 of Directive 89/665/EEC (also following its modification by Directive 2007/66/EC), which provides for the automatic suspension of the procedure when the review of the contract award decision is sought (Member States will guarantee that the contracting authority can not conclude the contract), and ensures that the suspension remains in place until the review

body has ruled on the application for interim measures or on the matter under review. This guarantee to suspend the procedure is specifically included for the case in which the special review of contracting matters is sought to contest contract awards, but the automatic nature of the suspension is not so clear in the contentious-administrative route. In this second case, the suspension of the contract will be adopted at the request of one of the parties and solely when the execution of the act or the application of the provision might mean that the review would lose its legitimate end purpose. Such a precautionary measure might also be refused when its adoption might imply serious harm to the general interest or to third parties that the court or Tribunal will assess in each case.[23] Where do these two different routes for review procedures take us? They imply that the application for a review procedure produces different effects, in particular with regard to the objective pursued by the European Directive of not concluding a contract without having previously taken a decision on any application for a review procedure to contests its award. Automatic suspension of the award of the contract will only occur when the special review procedure seeks to contest the contract award. It will not have to be suspended when a review of that same award is sought through the judicial route.

Thus, it appears that the obligatory nature of the special review arising from Article 37 LCSP offers greater (swifter and more effective) legal protection to the appellant, guaranteeing that eventual infringements may be remedied prior to the award of a contract. It therefore appears, and paradigmatically so, in the case of claims in the contract award procedures in the water, energy, transport and telecommunications sectors that, in these contexts, the review procedures are indeed obligatory.

In conclusion, the existence of an alternative scheme of claims (administrative and judicial) with their procedural differences, places the objective pursued by the Directive at risk; a circumstance that suggests we reconsider its appropriateness.

A fragmented system of reviews.

Despite the demand for unity from a certain sector of the doctrine, the review system in the field of public procurement appears fragmented.[24] In other words, the "star" protection mechanism, the special review in the field of public procurement, does not cover the entire spectrum of contracts in the public sector, but only those contracts concluded by the contracting authority (not, therefore, the contracts concluded by entities from the public sector that do not have that same status), provided that they refer to:

a) Works contracts, the concession of public works, supply, services, collaboration between the public sector and the private sector and framework agreements, subject to harmonized regulation.[25]
b) Service contracts that fall within categories 17 to 27 of Annex II of this Law [TRLCSP] the estimated value of which is equal to or more than €207,000, or
c) Public service management contracts for which the expenditure budget for its initial establishment, excluding the amount for VAT, is over €500,000 and the duration is for a period of over five years.

At this point, we should not overlook a short summary of attempts to approximate the legal framework of protection mechanisms for tenderers, extending the scope of the special review procedure to other contracts that differ from those mentioned earlier. Thus, Law 3/2012, of 8 March, on Tax and Administrative Measures in the Autonomous Region of Aragon,[26] in modification of Article 17 of Law 3/2011 of 24 February, on measures in the field of public procurement in Aragon[27] empowers the Administrative Tribunal for Public Contracts of Aragon [*Tribunal Administrativo de Contratos Públicos de Aragón*] to conduct special reviews in the field of public procurement that are lodged in relation to public works contracts for amounts of over one million Euros, or supplies and services for amounts of over one-hundred thousand Euros.

That limited scope of application of the special review procedure in matters of public procurement calls for a re-examination of the protection measures in those circumstances in which the aforementioned special review is not applicable. Neither in the LCSP, nor in the present TRLCSP do we find any reference to the regime of reviews applicable to contracts not included under Article 40.1 TRLCSP. There can be no other conclusion than to sustain that the ordinary regime of reviews will apply in such cases, in accordance with the administrative procedure Act and the judicial procedure Act.[28] The problem arises when it is confirmed that this system of "ordinary" reviews, as well as not being "equivalent" to the special review procedure with regard to its guarantees (something that the Directive imposes[29]), presents difficulties over its adjustment to the rules established in the TRLCSP for the contract award and its subsequent formal conclusion, with regard to the effects of the review (no standstill period nor independent body for the review in "ordinary" reviews). On this point, the considerations contained in Report 18/2008 of 21 July, from the

Consultative Committee on Administrative Contracting [*Junta Consultiva de Contratación Administrativa*] of the Autonomous Region of Aragon may be extensively disseminated, with the necessary refinements, relating to the system of review procedures to contest awards in the framework of the new Law of Public Sector Contracts [*Ley de Contratos del Sector Público*].

First of all, in relation to actions that exhaust the administrative route, an application for a facultative review for reconsideration should be completed within the course of one month following the notification of the award. In such cases, as a general rule, the award is not suspended, because of the review procedure (Article 111 of Law 30/92), such that, although the outcome of the review remains unknown, the contract will have to be concluded within fifteen working days following the day on which notification of the award was received (Article 156.3.3º TRLCSP). The application for reconsideration or the contentious-administrative review procedure, based on the contents of Article 28 of the LJCA opposing the award of the contract, is not admissible and a similar conclusion would be likely with respect to acts that may be contested through administrative channels.

However, as the facultative review procedure for reconsideration is not obligatory, if the application to contest the contract award has not been submitted, the contentious-administrative channel will always remain open. Moreover, the deadline for the contentious-administrative application is after a period of two months (Article 46 LJ); in other words, it could be submitted at a later date than the conclusion of the contract.

Therefore, challenges to contract awards issued by the contracting authority, provided they end the administrative proceedings, could be completed through the facultative application for a review procedure and subsequently through the contentious administrative route, or directly through the contentious-administrative review procedure. What happens is that, in view of the current regulation on the awards procedure, the conclusion of the contract (no later than 15 working days following the day on which notification of the award was received) will be put into effect regardless of any applications for review, as these have no immediate effect with regard to suspension.

Under these circumstances, as expressed by the Consultative committee (*Junta consultativa*) in the aforementioned report, the application of the ordinary review procedure in circumstances where contracts are not stipulated under Article 40.1 TRLCSP is an obstacle to reaching the objective pursued by the system of special protection. This objective is fundamentally the paralysation of the proceedings in the case of an application to challenge the award that is based on the valuation of tenders. This does allow to avoid, despite the controversy over this question, the conclusion of the contract award stage, its completion and the start of its implementation, with the difficulties that these bring for effective compliance with the decision issued in its day, upholding the application and therefore nullifying the award of the contract. It would therefore be convenient to design a system of single and equivalent reviews, apart from the amount of the contracts.[30]

The need to exercise control over the execution phase of the contracts. The case of controls over contract modifications

In addition to facultative and fragmented review procedures, in which two types of protection may be distinguished with regard to the total amount of the contract, we should also point out that not any act is likely to be reviewed by means of this special route. Only some proceedings may be challenged that take place in the preparatory and contract award phases, as pointed out in Article 40.2 TRLCSP:

a) The tender notices, the terms and the contractual documents that establish the conditions that govern the contract.

b) The administrative proceedings adopted in the award procedure, provided that these either directly or indirectly decide on the award, determine the impossibility of continuing the procedure or produce defencelessness or irreparably harm legitimate rights or interests. Procedural acts that determine the impossibility of continuing the procedure are considered to be the acts of the Contracting Committee in which the exclusion of tenderers is agreed.

c) The agreements to award a contract adopted by the contracting authorities.

However, actions that take place after contract completion during its execution phase are excluded from oversight through the special review procedure. The express exclusion from the scope of the review procedure of "the acts of the contracting authority issued in relation to the contractual modifications not foreseen in the terms that, in accordance with the provisions of Articles 105 to 107, have to be carried out once the contracts are awarded, regardless of whether or not a decision is taken to prepare and to issue a new invitation to tender"[31] is a controversial one. Such a regulation

limits the scope of the controls over public contracts by means of special reviews, the novel regime for which was introduced not so long ago in Law 2/2011, on Sustainable Economy,[32] a circumstance that is nothing but surprising and may turn out to contravene European Law on public contracts. European jurisprudence has made it clear that the illegal modification of a public contract would be the equivalent of a "new award"[33] (Judgment of the ECJ, 19 June 2008, Case C 454/06, *Pressetext Nachrichtenagentur GMBH*, Cf. section 34), and therefore that "new award" should be the subject of a special review, given that, in accordance with Article 40.2.c TRLCSP, the "agreements on awards adopted by contracting authorities"[34] can be the subject of the review.

In second place, the solution adopted by the legislator is a little strange, considering the reasoning that is followed for its justification. Having proposed the question of competence to conduct the review procedures that may be lodged to contest agreements that relate to the modification of public contracts, it appears to be a logical solution to refer the question to the review body empowered to establish legal remedies for the special review procedure in the field of procurement (the Central Administrative Tribunal [*Tribunal Administrativo Central*], or another body, because the *Tribunal Administrativo Central* is, as we may recall, not the only one that is empowered to conduct these reviews) so that criteria are laid down on competence to hear these cases. On the contrary, it was instead decided "to settle the question legally", excluding the possibility of requesting a review procedure because of modifications agreed by the contracting authorities. This solution is both a curious and a questionable one, when not only the Central Administrative Tribunal but also the Administrative Tribunal of Public Contracts [*Tribunal Administrativo de Contratos Públicos*] of Aragon have pronounced on the matter, pointing out in the procedural guide for conducting the special review procedure in the field of public procurement that "… administrative actions… may be contested… provided that they either indirectly or directly take decisions on the award, determine the impossibility of continuing the procedure or lead to defencelessness or irreparable harm to legitimate rights and interests… In particular, by way of example, the decisions and awards adopted without formal procedures – for example, instructions for delivery with own resources or modifications that fail to comply with legal requirements…"[35] In addition, the recent modification of regulations on public procurement in the autonomous region of Aragon (Law 3/2011 on measures relating to the public procurement contracts of Aragon, modified by Article 33 of Law 3/2012 of 8 March on Tax and Administrative Measures of the Autonomous Region of Aragon[36]), has introduced a new provision (Article 12.bis) which, after underlining the obligation to publicise agreements on contractual modifications, expressly points to the possibility of applying for a review procedure to oppose agreements on contract modification:

> "…Article 12 bis. Publicity on modifications
>
> 1. The agreement of the contracting authority to modify a contract will be published, in all cases, in the Official Bulletin and the medium in which the award was published, detailing the grounds for its justification, its scope and total costs, so as to guarantee appropriate use of this legal instrument.
> 2. Likewise, this decision will be notified to eligible tenderers, including, in addition, the necessary information that would allow the tenderer to bring, if applicable, a sufficiently well-reasoned application for a review procedure against the decision on modification due to its incompliance with legal requirements…"[37]

In any case, this exclusion of the "modifications" from the objective context of the special review has not been ignored in a large part of the doctrine, which has questioned such a choice.[38] It should be remembered that new rules were incorporated in the LCSP for procedures to modify public procurement contracts through the Law on Sustainable Economy [*Ley de Economía Sostenible*], in accordance with the practices recommended by the European Union, and especially taking account of the stance adopted by the Commission in its Reasoned Opinion of 2 December 2008, questioning the former policy on the modification of administrative contracts. With the exacting requirements introduced for the acceptance of the modification of public contracts in Articles 105 to 108 TRLCSP, which only allow modifications under exceptional circumstances, J. *Colás Tenas* went so far as to conjecture that "the era of reform" had come to an end.[39] It is therefore surprising that control over compliance with newly established requirements is excluded from the scope of the special review in the field of procurement, with the excuse of "avoiding procedures that might delay the administration of the modifications".[40]

The undesirable splintering of review bodies

In the section that analyses the fundamental aspects of the review procedure, we made reference to the existence of a central body, some regional bodies, and even some others of local level, established under the regulations of certain autonomous regions (Andalusia, Catalonia and the Basque Country). There are in addition review bodies that form part

of other institutions not considered part of the public Administration, such as the Spanish Parliament [*Cortes Generales*] and the Parliament of the regions of Catalonia and Aragón. [*Parlamento de Cataluña* y *Cortes de Aragón*].

This splintering of the review bodies is another aspect that can weaken the efficiency of the system of legal protection of "good contractual administration" for various reasons. First of all, the risk of breaking doctrinal unity by encouraging the appearance of divergent and contradictory interpretations on the same question among the large number of review bodies that have been established. This splintering is especially dangerous, though, in the context of local authorities, where the independence and specialization of the members that form part of these review bodies may no longer be sufficiently well guaranteed within such a confined space. In this context, it appears advisable that such excessive proliferation of the bodies authorised to decide on the review should go no further than the state and the autonomous region. Hence, the competence to issue remedies in review procedures that relate to the contractual acts of the local authorities and those of the public institutions that have a special status of independence should be assigned to the aforementioned state or regional bodies, establishing the relevant convention with them.[41]

THE STRENGTHS OF THE SYSTEM

Notwithstanding the weaknesses and possibilities for improvement that have been noted, the Spanish system of review procedures in the field of procurement deserves, in any case, a positive appraisal. And there are various reasons that support such a favourable assessment.

The present-day situation is much improved compared to the time when the effectiveness of the system of legal protection was debatable, when no independent, specialized review body existed to remedy review procedures and claims, nor did the institution of a review procedure automatically suspend the conclusion of the contract, preventing the timely solution of possible defects that might have existed.[42] It may be affirmed, at least at present, that the existing system of review procedures is effective. Some of its strong points are listed below.

Unified subjective scope

The new system of review procedures has unified its subjective scope of application, which now includes the acts issued by all the contracting authorities and not only the entities that, for the purposes of the TRLCSP, have the status of a public administration. Let us recall that, not so very long ago, purposefully emphasizing the importance of the formal point of legal personality, the legal regime of the contractual activity of private law entities linked to the Administration were referred to private law, and consequently, the settlement of lawsuits relating to that contractual activity were dealt with under civil law. The new system of review procedures has unified the contractual activity of the contracting authorities in a single system of legal protection, disregarding the formal definition of their legal personality.

The efficacy of the review seen from the position of the appellant

In my opinion, the best indicator of the smooth running of the new review procedure in the field of procurement is in the form of statistics on applications for review procedures and the success rate of those that are opened. As regards the almost inexistent level of litigation existing in the pre-contractual phase prior to 2010, the launch of the special review procedures has acted as a "wake up" call for tenderers and other interested parties, as demonstrated by the statistical data relating to the activity of review bodies over the previous year. (*See Table 1)*

	Central Administrative Tribunal for Contractual Reviews	Administrative Tribunal for Public Procurement of Aragon	Tribunal of the Community of Madrid	Administrative Tribunal for Contractual Reviews of the Regional Gov. Of Andalusia	Administrative Body for Contractual Reviews of Catalonia	Administrative Tribunal for Contractual Reviews of Castile-Leon
Applications for a review procedure	312	93	148	124	89	31

Applications refused	56	15	43	56	37	5
Review accepted	97	33	40	23	28	9
Review not upheld	146	43	59	39	22	17
Success rate	39,9%	43,42 %	40,40 %	37 %	56 %	36 %

Table 1: Activities of the review bodies for Public Procurement procedures in 2012

The involvement of these specialised bodies has led to the timely resolution of doubts raised over the awards procedure, before the commencement of project execution. Moreover, it has yielded evident benefits for the appellants who now no longer question the efficacy of the review procedure and increasingly choose to use it. In addition, the independence and the specialization of the bodies that conduct the reviews contribute to yet another advantage: preventing the litigation culture from taking over. The *auctoritas* that the members of the review body are generally acknowledged to possess has meant that the parties normally accept the solution that is offered through the administrative route, and turn down the option of seeking a second judicial instance. This is demonstrated by the evident drop in the number of cases that are now brought before the contentious-administrative tribunals (less than 6% of decisions issued by the specialised review bodies are subsequently brought to appeal before a contentious-administrative tribunal).

Swift protection, real protection

A further important strength of the procedure is its swiftness. The establishment of these independent review bodies has permitted a rapid response to the disputes that arise in the public contracts award procedures. In fact, the special review procedure is a rapid process, which should be concluded, once the claims of each party have been fixed, within a maximum of five days, although that time period for a solution fluctuates in practice – depending on the review bodies and the complexity of the cases – between five and fifteen days. This is a great advance with regard to the alternative judicial system of reviews, which let us recall, is not characterized by its speed, as the definitive conclusion of the reviews can be delayed over several years.

The speed with which the reviews are completed also has other important effects, related to the value that is attached to the doctrine issued by the review bodies. Thus, that administrative doctrine contributed to a meaningful interpretation of the regulation, playing a similar role to jurisprudence. In fact, some regulations even compare that interpretative function of the doctrine by the review bodies to the jurisprudence of the European Court of Justice of the European Union and the other courts and tribunals.

Efficient protection, if free, even better

Finally, we can not forget another great advantage of this special review procedure in the field of public procurement: it is without charge for the appellant. Insofar as it is an administrative procedure, the principle of free legal services for the appellant applies, sidestepping the application of fees for access to review mechanisms that are applied in a judicial context.[43] Neither does the practice apply in this special review procedure of imposing costs on the party whose claims are totally rejected, which on the contrary is what happens in a judicial context.[44]

In view of this free legal service, "abuse" in the use of the review is prevented by other means, principally through recognition of the possibility of sanctioning the appellants through the application of fines that can be as high as €15,000 when malice or bad faith is appreciated in the application for a review or in the request for precautionary measures.

LESSONS LEARNED AND CONCLUSSIONS

Spain has only very recently included the prescriptions of the "review" Directives in its internal public procurement Law. In this sense, the important modifications, which were introduced mainly within Law 34/2010 – which are maintained in the present regulation of that special review contained in arts. 40 and following of Royal Decree 3/2011, in approval of the Amended Text on the Law of Public Sector Contracts – (TRLCSP), have improved the effectiveness of the Remedies system from the previous experience.

The final result is a complex system of "contract and administrative justice", in which we find mechanisms of administrative protection that function even before completion of the contract. These pre-contractual mechanisms include, for example, the special administrative review in the field of public sector contracts and a prior claim in the field of contract procedures in the water, energy, transport and telecommunications sectors. Following the conclusion of the contract, further administrative protection is ensured by means of the question of nullity, without overlooking the possibility of recourse to jurisdictional routes, as an alternative to these special administrative routes, or subsequently, once the aforementioned reviews and claims have been remedied.

Although this system has meant undoubtable improvements, in order to guarantee formal and substantive remedies for the public contracts awards procedure, it is also true that its strong points may be better exploited, to convert it, perhaps, into the paradigm of a new model for the protection of "good contract administration".

In this sense, we firstly consider that there is still room for improvement regarding the "facultative" nature of the remedies procedure, and that an initial possibility for its improvement would be to give the "star" instrument, the special review procedure in the field of public procurement, an obligatory rather than a facultative nature. As pointed out before, it can be affirmed that the existence of an alternative scheme of claims (administrative and judicial), with their procedural differences, places the objective pursued by the Directive at risk; a circumstance that suggests we reconsider its appropriateness.

Secondly, the "fragmented" nature of the system, only available for contracts falling within the scope of those Directives, could also be improved. Actually, the application of the ordinary review procedure in circumstances where contracts are not stipulated under Article 40.1 TRLCSP is an obstacle to reaching the objective pursued by the system of special protection. This objective is fundamentally the paralysation of the proceedings in the case of an application to challenge the award that is based on the valuation of tenders. This does allow to avoid, the conclusion of the contract award stage, its completion and the start of its implementation, with the difficulties that these bring for effective compliance with the decision issued in its day, upholding the application and therefore nullifying the award of the contract. It would therefore be convenient to design a system of single and equivalent reviews, apart from the amount of the contracts.

In another matter of things, it would be also advisable to exercise control over the execution phase of the contracts (i.e. modifications). The express exclusion from the scope of the review procedure of "the acts of the contracting authority issued in relation to the contractual modifications not foreseen in the terms that, in accordance with the provisions of Articles 105 to 107, have to be carried out once the contracts are awarded, regardless of whether or not a decision is taken to prepare and to issue a new invitation to tender" is a controversial one. Such a regulation limits the scope of the controls over public contracts by means of special reviews, and this may turn out to contravene European Law on public contracts, as it has been stated by the European jurisprudence which has made it clear that the illegal modification of a public contract would be the equivalent of a "new award" and therefore that "new award" should be the subject of a special review, given that, in accordance with Article 40.2.c TRLCSP, the "agreements on awards adopted by contracting authorities" can be the subject of the review.

Lastly, the splintering of the review bodies is another aspect that can weaken the efficiency of the system of legal protection of "good contractual administration" for various reasons. First of all, the risk of breaking doctrinal unity by encouraging the appearance of divergent and contradictory interpretations on the same question among the large number of review bodies that have been established. This splintering is especially dangerous, though, in the context of local authorities, where the independence and specialization of the members that form part of these review bodies may no longer be sufficiently well guaranteed within such a confined space. In this context, it appears advisable that such excessive proliferation of the bodies authorised to decide on the review should go no further than the state and the autonomous region. Hence, the competence to issue remedies in review procedures that relate to the contractual acts of the local authorities and those of the public institutions that have a special status of independence should be assigned to

the aforementioned state or regional bodies, establishing the relevant convention with the more the independence of the review Authorities and its splintering at regional and local levels.

So taking into account that in this term of four years, several lesson have been obtained it would be desirable and strongly advisable, to make good use of the opportunity that will be offered within the implementation of the new public procurement Directives in order to continue improving the Spanish remedies system.

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[1] In December 2011, the Commission adopted three proposals on public procurement. These proposals are part of an overall programme aiming at an in-depth modernization of public procurement in the European Union. This programme includes the revision of Directive 2004/17/EC (procurement in the water, energy, transport and postal services sectors) and 2004/18/EC (public works, supply and service contracts), as well as the adoption of a directive on concessions, which were until now only partially regulated at a European level.

[2] A comparative approach in Greco, (2010), *Il sistema della giustizia administrativa neglia ppalti pubblici in Europa*, Giuffré, Milano; and Treumer/Lichère, (2011), *Enforcement of the EU public procurement rules*, DJOF Publishing, Copenhagen.

[3] Ley 13/1995, de 18 de Mayo, de contratos de las Administraciones Públicas.

4 "Porque la materia de recursos que constituye su objeto es ajena a la legislación de contratos de las Administraciones Públicas, y respecto a la primera (Directiva 89/665/CE), además, porque nuestro Ordenamiento Jurídico, en distintas normas procedimentales y procesales vigentes, se ajusta ya a su contenido" (translation by the author).

[5] See Tornos Mas, J. (2011)"Los tribunales independientes para la resolución de los recursos administrativos en materia de contratos del sector público", in *Derecho Administrativo y regulación económica. Liber amicorum* Gaspar Ariño Ortiz, La Ley: 806.

[6] Ley 30/2007, de 30 de octubre, de Contratos del Sector Público.

[7] Ley 31/2007, de 30 de octubre, de contratos en los sectores del agua, la energía, los transportes y los servicios postales.

[8] Ley 34/2010, de 5 de agosto, de modificación de las Leyes 30/2007, de 30 de octubre, de Contratos del Sector Público, Ley 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales, y Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa para adaptación a la normativa comunitaria de las dos primeras.

[9] Real Decreto legislativo 3/2011, por el que se aprueba el Texto Refundido de la Ley de Contratos del Sector Público.

[10] See Gimeno Feliú, J.M. (2011), *Las reformas legales de la Ley 30/2007, de contratos del sector público*, Civitas: 47-108; Moreno Molina, (2010) "La reforma de la ley de contratos del sector público en materia de recursos. Análisis de la Ley 34/2010, de 5 de agosto", *La Ley,* Madrid: 173-190; Gallego Córcoles, I. (2010) "Comentario a la Ley 34/2010, de 5 de agosto", *Contratación del sector público local*, La Ley, 2.ª ed., Madrid. On the previous system of review, see Noguera de la Muela, B. "El recurso especial en materia de contratación y las medidas cautelares en la Ley 30/2007, de 30 de octubre, de contratos del sector público, a la vista de la Directiva 2007/66/CE, por la que se modifica la Directiva 89/665/CEE", in Gimeno Feliú (ed.), *El Derecho de los contratos públicos, Monografía num. X de la Revista Aragonesa de Administración Pública*. 299-312.

[11] For a general overview of the system, see Diez Sastre, S. (2012) *La tutela de los licitadores en la adjudicación de contratos públicos*, Marcial Pons.

[12] On this Tribunal, see Pulido Quecedo, (2010), *El nuevo Tribunal Administrativo Central de Recursos contractuales*, Aranzadi, Pamplona, and (by the same author) (2010) "Competencias y legitimación ante el Tribunal Administrativo Central de Recursos Contractuales (TACRECO): especial consideración de los supuestos de nulidad contractual", *Documentación Administrativa,* 288: 65-98; Pardo García-Valdecasas, (2010) "El Tribunal Administrativo Central de Recursos contractuales", *Documentación Administrativa*, 288: 19-42 (this paper presents the added value of being prepared by the Chairman of that Tribunal).

[13] See Menéndez Sebastián, (2012) "Virtualidad práctica del recurso especial en materia de contratación pública: una figura inacabada", *Revista de Administración Pública*,188: 383.
[14] In the Basque Country and Catalonia, municipalities of more than fifty-thousand inhabitants are allowed to create their own bodies. There are no minimum population limits for Andalusian municipality bodies and Provincial Councils. Exploiting this possibility, the Provincial Council of Granada, and the municipalities of Granada, Seville and Malaga have created their own review bodies.
[15] "Los Estados miembros velarán por que... los procedimientos de recurso sean accesibles, como mínimo, a cualquier persona que tenga o haya tenido interés en obtener un determinado contrato y que se haya visto o pueda verse perjudicada por una presunta infracción" (translation by the author).
[16] "Toda persona física o jurídica cuyos derechos o intereses legítimos se hayan visto perjudicados o puedan resultar afectados por las decisiones objeto de recurso" (translation by the author).
[17] The Administrative Tribunal for Public Procurement of Aragon affirmed that "the TRLCSP chose a broad regime for legitimacy, acknowledged in article 42 for all natural and legal persons whose rights or legitimate interests have been harmed or may be affected by the decision under appeal" (translation by the author).
[18] "Existe una legitimación ex lege, que conviene concretamente, por razón del mandato representativo recibido de sus electores, a los miembros electivos de las correspondientes corporaciones locales para poder impugnar los actos o actuaciones de éstas que contradigan el Ordenamiento jurídico. No se trata de una legitimación basada en un interés abstracto en la legalidad, sino de una legitimación directamente derivada de la condición de representante popular que ostentan, en cuanto ahora importa, los concejales de un Ayuntamiento y que se traduce en un interés concreto -inclusive puede hablarse de una obligación- de controlar su correcto funcionamiento, como único medio, a su vez, de conseguir la satisfacción de las necesidades y aspiraciones de la comunidad vecinal..." (translation by the author).
[19] "El concejal, por su condición de miembro -no de órgano- del Ayuntamiento, que es, a su vez, el órgano de gobierno y administración del municipio...está legitimado para impugnar la actuación de la corporación local a que pertenece, por el interés concreto que ostenta en el correcto funcionamiento de dicha corporación en virtud de su mandato representativo" (translation by the author). See Spanish Constitutional Court judgement 173/2004, of 18 October 2004, reiterated in later judgements 108/2006, of 3 April and 210/2009, of 26 November, and also the Supreme Court judgements of 23 October 2009 and of 10 May 2012, upholding the legitimization "*ex lege*" of the elected members of the local authorities, because of the representative mandate received from their constituents.
[20] "La legitimación en el recurso especial en materia de contratación no puede apartarse de la que se reconoce para los recursos ordinarios, de reposición y alzada, pues comparte con ellos la misma naturaleza administrativa, eso sí, con unas garantías reforzadas de celeridad e independencia, con objeto de que las posibles infracciones legales que se produzcan en los procedimientos de selección puedan tener una respuesta eficaz." (translation by the author). The Administrative Tribunal for Public Procurement of Madrid decided in a like manner – in relation to the legitimization of councillors- in its Decision num. 2/2012, of 18 January.
[21] See Ponce Solé, (2010) "El Órgano administrativo de Recursos Contractuales de Cataluña: un nuevo avance en la garantía del derecho a una buena administración", *Revista Documentación Administrativa*, 288: 206.
[22] Opinion number 499/2010 of 29 April 2010.
[23] See Art. 129 and 130 Law 29/1998 of 13 July, in regulation of the Contentious-Administrative Judicial Authority on precautionary measures.
[24] See Gimeno Feliú, (2011) *Las reformas legales de la Ley 30/2007, de contratos del sector público*, Civitas: 93-101; Moreno Molina, (2010) La reforma de la ley de contratos del sector público en materia de recursos. Análisis de la Ley 34/2010, de 5 de agosto, *La Ley*, Madrid: 173-182; and Razquin Lizarraga, (2011) "La Ley de contratos del Sector público: Balance crítico, aplicación y novedades, en especial, para las Entidades locales", *Revista de Administración Pública,* 186: 59.
[25] The condition of a contract subject to harmonized regulation appears to be linked to three aspects: 1) the condition of contracting authority of the contracting entity, 2) the contract (works, supplies, public-private partnership and only some service contracts), and 3): its estimated value in excess of € 5,000,000 in the case of public Works contracts, and €200,000 for supplies and services contracts (public-private partnership contracts are at all times subject to harmonized regulation). On this set of contracts subject to harmonized regulation, see Moreno Molina (2009) "'Un mundo para Sara'. Una nueva categoría en el Derecho español de la contratación pública: los contratos sujetos a regulación armonizada", *Revista de Administración Pública*, 178: 175-213.
[26] Ley 3/2012, de 8 de marzo, de Medidas Fiscales y Administrativas de la Comunidad Autónoma de Aragón.
[27] Ley 3/2011, de 24 de febrero, de medidas en materia de contratos del sector público en Aragón.
[28] Ley 30/1992, de 26 de noviembre, Reguladora del Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común and Ley 6/1998 of 26 November, Reguladora de la Jurisdicción Contencioso-Administrativa.

[29] Article 1.2 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts states that "Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules." See Baño León (2008) "Tutela judicial precontractual", *in Bermejo Vera/Bernal Blay* (Dir.), *Diccionario de contratación pública*, Iustel, 2008: 689.

[30] See, in the same opinion, Gimeno Feliú, (2011) *Las reformas legales de la Ley 30/2007, de contratos del sector público; Alcance y efectos prácticos*, Civitas: 96.

[31] "…los actos de los órganos de contratación dictados en relación con las modificaciones contractuales no previstas en el pliego que, de conformidad con lo dispuesto en los artículos 105 a 107, sea preciso realizar una vez adjudicados los contratos tanto si acuerdan como si no la resolución y la celebración de nueva licitación..." (translation by the author).

[32] Ley 2/2011, de Economía Sostenible. On the legal regime of modifications of contracts during the performance phase, see Medina Arnaiz/Bernal Blay, (2011) "Recent reform of Spanish public procurement legislation in compliance with EU Law: the issue of modifications to concluded contracts", *Public Procurement Law Review* 6: 256-261; Puerta Seguido (2011) "El régimen de la modificación de los contratos del sector público en el Real Decreto Legislativo 3/2011", in Gimeo Feliú/Bernal Blay (eds.) *Observatorio de Contratos Públicos*, Civitas: 481-513; Colás Tenas, "La reforma de la legislación de contratos del sector público en la ley de economía sostenible: El régimen de modificación de los contratos del sector público", *Revista Española de Derecho Administrativo,* 153: 253-276.

[33] See Art. 72.1 of Proposal for a directive on public procurement, replacing Directive 2004/18: "A substantial modification of the provisions of a public contract during its term shall be considered as a new award for the purposes of this Directive and shall require a new procurement procedure in accordance with this Directive".

[34] "Los acuerdos de adjudicación adoptados por los poderes adjudicadores" (translation by the author).

[35] "Son impugnables… los actos de trámite siempre que decidan directa o indirectamente sobre la adjudicación, determinen la imposibilidad de continuar el procedimiento o produzcan indefensión o perjuicio irreparable a derechos o intereses legítimos… En particular, a título de ejemplo, las decisiones o adjudicaciones adoptadas sin procedimiento formal – por ejemplo, los encargos de ejecución a medios propios o los modificados que no cumplen los requisitos legales…" (translation by the author).

36 "Ley 3/2011, de medidas en materia de contratos del sector público de Aragón, modificada por el art. 33 de la Ley 3/2012, de 8 de marzo, de Medidas Fiscales y Administrativas de la Comunidad Autónoma de Aragón" (translation by the author).

37 Artículo 12 bis. Publicidad de lo modificado.

1. El acuerdo del órgano de contratación de modificar un contrato se publicará, en todo caso, en el Boletín Oficial y perfil en que se publicó la adjudicación, figurando las circunstancias que lo justifican, su alcance y el importe del mismo, con el fin de garantizar el uso adecuado de esta potestad.

2. Igualmente, esta decisión se notificará a los licitadores que fueron admitidos, incluyendo, además, la información necesaria que permita al licitador interponer, en su caso, recurso suficientemente fundado contra la decisión de modificación de no ajustarse a los requerimientos legales…" (translation by the author).

[38] See Gallego Córcoles (2011) "Novedades en la regulación del recurso especial en materia de contratación: la discutible exclusión de las modificaciones contractuales *ex lege* de su ámbito de aplicación" *Revista Contratación Administrativa Práctica,* 113: 32-37, and Díez Sastre (2011) "El recurso especial en materia de contratación pública", *Anuario de Derecho Municipal* 5 (2011):141.

[39] See Colás Tenas, "La reforma de la legislación de contratos del sector público en la ley de economía sostenible: El régimen de modificación de los contratos del sector público", *Revista Española de Derecho Administrativo*, 153: 253-276.

[40] "Evitar trámites que puedan retardar la tramitación del modificado" (translation by the author).

[41] This is the conclusión for which I have argued, for example, in connection with the contractual activity of external oversight bodies, in my work on (2012) "La tutela de los licitadores en los contratos de los órganos de control externo", *Auditoría pública: revista de los Órganos Autónomos de Control Externo,* 58, 2012: 95-109.

[42] See Bassols Coma, (2013) "En defensa del efecto útil de las Resoluciones de los recursos especiales en materia de contratación de las Administraciones públicas", Iustel, *Diario del Derecho Municipal*, 17 January.

[43] See Law 10/2012 of 20 November, [*Ley 10/2012, de 20 de noviembre, por la que se regulan determinadas tasas en el ámbito de la Administración de Justicia y del Instituto Nacional de Toxicología y Ciencias Forenses, modificada posteriormente por Real Decreto-ley 3/2013, de 22 de febrero, por el que se modifica el régimen de las tasas en el ámbito de la Administración de Justicia y el sistema de asistencia jurídica gratuita*] in regulation of certain fees in the area of administration of Justice (…).

[44] See Art. 139.1 Law 29/1998 of 13 July, in regulation of the Contentious-Administrative Judicial Authority, amended by Law 37/2011, of 10 October, on Procedural Streamlining Measures [*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa, amended by Ley 37/2011, de 10 de octubre, de Medidas de Agilización Procesal*].

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-(2011) Las reformas legales de la Ley 30/2007, de contratos del sector público, Civitas: 93-101.

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Knowledge management for public sector procurement – exploratory study and model development

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Procurement is an important aspect of achieving the organizational goals of public sector organizations. Given the advantages generally attributed to Knowledge Management (KM), it is assumed that public clients can significantly improve the outcome of their procurement strategies by being well positioned in managing the procurement knowledge present in the organization. However, while literature on KM abounds, KM literature on the topic of public procurement is scarce. The question of how to manage public procurement knowledge effectively and efficiently has hardly been addressed.
The aim of the research reported in this paper has been to identify the type of procurement knowledge that public clients in the construction industry should manage, and to develop a model that combines general KM concepts with the particular context of public procurement. The procurement practices of such clients are characterized from project and portfolio perspectives. Based on these characterizations, it is argued that the essence of procurement knowledge can be represented by the terms argumentation and generalization. This leads to the suggestion that public clients should primarily focus their KM efforts on the processes in which argumentation and generalization are applied. Subsequently, the paper presents a KM model that combines a procurement knowledge process cycle with both general KM processes and the classic distinction between tacit and explicit knowledge forms. This model is intended to facilitate further analysis of procurement practices on the strategic, tactical and/or operational levels from a KM perspective. In subsequent study phases, the intention is to apply the model in the context of a public sector client organization procuring from the construction industry.
Given that the literature on advanced KM practices in the context of procurement by public sector clients is scarce, we hope that the constructs and the model proposed in this paper stimulate researchers to further explore the application of KM theory and concepts in this particular field. The model may also help practitioners to bring greater focus in their efforts to manage the procurement knowledge present in the organization.

Keywords: knowledge management, procurement, public sector.

INTRODUCTION

In the current economic crisis, numerous public sector organizations are faced with austerity policies imposed by the government. Perhaps more than ever, this puts a focus on the efficacy of their procurement practices. This naturally includes public sector clients of the construction industry. In this area, the public sector typically outsources a major part of their budgets to private parties in order to realize infrastructural and building projects. As such, procurement is an important means for achieving an organization's goals. In practice, various procurement strategies are applied for different projects. It seems that there is no single best procurement strategy given the variety of projects a client will carry out [1]. Clients striving for high procurement efficacy therefore need to know what works best for which type of project. The experience gained in past projects represents valuable procurement knowledge. Ideally, the client should be able to use the knowledge gained to its full advantage in procurement decisions regarding forthcoming projects.

However, it is widely recognized in the literature that knowledge may get lost within an organization, with negative consequences. Many factors, such as staff layoffs, resignations, retirements, restructuring and outsourcing can result

in a loss of knowledge. This holds, and is maybe even more of an issue, for project-based organizations due to the one-off nature of project work and the many resulting discontinuities [2]. Project teams can be formed for a new project, may change during the project, and likely be disbanded at the end of the project, with team members moving on to other projects. Typically, as some procurement activities require specialized skills, some employees concerned with procurement activities (such as tender managers, cost engineers, legal advisors and strategic consultants) are only temporarily part of a project team. If not managed properly, procurement knowledge may well get lost to the project team or organization as these specialists move on to other projects. As a consequence, negative effects may occur: mistakes are repeated, solutions reinvented, and ambiguities emerge. Since procurement is an important component in achieving the organizational goals of public clients, the question emerges of how to manage procurement knowledge effectively and efficiently within these organizations.

In seeking an answer to this question, this study explores the Knowledge Management literature for relevant theory and concepts that can help public sector clients of the construction industry more effectively manage their procurement knowledge. In starting to investigate ways of managing procurement knowledge, the following two basic questions are raised: which set of procurement instruments is best suited for addressing the unique requirements of a particular project (i.e. the project or the tactical perspective) and which procurement portfolio content will optimally serve the organization's strategic goals (i.e. the portfolio or the strategic perspective)? It is assumed that most public clients will recognize these as the two primary questions when viewing procurement strategically and tactically. These two perspectives are therefore chosen as a basis for model development.

This paper is structured as follows. The next section concisely introduces the field of Knowledge Management (KM) and demarcates the area of interest for this study. The subsequent section describes the particular research context of this study by introducing the relevant terminology and raising the two primary procurement questions. Using these two questions, specific issues related to knowledge management from the project and portfolio perspectives are elaborated in the subsequent section. These issues are reduced to the general idea that managing procurement knowledge primarily has to do with processes in which 'argumentations' (expectations in the form of arguments, reasons and motivations) and 'generalizations' (statements derived from practical experiences) are constructed on the strategic, tactical and operational levels. Based on this contention, the following section describes the KM model developed in this study. Conclusions then follow in the final section.

KNOWLEDGE MANAGEMENT

This study draws on three overlapping fields of literature: knowledge management, public procurement and construction management. This section first presents the case for undertaking KM research and then highlights some of the choices in demarcating the area of interest regarding KM theory and concepts for this study.

The case for KM

Does managing knowledge in an appropriate way really result in benefits for an organization? Indeed, empirical research has demonstrated that managing knowledge does function as an enabler of high organizational performance [3]. However, the main reason for performing that research was the observation that there are relatively few empirical studies that demonstrate the connection between KM and organizational performance [3]. As such, the question remains whether this conclusion is true in general and, given our interests, for managing procurement knowledge in a public sector organization in particular. Although there are no reasons to presume that the public sector will not benefit from KM, there is very little literature dealing with KM in the particular context of public procurement in the construction industry. Notably, a study by Hazlett et al. [4], in the context of a public sector procurement agency, did indicate a need for adequate knowledge transfer. This was apparently due to an organizational structure in which tasks related to procurement, contract management and engineering were allocated to different personnel on different organizational levels. The study reported on various causes of errors and mistakes including a lack of understanding of the contract documentation (including historical knowledge), misunderstandings or ignorance over implementing measurement, no clear understanding of the role of the engineer within the contract and staff simply working in the same way as they always had. These contextual examples reflect phenomena generally observed in the KM literature. On this basis, we argue that KM applications will have a positive effect on the performance of public procurement.

Demarcations in KM

The underlying ideas of KM posit that certain knowledge is present in an organization and, when this is managed in appropriate ways, the organization will benefit from that knowledge. However, what knowledge is it that should be managed? Throughout history, the minds of many scholars have been preoccupied with the definition of knowledge. Kakabadse et al. [5] provide an overview of proposed taxonomies of knowledge. Among the several taxonomies, the most widely used classification of knowledge types is the distinction between tacit and explicit knowledge [6]. This distinction was first proposed by Polanyi [7]. Explicit knowledge is that knowledge which can

be codified and stored, whereas tacit knowledge cannot. Based on this distinction, Nonaka and Takeuchi [8] developed the SECI conversion model in which tacit and explicit knowledge are viewed as the two ends of a continuum [9]. As such, while tacit knowledge in the strictest sense cannot be articulated, it may be possible to convert less tacit forms of knowledge into explicit knowledge. The SECI model argues that valuable tacit knowledge resides within individuals and can only add value if it is converted into explicit knowledge. Although there are many available taxonomies, the scope of this study is restricted to the tacit - explicit continuum. Our expectation is that this concept will help in better understanding how the procurement knowledge present in an organization can be used.

Are there other KM theories or concepts that are suited to the particular context of this study? A recent extensive KM literature review provides a quick entry into the vast field of the KM literature [6]. This literature review proposes classifying the KM literature into five categories: (1) ontology of knowledge and KM; (2) Knowledge Management Systems; (3) role of Information Technology; (4) managerial and social issues; and (5) knowledge measurement. The focus of this paper is primarily on Knowledge Management Systems (KMSs). It is expected that the concepts within this literature category will provide useful elements for further demarcation and model development.
A KMS is described as a configuration of managerial, technical and organizational systems that is structured to support the implementation of KM within an organization [10]. Three main approaches, plus a hybrid approach, to KMSs have been identified: codification, personalization and people finder [6]. Codification is a 'people-to-documents' strategy and concerns documenting and storing knowledge in order to create access to this knowledge by other people and/or future applications. In contrast, personalization is a 'person-to-person' strategy that focusses on the transfer of knowledge through face-to-face social interaction activities. The third strategy focusses on mapping the location of knowledge within the organization. For an initial demarcation of this exploratory study, we focus on the codification strategy only.
Although a number of KMSs have been proposed, in essence the processes that should be incorporated in any KMS can be grouped into four core KM processes [6]:

- knowledge creation and acquisition: the process of generating knowledge internally and/or acquiring it from external sources;
- knowledge storage and retrieval: the processes of knowledge structuring and storing that make it more formalized and accessible;
- knowledge transfer and sharing: the processes of transferring, disseminating and distributing knowledge in order to make it available to those who need it;
- knowledge application: the process of incorporating knowledge into an organization's products, services and practices to derive value from it.

Since these four KM processes are considered as the core processes, they constitute the main features of our initial model. Further adjustments may be applied in later study phases.

RESEARCH CONTEXT

The research context should be considered to ensure the KM theory and concepts are properly applied. This section describes the main characteristics of the particular context of public procurement in the construction industry. Noting the lack of widely accepted terminology, a number of basic constructs used in this study are first defined. Following this, two primary and recurring procurement questions that will be recognized by any regular procuring public client are introduced. These relate to the project and portfolio perspectives, both of which are relevant in KM model development. Finally, areas where there is relevant procurement knowledge for a client are identified.

The role of standardized procurement instruments

Clients of the construction industry utilize several systems, methods and means for procurement purposes. Project delivery systems such as Design-Bid-Build or Design & Construct are part of a well-known categorization of procurement methods. To achieve such a procurement method, clients combine several instruments such as tendering methods, qualification systems, electronic tendering systems and past performance measurement tools. In the absence of a widely accepted term for referring to these systems, methods and means, in this paper we refer to them as 'procurement instruments'.

Many clients have large ongoing construction portfolios, rather than one-off construction projects. This observation has led to the introduction of the terms 'multi-project environment' (a multiplicity of projects within an organization) and 'multi-project client'[11]. In order to facilitate the outsourcing of tasks in such a multi-project environment, clients may utilize a number of procurement instruments at the same time; for example, separate contracts for designing and building in a project where the Design-Bid-Build approach may be deemed the most appropriate, and a single contract for a Design & Construct-approach in another project. Contracts are however only one type of instrument. In order to organize the overall procurement process, a number of procurement instruments

from different categories will be combined. For instance, a client may choose to tender for a Design&Build contract using a negotiated procedure. Contractors will be notified about the upcoming procedure, perhaps through an electronic tendering system. The applicants invited to tender may be selected by means of a qualification system. Then, after bids have been received, these may be evaluated using the criterion of the most economically advantageous tender, and here past performance measurement systems may play a role. As there appears to be no universally accepted terminology for this, we refer to such combinations of instruments as a 'procurement strategy'.

Clients may adopt generally available standard procurement documents (such as the current NEC3 contracts, which are recommended by the Construction Clients' Board in the United Kingdom). However, such branch standards may not fully meet the requirements of the particular context of the client and may therefore be adapted by the client. For reasons of efficiency, a client will want to reuse these tailored procurement instruments on several projects. In this way, the tailoring process will result in the use of instruments that are considered 'standardized instruments' within a client's organization. In wanting to keep these instruments consistent across projects, the client's policy will be aimed at complementing them with project-specific information rather than changing elements of the contractual arrangement. Through this logic, a set of tailored standardized procurement instruments will be maintained by a client for use in the majority of projects. Given the lack of a widely recognized term for these, we have adopted the term 'portfolio of standardized procurement instruments'.

The procurement instruments in the portfolio can be categorized in several ways but, for the purposes of this study, it is assumed that any taxonomy will do as long as procurement instruments from every category are selected in order to assemble a procurement strategy that covers the entire procurement process. Usually, in at least one category of procurement instruments, alternatives are available within the portfolio. Therefore, a 'selection process' will be carried out in which several procurement instruments are combined to devise a procurement strategy for a particular project. If the portfolio is designed to facilitate the majority of frequently recurring types of projects, then the selection process will often be sufficient to meet the project's procurement requirements. However, this need not always be the case. Sometimes a client may feel the need to adapt a current instrument or even to develop a new one. In such cases, a '(re-)design process' on top of the selection process emerges. This is depicted in Figure 1.

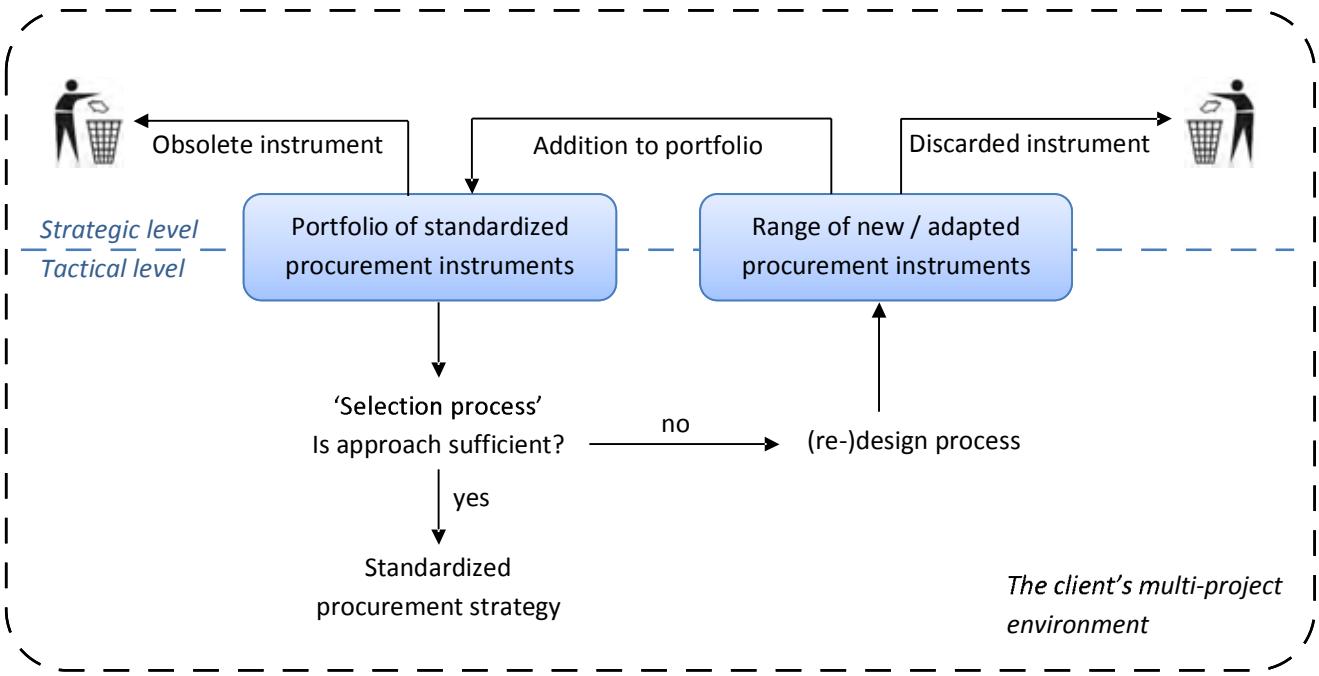

Figure 1: The portfolio of standardized procurement instruments and its context.

Two primary questions

With many procurement options, clients face two basic questions related to the different perspectives on procurement. First, from the perspective of a particular project, a likely pressing question is which set of instruments best addresses the unique requirements of this project? Second, when viewed from the perspective of the portfolio of instruments, a more strategic question emerges: what of the portfolio's content best serves the organization's strategic goals?

In answering the first question, a client will be inclined to draw conclusions from experiences with applying the procurement instruments in previous projects. Numerous questions are likely to arise when investigating the 'experience'. First of all, what do we know about the experience. Is it causally related to the instrument and, if so, were any drawbacks inherent to the instrument or was it misused? If the problems are inherent, do the instrument's advantages still outweigh the disadvantages, and against which criteria should these be evaluated? What were the original purposes of this particular instrument, was it actually meant for use in this particular situation? Second, given all these questions, who in the organization knows the answers to one or more of them? Who has documented information available, or does the organization perhaps rely on people's memories? If so, are these people still available? Third, how do we know which procurement instrument is best? Which methods are used to compare the performance of various procurement instruments? The knowledge applied in formulating answers to such questions may be viewed as internal knowledge of the procurement instruments, in the sense of it being a client-specific subset of the more general 'procurement knowledge'. This distinction serves to highlight that clients need to know what works, and what does not, in their own particular context.

While forthcoming new projects will trigger the seeking of answers to the first primary question, the second question, related to the organization's strategic goals, may not be automatically triggered in this way. If it is not deliberately managed as a recurring topic, the question may need other events for it to be raised. For instance, a reformulation of the organization's goals might cause reconsideration of the portfolio's alignment with the new goals. Other triggering possibilities include a successful implementation of newly developed procurement instruments by other clients, and an apparent failure to achieve organizational goals when using the current portfolio. In the public sector, a new governmental policy could affect the portfolio content directly as well. Public opinion and complaints from the construction industry might also be a driver. If, for whatever reason, the portfolio question is triggered then it is unlikely that the knowledge of procurement instruments will be sufficient to provide a sound answer. Knowledge of other procurement instruments used outside one's own organization is needed to assess and compare these alternatives with the current portfolio. Therefore, at times more 'general procurement knowledge' will be required.

To summarize, both internal knowledge of procurement instruments and general procurement knowledge need to be available to reliably answer the two primary questions facing public sector clients.

ARGUMENTATION

The two primary procurement questions discussed in the previous section form the basis for developing an outline of the kind of procurement knowledge that should be managed properly. First, by addressing the first question from the project perspective, the selection process and the (re-)design process are considered. Following this, the question regarding the optimal portfolio content is discussed. From these discussions, a general outline is proposed using the term 'argumentation'.

The selection process

A number of publications in the procurement and construction management fields have explicitly addressed issues related to the selection process. Several alternative procurement selection processes have been developed, and Love et al. [1] produced a useful overview covering developments in the period from 1985 to 2006. This research continues, with Tran et al. [12] one of the latest publications.

Using the description of the selection process proposed by Love et al. [1] as a starting point, a number of observations can be made from the Knowledge Management perspective:

1. The selection process applied in practice and proposed by Love et al. [1] consists of several steps. They recommend that *"After each step is completed and key decisions are made, the justification for these decisions should be carefully documented so as to aid the process of transparency and provide a learning tool for future projects."* (p. 315). Although they do not elaborate on this learning tool, it is clearly meant to serve as input for subsequent selection processes. The point is strongly made that this learning tool should contain the justifications for the decisions made. We hypothesize that the reason for this is that these justifications provide an argumentation in the sense of an elaborated prediction of the effects that alternative procurement strategies will have on project performance in this one particular case. The argumentation concerning the selected procurement strategy can be evaluated afterwards and thus give insight into the validity of the arguments used.
2. The selection process was carried out by a number of participants [1]. The participants were asked to award scores to alternative procurement strategies. The way in which the participants familiarized themselves with the different types of procurement method is not described. We would nevertheless assume that the information used for familiarization and then interpretation by the participants will influence their scoring process. As such,

the type of information and the way in which it is supplied will likely matter. The question is what information should be provided, and in what manner, to help build the argumentation?

3. Related to this observation is the question as to on which abstraction level a project delivery system should be defined. Some authors contend that the selection models need to address the second stage in the process: the selection of a sub-variant of a particular project delivery method [13]. Following this line of thought, one wonders which level(s) of detail should a selection process address in order to result in a convincing argumentation for the preferred procurement strategy?
4. The proposed selection process seems to have been developed for use in single projects and its relevance in the context of multi-project clients is uncertain. Miller and Evje [14] developed a selection process for a portfolio of projects that allowed for a more strategic rather than operational perspective. Taking this perspective may change the argumentation from a 'best-for-project' reasoning to one that attempts to balance the predicted effects on project goals and on organizational goals.

To summarize, it is apparent that a number of issues emerge when viewing the selection process from the perspective of knowledge management. However, a general outline emerges in which the selection process delivers an argumentation as to which procurement strategy is the best. From the perspective of the four KM processes, it is observed that procurement knowledge is retrieved, shared and applied in the process of creating this argumentation.

The (re-)design process

In figure 1 the process of adapting current procurement instruments, or even creating new instruments, is referred to as the (re-)design process. Though a few publications, including Azari-Najafabadi et al. [15], do view procurement instruments as the product of a design or redesign process, this viewpoint appears to be uncommon. In this study, we do however consider these processes as involving a design process. The advantage of this viewpoint is that it encourages one to distinguish between the perceived problem and the possible solutions to that problem. Moreover, verification forms part of the design process, calling for an upfront argumentation as to why the proposed solution will indeed solve the problem. From this perspective it therefore seems obvious the that some form of argumentation is involved in this process. Similar to the contention above for the selection process, we assume that procurement knowledge is necessary for the creation of such an argumentation. If so, then KM can help advance managing the organization's procurement knowledge.

Choosing the optimum portfolio content

The second fundamental question raised in this study concerns the strategic topic of optimizing the portfolio of procurement instruments to achieve the organization's goals. Since this specific issue has not been discussed in the literature, we explore literature related to the portfolio question in order to create an outline of the likely nature of an optimized portfolio.

The portfolio question addresses the strategic level of decision-making and relates to operationalizing the organization's overall strategic goals. Although it is not unusual for public sector organizations to express a mission statement in which the organization's goals are articulated, to the author's knowledge the procurement literature has not discussed operationalization strategies in a public sector context. However, for the private sector, it is argued that the purchasing strategy and purchasing practices should be designed to optimally support the business strategy in order to positively affect performance [16]. There, research has addressed the impact of strategic alignment and purchasing efficacy on the financial performance of the company [17]. How does this translate to the public sector? First, one should note that financial performance is arguably not the dominant performance criterion of public sector organizations. Erridge et al. [18] argue that procurement in the public sector is complex and that a number of competing priorities can confuse the final goals. They identify three competing strands that influence the public sector procurement policy: 1) the commercial strand that concerns themes like value for money, efficiency and effectiveness; 2) the regulatory strand that deals with themes such as transparency, equality and compliance; and 3) the social strand addressing themes like employment concerns, social exclusion and environmental policy. In following this framework, the procurement performance of a public client will be assessed internally by a mixture of themes drawn from these three categories.

Two observations can be added to these considerations. First, applying the 'best for project' principle does not necessarily achieve the 'best for the organization'. This is illustrated by the development of procurement instruments that do not directly have a positive effect on project performance. For instance, the application of the CO_2-performance ladder in determining the economically most advantageous tender will not directly contribute to the project being delivered on time, within budget and meeting quality targets [19]. It will however contribute to the organizational goal of CO_2 reduction. The second observation is that public sector clients may accept the risks associated with trying new procurement instruments. Such risks may result in negative consequences in terms of the duration, budget or quality of a project, but these may be considered acceptable in seeking new directions. Overall,

the portfolio of procurement instruments may not be optimal even when optimally suited to procuring the whole range of diverse projects.

Combining the conceptual model of Baier et al. [17] with the framework of competing priorities by Erridge et al. [18], and applying this to the concept of a portfolio of procurement instruments, results in the model shown in Figure 2.

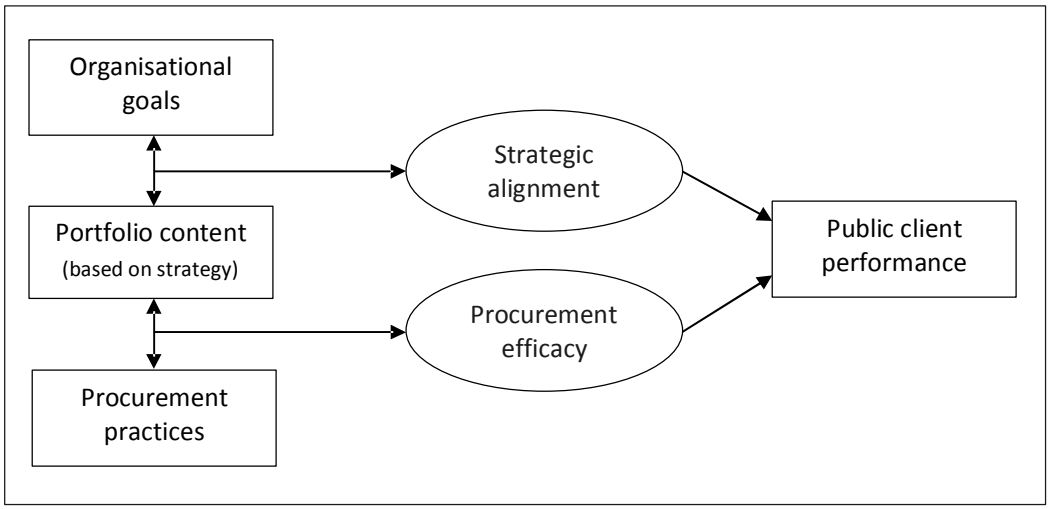

Figure 2: The alignment and performance link (adapted from Baier et al. [17]).

This adapted model not only suggests a research approach but, for this study, it also highlights that the portfolio perspective requires an argumentation that logically links the portfolio content to the organizational goals and to the strategies devised for projects or programmes in the procurement practices. This argumentation should strive to be convincing in addressing two important contentious issues. First, that the portfolio is strategically aligned with the organizational goals and, second, that the portfolio facilitates efficacious procurement practices. To create such an argumentation, KM processes are required.

To summarize, the project and portfolio perspectives discussed above reflect the recurring theme of 'argumentation'. It appears that, from these perspectives, procurement knowledge is essentially used to construct argumentations that facilitate decision-making processes. Such argumentations can be seen as expectations or predictions of the effects that a single procurement instrument or procurement strategy will have in a particular forthcoming project. Alternatively, zooming out to the portfolio level, predictions about the effects that the portfolio will have in terms of achieving the organizational goals.

GENERALIZATION

Where does the knowledge needed to build argumentations come from? In this study, it is assumed that the experiences gained in previous projects are an, and perhaps even the most, important source of contextual procurement knowledge a client can draw on. We hypothesize that experiences are converted into cause-and-effect relationships, for instance in the appearance of a formal evaluation report or in informal narratives exchanged over coffee. Justifiably or not, these relationships are attributed as features to single procurement instruments, to procurement strategies or to portfolios. Examples of such features are statements such as 'Design & Construct improves the constructability of the design' and 'a negotiated procedure enhances the applicant's understanding of the client's vision of the project goals'. During this process, features become somewhat detached from the original context from where they were derived. To distinguish these features from the argumentations introduced above, we use the term 'generalizations'.

Public sector clients who regularly procure construction work will, on the operational and/or tactical levels, use their internal procurement knowledge in the selection and/or design processes. The client will create generalizations out of previous practical experiences with procurement instruments. These generalizations may then be used in the form of an argumentation to justify the procurement strategy selected for an upcoming project. The iterative nature of this makes one think of a process cycle. On the strategic level, argumentations and generalizations similarly occur in explaining the choices made in maintaining or adjusting the content of the portfolio of procurement instruments.

Since these argumentations and generalizations appear to relate to the manifestation of procurement knowledge in all the processes described above, these are considered the core concepts at which KM efforts should be directed. Consequently, we hypothesize that public clients striving for a higher procurement efficacy through applying KM should focus on the management of procurement knowledge in the form of argumentations and generalizations.

MODEL FOR MANAGING PROCUREMENT KNOWLEDGE

How can the argumentation and generalization concepts be modelled from a KM perspective? This section endeavours to link the four core KM processes briefly introduced earlier to these two concepts. Further, noting that argumentations and generalizations may have certain shortcomings in practice, the tacit/explicit dichotomy is also linked as this may help explain the causes of the shortcomings. Based on these general KM concepts, this section presents a simple KM model that is aimed at advancing the management of procurement knowledge from the viewpoint of the codification strategy.

Linking KM processes to procurement

Earlier it was argued that a client, in preparing for decision-making in a procurement context, creates an argumentation that in its essence has the nature of a prediction. The use of procurement knowledge will contribute to the quality of the argumentation and, therefore, a knowledge application process is executed. Relevant procurement knowledge is applied in order to create a convincing argumentation. Once decisions are made and the procurement process executed, these predictions are put to the test in practice. The comparison of the predictions with practical outcomes contributes to the process of knowledge creation and acquisition. This new knowledge is transferred from the situated to the organizational context through generalizations, making it available for storage and later retrieval.

Tacit and explicit knowledge

In all of these processes, it is probable that only part of the knowledge concerned is of an explicit nature. For example, in the process of knowledge acquisition, some elements of the total richness of the contextual project information will not be articulated. The deduction of cause-and-effect relationships will involve focussing on particular issues and thereby avoiding others. We hypothesize that, in general, the processes of creating and transferring procurement knowledge involve selecting from the available information. As such, we see the tacit/explicit distinction as an indispensable element of the model. In a previous phase of this research project, it was observed that, in practice, some of the argumentation used by a public sector client for selecting and redesigning a particular procurement instrument for a number of subsequent projects was implicit [20]. As such, there is some empirical evidence to support this hypothesis.

One of the assumptions of the SECI model is that tacit and explicit knowledge are at opposite ends of a continuum [9]. Whereas tacit knowledge in its extreme form (one end of the continuum) is by definition not articulable, other forms of tacit knowledge can be conversed to explicit knowledge and vice versa. We hypothesize that applying methods, in the form of a codification strategy, that convert tacit into explicit knowledge will contribute to the effective management of procurement knowledge. The combination of KM concepts and the terms argumentation and generalization leads to the model presented in Figure 3.

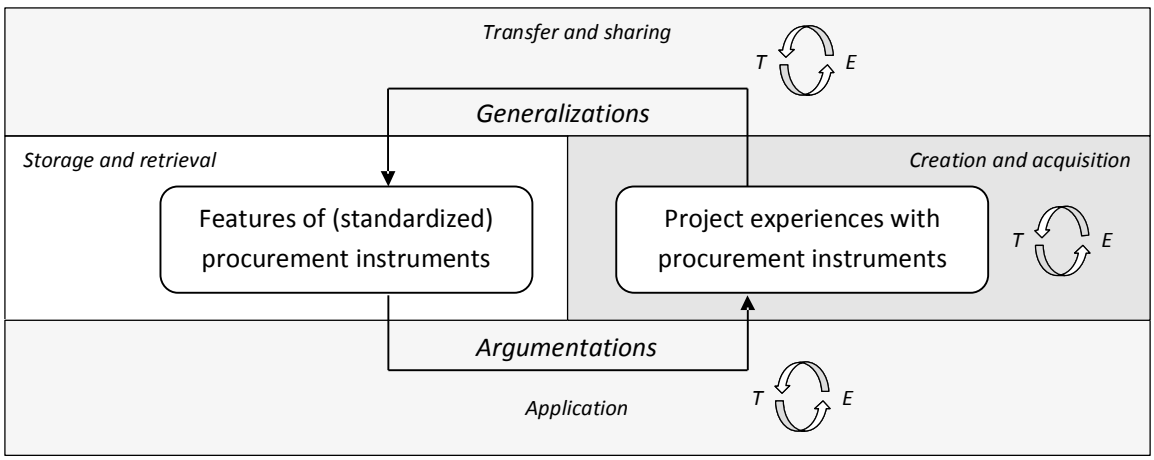

Figure 3: Model for managing procurement knowledge.

This model can serve as a basis for further exploring knowledge management applications within a public sector client's organization. Regarding the project and portfolio perspectives, we argue that this model can be applied on any level of abstraction. For instance, the process of devising and testing a procurement strategy could be analysed using this model. In so doing, the focus of the researcher or practitioner would be directed towards the extent to which arguments applied in devising the procurement strategy are explicit, and where these are derived from. On a lower level of abstraction, the model could serve as a means to explicate the choices made in redesigning a procurement instrument to meet the particular requirements of a certain project. On a higher abstraction level, research into the process of adjusting a portfolio of procurement instruments could be directed by this model.

CONCLUSIONS

It is argued that KM applications can help a public sector client increase performance. However, KM literature related to public sector clients who regularly procure work from the construction industry is scarce. Our exploration of the literature in the related fields of KM, procurement and construction management led to the introduction of the terms argumentation and generalization. Combining these terms with general KM concepts enabled the development of a model that is aimed at advancing the management of procurement knowledge.

In conclusion, the constructs and the model proposed in this paper could stimulate and support researchers in further exploring the application of KM theory and its concepts in the field of procurement management. Although the model only hints at practical applications, it could help practitioners to bring greater focus to their efforts to manage the procurement knowledge present in the organization.

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SME policies in public procurement: time for a rethink?

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*The opinions in this paper are personal, and are not to be viewed as representing official views of the United Nations or the Government of Austria

"*Micro, small and medium-sized enterprises (SMEs) are the engine of the European economy. They are an essential source of jobs, create entrepreneurial spirit and innovation in the EU and are thus crucial for fostering competitiveness and employment*…." (Günter Verheugen, Member of the European Commission, Responsible for Enterprise and Industry, in EC/Enterprise and Industry). Looking beyond the EU, SMEs "*constitute the vast majority of business establishments, are usually responsible for the majority of jobs created and account for one third to two thirds of the turnover of the private sector,*" (OECD/UNIDO, 2004)). As a result, governments of countries at all levels of economic development pursue policies to support SMEs (Storey, 1999).

This paper will consider the economic rationale behind such SME policies, how they may be pursued through public procurement, and whether and how their effectiveness can be evaluated. It will conclude with some considerations for policy-makers in public procurement. It will not analyse social and political justifications for SME policies per se, though it is acknowledged that righting historical disadvantage and supporting minorities in public procurement can have consequential economic benefits, and that the political context in SME policies is significant.

The two main economic policy considerations revolve around (a) improving SME participation in the public procurement market, with a view to enhancing competition and hence value for money, and (b) awarding more procurement contracts to SMEs, with a view to encouraging entrepreneurship and innovation, and thereby job creation, economic growth and development to the benefit of wider society. While this paper draws heavily on authoritative works on SME policies, it is not intended to provide a comprehensive survey of the economic literature on the subject. Rather, it seeks to highlight some of the published findings on the scope and impact of SME policies, and to urge policy-makers to seek and consider empirical evidence and move to policy, rather than the other way around.

Statistics on SMEs and the public procurement market

The volume of statistics on SMEs in many systems amply demonstrates that SMEs overall constitute the overwhelming majority of all enterprises (to report on them in detail exceeds the scope of this paper, but an example is found in EC, 2003). For example, in the EU, 99.8% of enterprises in the non-financial sector are stated to be SMEs (representing 67% of the total non-financial employment), and 92% of the total business sector is estimated to be micro-enterprises, with fewer than 10 employees (de Kok et al, 2011). SMEs comprise over 99% of the UK's 3.8m businesses, and provide 56% of its private-sector employment and 52% of total UK turnover (Small Business Service (SBS), 2004, cited in Zheng et al, 2006). In South Korea, the statistics show that SMEs comprise 99% of businesses and 88% of private-sector employment Government of Korea, 2011); in South Africa, 55% of private sector employment, and 22% of GDP (Kauffmann, 2005, and cited in Kim, 2011). In the US, SMEs constitute 99.7% of all businesses, generate 46% of private, non-farm GDP, and smaller SMEs employ 34.9% of all private sector workers (US Census Bureau, 2007).

There are varying definitions of SMEs: OECD/UNIDO (2004) note that SMEs are defined in the literature most commonly by reference to employment, due to the simplicity of the measure and the ease of collection of data (the OECD and US generally use a measure of under 500 employees, the EU 250). Many systems use a broader definition in practice, e.g. in the EU, where SMEs are those with fewer than 250 employees, provided that their turnover and assets are below certain limits (EU, 2008), although EUROSTAT statistics are presented by reference to employee numbers only (EU, 2014). A similar approach is employed in the standards used by the US Small Business Association (SBA) to classify SMEs (though the SBA is not concerned with public procurement). Hence the figures in the preceding paragraph are not directly comparable, even before accounting for the different level of development in the countries and regions concerned, though a general conclusion that most businesses are "SMEs" can be drawn.

It is also clear that SMEs' share of the public procurement market is below their proportion of total enterprises: in the EU, for example, SMEs secured 35%-35% of contracts by value in 2006 and 2007, and 42% in 2008 (EU, 2009); and between 53% and 78% of contracts by volume (EU 2008). This is not a recent trend: Bovis (1998) argued that market access is also limited for SMEs. The situation is similar elsewhere: the US SBA estimates that 21.89% of contracts were awarded to SMEs in 2009 (SBC, 2010), whereas in Canada since 2006-2007, over 43% of the total value of contracts on average was awarded to SMEs (Government of Canada, 2014).

Within the overall numbers and using a more flexible approach to what is an SME, the EU (in a report on SME access to public procurement) notes that SMEs' access to public procurement varies from one Member States to another, but that overall they are awarded 18% lower contracts than their overall economic share calculated by turnover (EU, 2009). Behind these aggregated data, however, the position varies as between micro, small and medium-sized enterprises: "medium-sized enterprises do not seem to be unduly under-represented in public procurement", but "the relative significance of micro and small enterprises lags considerably behind their actual role in the real economy": the percentage lags are 2% (medium-sized, ie with up to 249 employees), 5% (small, ie with 10-49 employees) and 11% (micro, ie with up to 9 employees) (EU, 2009, European Commission, 2013).

Economic (and other) justifications for SME policies

These overall conclusions of under-performance are generally taken as evidence of market failure on a scale that justifies intervention to level the playing-field. Estimates of the value of the total public procurement market vary, but according to the OECD "governments in OECD member countries spend on average 12% of their GDP on public procurement (excluding procurement by state-owned utilities)", (OECD, 2011). Variations are considered to reflect the different size of the state, its role in the economy and the existence of high-value infrastructure and similar projects and range from 15% of GDP (the Netherlands, the Czech Republic and Iceland) to under 7% (Mexico, Chile and Switzerland) (ibid, 2008 figures). The figures consequently appear to justify intervention on a significant scale: Storey (2006, also cited in Freeman, 2013) estimates that the annual total financial support for SMEs in the UK is equivalent to £7.9 billion per annum - more than is spent on the police force or universities.

A separate area of rationale for SME support policies arises from cited economic benefits of SMEs over enterprises in general, such as that SMEs add value and promote innovation (Carter et al, 1999, Erridge et al, 1998, and Hoffman et al, 1998, as cited in Zheng et al, 2006); that SMEs are more adaptable and responsive to the needs of purchasers (Zheng et al) and support the creation of new supply markets, and respond to supply market dominance and fragmentation (Caldwell et al, 2004); that there are benefits to local economies from local sourcing (Walter, 2005, NERA, 2005 (and cited in Zheng et al, 2006)). At the micro-economic level, SME support can contribute to individual business sustainability (Zheng et al, 2006).

The economic rationale is linked closely to social motivations (McQuade and Johnson, 2003, Ram et al, 2002, cited in Zheng et al, 2006), including public relations and reputational value for enterprises contracting with local SMEs, and minority-support policies that lie at the heart of the US SBA and South African Black Economic Empowerment policies. Perhaps as a consequence, the policy goals behind SME policies are frequently stated in very broad and political terms (as the quotations in the introductory paragraph to this paper indicate).

Indeed, a recent report into SME access to public procurement in the EU concludes a statistical overview saying that "it is important to highlight that SMEs' share of the value contracted for contract below €300,000 in fact slightly exceeds the corresponding figures for real economy. However, this is more than offset by the huge disadvantage they (micro and small enterprises primarily) have in accessing larger contracts. Whilst one would not expect the largest contracts to be won by SMEs, they could eventually win more lower-value contracts to have their 'fair share' of public procurement overall," (EU, 2009). Gibbs (2000), in a paper entitled "SME policies, academic research, and the growth of ignorance, mythical concepts, myths, assumptions, rituals and confusion", highlights

that along with the substantial growth in SME research and publications there has been a parallel growth of ignorance, and that "mythical concepts" and 'myths" are used as a basis for key areas of policy development.

Data on SME policies

This lack of clear policy goals is, unsurprisingly, reflected in the data available on SME policies themselves. This situation was already identified over a decade ago; when considering whether bank lending to SMEs was insufficient, the UK's Bank of England sought to "bring facts into debates typified by anecdote, assertion and assumption," (Bank of England, 2004, cited in Freeman, 2013). Freeman adds that "a close examination of the academic, regulatory and commercial literature regarding SMEs and their role in the economy remains riddled with poor thinking and muddled conclusions, problems compounded by a plethora of issues relating to the availability and quality of relevant data". Zheng et al (2006), Karjalainen et al (2008) and Dalberg (2011) have all noted the relatively limited extent of empirical data.

Zheng et al et al, citing the SBS and other sources from the UK, notes that many policies are presented in descriptive terms rather than by reference to measurable objectives or goals. A later example can be found from the European Commission, which says that SMEs policies are mainly concentrated in five priority areas, covering: "the promotion of entrepreneurship and skills; the improvement of SMEs' access to markets; cutting red tape; the improvement of SMEs' growth potential, and strengthening dialogue and consultation with SME stakeholders" (EU, 2014).

While these objectives may be desirable policy objectives, achievements are effectively immeasurable without targets or benchmarks. The literature reveals few targets, though notable exceptions are found in the US, which has a policy goal of 23% awards by value to SMEs (SBA, 2010), and the UK (25% by 2015, UK Government, 2014).

A first issue, therefore, is to identify what we can learn about the use of SME policies that may be of use to policy-makers. Much literature on SMEs participation in public procurement tends to review SMEs as a group. That is, the data are aggregated data, rather than broken down by e.g. market sector, SME type or size, nature of the public purchaser, or referring to differing business goals, owners' backgrounds, levels of available technologies, skills and experiences, regions in which SMEs operate. In addition, there is a significant focus on the social aspects of SME purchasing (from minorities, etc, which are key elements of policies in the US and South Africa) (Zheng et al et al, 2006). Research at this aggregate level (Curran, 2000) gives little insight into what may motivate individual procuring entities and buyers to purchase from SMEs, and what factors influence their individual decisions (Zheng et al et al, 2006); decisions of procuring entities may be influenced by variable characteristics, such as spend portfolios, priorities, cultures and stakeholder requirements (Caldwell et al, 2004).

However, as Storey (2008) notes, the situation is gradually improving. For example, a recent EU Report provides a comprehensive set of data at the regional level; it contains an analysis of SME under-performance in public procurement contracts, which is broken down by country, type of government awarding body, contract size and whether the contract was for goods, services or construction, and by procurement method. The overall trend reflects the unsurprising proposition that the larger, more complex contracts are rarely won by micro and small enterprises (EU, 2009). Nonetheless, although the report starts with a chapter breaking down SMEs by industry sector, the analysis of under-performance in procurement is not broken down this way; in addition, the surveys of suppliers and procuring entities do not appear to have enquired into the different award proportions per sector, though they do identify a limited number of obstacles that have differing impact on micro, small and medium-sized enterprises (and many that all sizes of enterprises report as obstacles). In addition, the EU notes that data for different periods are not fully comparable (EU, 2009, a finding repeated in many other studies).

Indeed, in 2000, Curran had already reported on data difficulties and obstacles to the quantitative evaluation of policies: he cited quantitative methodologies that do not adequately account for net positive outcomes ("additionality"), as deadweight (ie outcomes that would have occurred without the policies concerned) and displacement (firms outside the policy cease to trade, have lower sales or employment, or have higher costs) should be accounted for. A lack of matched control samples as a result of the heterogeneity of SMEs was indicated by Storey (1999); difficulties of selection bias and low or biased response rates are evident. These factors also mean that deadweight is the most difficult element to evaluate – precisely the factor that policy evaluation should address if it is to be meaningful. Although qualitative alternatives have been employed to seek to improve this situation, they are essentially add-ons to quantitative research. Curran's overall conclusion that "there will always be a high level of uncertainty in estimating outcomes and impacts of [SME] policies" would not seem to have changed significantly. Indeed, a general policy of deregulation may have perverse consequences in that some SMEs now slip below the reporting obligations that allow statistical evidence to be gathered (Freeman, 2013).

Need for SME policies: market failures and SME support

The World Bank and IFC consider that the theoretical justification for SME support lies in "market and institutional failures that bias the size distribution of firms, rather than on any inherent economic benefits provide by small firms" (WB/IFC, 2000). Adapting Storey's 2008 analysis of forms of market failure relevant to SME policies to the public procurement context, there are several types of failure that may justify market intervention. However, while market failure has long been noted as a necessary precondition for government intervention, it is not a sufficient one: intervention is justified only where the results will improve welfare (Storey, 2008). This issue will be considered below, after a description of the failures themselves and common policies applied to mitigate them.

The first group of market failures arise, adapting Storey (1999), as SME owners do not realise the benefits of participating in the public procurement market, and do not fully appreciate the benefits to their business of taking steps such as workforce or management training and promotion activities, that would allow them better access to this market. This is indicative of inadequate information (EU, 2009, ADB, 2012, Smith et al, 2001). The EU has also recognized that poor information about procurement opportunities can close markets to SMEs, and that inadequate information on procurement regulations and requirements as a major impediment to SME participation in procurement (Mishory, 2013). Similar findings are reported in Karjalainen et al, 2008, citing Fee et al, and ECEI, 2014. Indeed, Fee argues that inadequate access to information is the most significant barrier to SMEs' performance generally. The EU, however, has found more recently that information about procurement opportunities is less of an issue than information on tenders themselves (ambiguous requirements, late information, and a lack of debriefing, for example (EU, 2009)). Lack of information about the procurement process itself, such as the mandatory legal requirements and associated procedures that all participants must follow, also presents obstacles to SMEs (EU, 2009).

A further limiting factor is the costs of participating in public procurement, which are noted as being 10-50% higher than for comparable projects in the private sector (Fee et al, 2002, cited in Karjalainen et al, 2008, Smith et al, 2001, UK Government consultation, 2013). These costs disproportionally affect SMEs, in part because many are fixed (ECEI, 2014, ADB, 2012). Indeed, a 2010 study found that the costs of regulation per employee are 36% higher for small than medium-sized and large firms in the USA (ADB, 2012). The costs themselves are derived from the disbursements required in the procurement process (including tender securities and performance bonds, inspection fees, registration and documents fees) and the time and resources involved in complying with rigorous and protracted procedural requirements, such as registration, production of detailed tender information (such as regarding minutiae of prices) and large volumes of documents (ADB, Karjalainen et al, 2008; Fee et al, 2002). An EU study (PWC 2011) found, that at the lower threshold under the EU directives (at that time €125,000), the total costs per PP procedure may reach between 18 and 29% percent of the contract value. As most of these costs fall on business side of the transaction, they might act as a deterrent to participation.

SMEs are also noted as suffering from tender preparation periods that are too short (ECEI, 2014), i.e. there is insufficient time to bid (EU, 2009). Bovis (1998) also cited the lack of language skills in technical areas of tendering as a further obstacle to SMEs (in Karjalainen et al, 2008), a finding also evident in the 2009 EU Report – SMEs do not have tender-writing specialists, and are less experienced in the task. This report also highlighted an over-emphasis on price in evaluation, disproportionate qualification and other criteria, together with the overall administrative burden. Although interaction with the procuring entity was noted to have improved over recent years, SMEs as a group considered further reforms in this area would be among the most pressing (EU, 2009).

After the selection process is complete, a winning supplier can expect to be confronted with complex contract management procedures and dispute resolution processes (ADB, 2012), and the costs and cash-flow implications of funding the projects concerned until payment (the payment period in the public sector is significantly longer than in the private sector) (ADB, 2012, Intrum Justicia, 2013).

Other issues relate to the manner in which the procuring entities manage contracts and SME participation. Here, an observed tendency is towards larger contract sizes and contract aggregation through framework agreements and similar tools (EU, 2014). For example, the value threshold above which the statistics indicate that SMEs underperform is in the range of €300,000 to €1m (EU, 2009). While noting that the median size varies among member States, a recent report states that the median contract size above thresholds should be accessible for SMEs, but that this median has increased recently from about €330,000 to €928,000 (EU, 2009). Even by 2003, the US equivalent of framework agreements accounted for nearly 30% of federal public procurement; the value of one type of framework agreement alone rose from $4bn in 1992 to $32.5bn in 2004 (Gordon et al). The literature on economy and efficiency in procurement routinely notes an increasing use of framework agreements, purchasing consortia and centralised purchasing agencies to aggregate purchases to enhance value for money. Bundling is also claimed to be administratively efficient (Clark and Moutray, 2004, ADB), though more recent studies are indicating

that there are trade-offs in terms of meeting the needs of certain procurers, and where framework agreements used as the purchasing tool are sub-optimally set up and used (Nicholas, 2011). The pressures of financial austerity and shrinking procurement budgets is, for example, part of the reason for an ever-greater use of framework agreements in this context. SME surveys report a significant impact through bundling (EU, 2009, ADB, 2012), and aggregation has been considered to be "bad news for SMEs" (Smith et al, 2001). The "bad news" arises in two ways: bundling or aggregation at the geographical level or through grouping types of purchases excludes SMEs that do not cover all necessary areas or ranges (Bovis, 1998; EU, 2009), and through larger orders that exclude SMEs who do not have the requisite capacity or capital (Morand, 2003, EU, 2009, Zheng et al, 2006).

SMEs surveyed also highlight risk aversion on the part of procurement officials as a significant barrier to participation (EU, 2009). Zheng et al cites studies pointing to issues with professionalism in procuring entities, trust between SMEs and procuring entities, and a lack of technical expertise in applying socio-economic objectives because of a lack of understanding of their impliations and impact on purchases themselves (citing Ruth et al, 2002, Dollinger et al, 1991, Drabkin and Thai, 2003). These issues increase apparent risks of SME contracting. Procurement officials also have fiduciary duties as regards public moneys (ECEI 2014), which may translate into stringent financial and experience requirements that disfavour SMEs (ADB, 2012). This may also be a paradoxical result of measures to enhance transparency and accountability, as individual procurement officials seek to avoid censure for sub-optimal outcomes. At the institutional level, some compliance requirements on suppliers may have little to do with performance risk in a public procurement contract, but are designed to avoid political risk (contracting with "undesirable" suppliers with convictions for tax evasion, for example). In terms of the demand side, where innovation could be encouraged, procurement officials are cited to be reluctant to retreating from to the tried-and-tested, "safe" solutions, specifications and suppliers (Georghiou et al, 2013), leading to a perception that the "nobody ever got fired for choosing IBM" rationale remains a real barrier (Smith et al, 2001).

Types of interventions to support SMEs

Storey (2008) sets out an analytical basis for distinguishing the types of intervention that may mitigate these obstacles and may be used to pursue the overall goals. A key distinction in policy can be observed: measures may seek to lower barriers or to offer support. Many governments pursue a mixture of both measures. The goal of such mitigating policies arguably should be to encourage participation (and hence the potential for competition in the public procurement market concerned (UNCITRAL Guide, 2012)).

To start with the "barrier" side, measures in the public procurement sphere may seek to reduce excessive regulations and/or to mitigate their impact. Extrapolating from the World Bank's Doing Business surveys (citing the 2006 study), Storey (2008) categorises the policy options: first, policy-makers can seek to lower the impediments to business creation or small-firm expansion (broadly speaking, the approach of the USA, Canada and perhaps New Zealand). Secondly, policies can seek to provide direct assistance to compensate for the burdens or impediments (broadly speaking, the situation in the EU, which has relatively high impediments to starting a business in particular). Storey also notes that the situation in developing countries is often characterised by both high impediments and low direct assistance, an interesting finding given the many statements about the importance of the SME sector in those countries. Drawing on Lundstrom and Stevenson (2005), Storey concludes that there is considerable diversity in approaches to reduction of administrative burdens.

The legal framework for public procurement will include provisions on eligibility and qualification, descriptions of contract terms and specifications, and evaluation criteria, each of which have the potential to fall disproportionately on SMEs. In recognition of this general proposition, the 2014 EU Directives on public procurement introduce new measures to counter the burdens involved: first, self-declarations in matters of qualification are being introduced, with the declared aim of primarily benefitting SMEs. Secondly, the evidence of financial capacity of the supplier that can be required is to be limited as a general rule: for example, that for turnover requirements may not exceed a maximum of twice the estimated value of the contract (EU, 2014).

Other programmes seek to eliminate unnecessary qualification requirements: for example, the UNCITRAL Model Law on Public Procurement (which includes procedurally simpler methods for smaller-value procurement) provides for tender securities, but the Guide to Enactment that accompanies Model Law discourages imposing tender securities routinely, on the basis that the formalities and expenses concerned may discourage the participation of suppliers. It adds, "the procuring entity should consider all the implications of requiring tender securities (positive and negative), on a case-by-case basis, prior to deciding whether or not to require them", and suggests that guidance and regulations should provide examples to assist whether a tender security could be excessive safeguard and where it would be justified, by reference to contract value, performance risk and so on (UNCITRAL Guide, 2012). Other policies may encourage international standards, testing and other requirements to be applied in a more user-friendly way, and to use functional, output-based rather than technical, input-based specifications, and less price-dominated

evaluation criteria (EU, 2009); all these measures have been cited as pro-SMEs because their benefits will accrue proportionately more to SMEs. At a more practical level, rules designed to ensure objectivity, clarity and transparency in specifications can be supported by tools to improve and standardise documents and terminology. The EU requires the use of its Common Procurement Vocabulary (CPV, adopted by Regulation (EC) No. 213/2008), to standardise specifications and other elements of descriptions of what is to be procured. The UN operates a similar scheme – the United Nations Standard Products and Services Code ("UNSPSC"). These tools are designed to establish "a shared and common understanding of a product domain" (Leukel and Maniatopoulos, 2005), and so address the information asymmetry of SMEs. Other measures include addressing possible SME weaknesses in terms of technical and financial capacity, by allowing joint bidders to fulfil requirements. improving dialogue between procuring entities and suppliers, engaging in post-submission qualification, and so on (EU, 2009). However, many procuring entities indicate that their time and resources, and a lack of concrete SME policies, do not allow for the full benefit of these types of scheme to be realised (EU, 2009). A further constraint may be risk aversion, considered further below, though it is acknowledged that standardisation of e.g contract clauses can mitigate the risks that may concern procuring entities.

A wide range of economy-wide administrative requirements may be incorporated into the public procurement sphere by reference. These include the need for licences, and compliance with health and safety, employment, environmental and other requirements. Requirements such as outmoded or unnecessary regulations; technical requirements that limit entry unnecessarily or serve as disguised tools for excluding competing suppliers (i.e. regulations that are non-discriminatory on the surface but are subtly discriminatory in their substantive requirements) and poorly designed regulations that are desirable in principle but unnecessarily intrusive, have long been recognised as detrimental to participation in markets and hence competition (WTO, 1998, in Anderson et al, 2011). The European Commission has established a high level expert group to consider reductions of specific disproportionate regulatory burdens on business (thereby covering SMEs as well). However the EU approach only focuses on so called "regulatory burdens" which are costs imposed by information obligations created by EU legislation (e.g. reporting and monitoring). As of today no EU-wide model for measuring compliance costs has been established (EC, 2007). The 2009 EU Report noted that SMEs frequently do not comply with necessary requirements, some of which are technical or relate to health and safety, and some relate to sustainability, equality and diversity policies (EU, 2009). To this can be added the displacement time spent in complying with rules (time spent with tax officials, for example (World Bank, 2014).

A related area of concern involves integrity measures in the procurement system that can have the unintended effects of limiting market participation. For example, expansive civil and criminal strictures against fraud in public procurement markets may create asymmetries between public and private contracting (Anderson et al, 2011).

Other measures designed to reduce the information asymmetry include the improvement of transparency in public procurement. UNCITRAL discusses the need to implement transparency requirements in a way that allows meaningful access in the prevailing circumstances; this may be particularly relevant in the context of developing countries as well as micro-enterprises in all systems, which may have lower technical resources than other SMEs (UNCITRAL Guide, 2012). The European Commission has been seeking to increase "access to information on procurement opportunities" and the "transparency of public procurement requirements," in its three revisions to the Public Procurement Directives over the last 15 years (EU, 2014), especially through the increased (and forthcoming mandatory) use of web-based technologies.

Many commentators have noted that improving regulations does not generally involve significant social cost (e.g., World Bank, 2014). However, as the legal framework is generally permissive rather than prescriptive, permitting less onerous requirements alone will not achieve the desired policy objective: meaningful guidance along the lines suggested by UNCITRAL and other measures to reduce risk aversion will be necessary for successful implementation. In addition, it is important not to equate better regulation with less regulation: the World Bank's Doing Business indicators are predicated on the notion that economic activity requires good rules and regulations that are efficient, accessible to all who need to use them and simple to implement" (World Bank, 2014). Hence some indicators give a higher score for more regulation (eg transparency measures) and others for simplified regulations (such as a one-stop shop for business start-up formalities) (ibid).

Measures aimed at better regulation are unlikely to be recorded within the approximately £8bn assessed to be the annual cost of SME policies in the UK (Freeman). While no studies have been found directly addressing the costs of improving regulation, there will be costs in terms of designing and bringing in new regulations, but it is at least arguable that the benefits of better regulation will have a positive contribution to overall welfare. However, and as Storey has argued, the concept of market failure (here, regulation discriminating against SMEs in fact) does not guide the appropriate scale or envisaged length of intervention (Storey, 1999). A relevant consideration here is the cost of "regulation churn", that is the costs of introducing and complying with new regulations, which should be

evaluated when new policies are proposed; once the desired policy goal is achieved, the policies should cease. Freeman cites a Bank of England finding regarding lending to SMEs, though recent news items indicate that the issue continues to attract much political attention. The more obvious costs include the expenses directly incurred in changing systems and monitoring; indirect (opportunity) costs may arise where resources are diverted from, say, putting together good offers to the public sector to learning the new regulations will be harder to identify and measure.

Moving to the support side, Piga (cited in ADB) records that SMEs consider the unbundling of large contracts as critical to increasing their access to public procurement. While in theory the use of procurement procedures that allow for partial offers coupled with appropriate selection of lot sizes might theoretically enhance SME opportunities (UNCITRAL Guide, 2012), there is little evidence of this in practice. However, the 2014 EU Public Procurement Directives encourage contracts whose value exceeds €500,000 to be split into smaller lots, to be more SME-friendly, and require procuring entities to explain why they opt out of structuring a contract into lots in this way (EC, 2014). Interestingly, the EU Final Report did not identify the use of smaller lots as one of the more helpful tools that could be introduced (EU, 2009). UNCITRAL, too, has provisions in many procurement methods (including framework agreements) that allow suppliers to compete for part only of a procurement contract, and permits the use of multi-supplier framework agreements, both of which techniques can facilitate SME access (UNCITRAL Model Law, 2011, UNCITRAL Guide, 2012, EU 2009). The Korean online purchasing system (KONEPS) includes a Multiple Award Scheme for SMEs, with simplified processes for purchases of high-volume, repeated products (ADB, 2012).

Nonetheless, the general trend towards aggregation may mean that procuring entities will not take advantage of any available power to allow for partial offers or unbundle contracts. In addition, key procurement officials and oversight entities need to focus on the highest-value contracts and those at greatest risk and not those in which SMEs may be interested; indeed, the extent of business with SMEs may not even be measured (Smith et al, 2001), so SME exclusion is unlikely to be acted upon. No macro-economic empirical studies into the long-term effects of aggregation on SMEs and competition generally in public procurement were identified; though some commentators consider the opportunity costs of excluding suppliers from the market, and the potential for oligopolies or even monopolies to arise if the market concentrates as a result of aggregated purchasing by dominant purchasers (Graells, 2011, Albano, 2010). UNCITRAL encourages public procurement agencies to coordinate with competition agencies and share data for this purpose (UNCITRAL Guide, 2012). The EU Directives (2014) are ambiguous in this regard: on the one side they encourage the participation of SMEs (see above); on the other, they facilitate aggregation techniques (for example in cross-border use of centralized purchasing bodies).

Technical assistance and outreach to SMEs can address the second of the "information gaps" above. Within the EU, there are several schemes at the national level: France has a programme entitled "Practical guide for SMEs" and an association called "PactePME"; the UK has training courses offered through "Supply London", local council website, face-to-face meetings, and tender resource packs for example (EU, 2009). Part of the USA's Small Business Administration programme is to sponsor and participate in conferences and training designed to enhance SME participation in public procurement (ADB, 2012); in South Korea, the "SME Excellent Government Supply Products" award programme is designed to increase SME product visibility, and to include SME products in the KONEPS database (ADB, 2012). Other measures with similar aims include enhanced information distribution networks, the use of e-procurement systems and e-catalogues, targeted training and outreach. While many studies cite the rise in e-procurement tools and techniques as benefitting SMEs through enhanced transparency and efficiency (EU, 2009, for example), others indicate a lesser effect particularly on micro-enterprises and those in developing countries (an example given is South Africa (Zheng et al, 2006)). Zheng et al also cites earlier studies identifying limited use of the e-marketplace by SMEs beyond email and Internet for information-gathering and communications; a recent EU report also indicates some limits to the observed benefits of e-technologies, though with an indication that the position is improving and the drive towards full e-procurement should continue (EU, 2009).

Programmes to mitigate the impact of lengthy delay in payment under public procurement contracts on SMEs include direct financing measures. For example, in South Korea, the Public Procurement Service Authority (PPS) provides advance payments for goods contracts, and an SME network loan programme (ADB, 2012). In addition, the KONEPS system is designed to pay accepted invoices in four hours (Public Procurement Service, Government of Korea, 2014). The EU Directives (2014) provide for the possibility of direct payments to subcontractors while at the same time the late payment Directive (2011/7/EU) reduces the standard payment period to 30 days.

A further set of measures seek to go beyond barrier removal and support measures. These range from sub-contracting programmes to price-preferences and set-asides. These measures are directly aimed at SMEs, and to that extent are restrictions on competition. An initial consideration, therefore, is whether they are legally permitted.

Many public procurement systems are regulated on the basis that the system should afford equality of treatment to all enterprises, so that "size cannot be a criterion in comparisons of tenders" (Karjalainen et al, 2008) or, indeed, in any part of the design of and selection in the procurement procedure. Examples at the international level include the EU Procurement Directives, which set out an express principle of equal treatment (in the 15th recital to the 2004 Directives, for example); and one of the WTO GPA's two "cornerstone principles" is non-discrimination. The World Bank Procurement Guidelines set out a general consideration that the Bank will give all eligible bidders from developed and developing countries the same information and equal opportunity to compete in Bank-financed procurement (January 2011 version). Although these "international" procurement texts are aimed at preventing discrimination at overseas suppliers and apply over certain thresholds, to limited sectors of the economy and to limited groups of nationals, the extent to which affected governments can apply price preferences or similar measures to support national SMEs is limited. A different approach is found in UNCITRAL, which is a template for national procurement systems rather than an international agreement or regulation of a donor programme. UNCITRAL's Model Law includes the objective of "fair, equal and equitable treatment", but permits the use of price preferences and set-asides, subject to compliance with international constraints and rigorous legal justification and transparency safeguards (UNCITRAL Model Law, 2011, articles 9-11 and Guide, 2012).

Where such direct assistance programmes are permitted, the advantages cited are that they support SMEs directly through creating and sustaining demand, and provide quick and visible benefits to SMEs. Some systems – such as in the US and South Africa, which base their SME policies on targeted assistance for economic and social reasons – set targets for awards to SMEs using a flexible combination of price preferences and set-asides, (and in the case of the US), require procuring entities to justify deviations from the policies concerned (ADB, 2012). This process has high administrative costs, arising from the use of classes and sub-classes of programmes, for which there are strict eligibility requirements, and the extent of justification for deviations.

Monitoring and evaluating SME policies

Storey (2008) identified a series of steps to assess SME policies, under a "COTE" framework, that involves policy clarity and coherence ("C"), specified objectives "O"), measureable targets ("T"), and evaluation "E"). However, he indicates that the "massively diverse" SMEs policies are not evaluated in practice at least partly for political reasons: partly because the "C", "O" and "T" elements are lacking; also because governments do not want SME policies to be evaluated (Storey, 2008; also Nightingale and Coad, 2011). Some issues relating to "O" and "T" have been canvassed above; some thoughts on "C" and "E" follow.

As regards "C", coherence, The UK Audit Commission referred to SMEs policies as "a patchwork quilt of complexity and idiosyncrasy" (Audit Commission, 1989; echoed by Storey (1994). SME policies should be simple and consistent, but in practice there is a bewildering array of them, at all levels of government, the effect of which is to impose rigorous qualification standards (and hence exclude many SMEs) (Storey, 2008) More generally, SME policies are said to have been implemented piecemeal and poorly (Storey, 1998), a finding subsequently echoed by Georghiou et al (2013).

At a more detailed level, some of the literature surveyed distinguishes between new SMEs and established SMEs when assessing the impact that administrative requirements may impose on new firms as compared with established ones. The effects of reducing more stringent financial and experience requirements – such as reducing the number of years' of required annual returns, tax compliance and previous contracts – may support financially less robust new SMEs proportionately more than established SMEs, as will reducing the costs of supplying tender securities. On the other hand, measures reducing the disproportionate tendering procedures and costs will benefit established as well as new SMEs. Policy-makers should be encouraged to decide whether they wish to target either or both groups; nothing in the literature surveyed indicates that policy-makers are heading down this path.

It may be considered that supporting all SMEs is the appropriate policy goal, given their aggregate contribution to economic performance. However, it is trite but true to say that policies cannot target 99% of the market. If they do, SMEs policies are merely pro-growth policies clothed in politically encouraging language (Freeman, 2013). Back in 2000, Curran identified some of the issues that inadequately targeted SME policies may raise, arising from a key finding: the low level of take-up of SME policies – many outreach initiatives rarely exceeding a 10% take-up, and often much less. They indicate insufficient targeting. Three reasons were noted: first, there was a perception that the support provider did not understand the business at issue. This perception was not clearly rooted in the nature and quality of the programmes, which were often carefully designed with appropriate professional input. Curran suggested that the obstinacy of the SME-owner and fear of losing personal autonomy may have been a partial cause; the SME owner's strong commitment to autonomy may also explain documented lack of growth ambitions. A second reason given was the "top-down" nature of the contents of outreach and training policies, much of which was distilled from large management practice and standard academic works. A third reason stemmed from

administrative convenience: governments favoured (and continue to favour) standardised approaches that are easy to cost, administer and monitor. In this regard, Curran suggests that even where the case for national measures is difficult to justify, local, better-targeted programmes may be more productive. Gibbs (2000) discusses the definitive work of Bennett and McCoshan (1993) supporting bottom-up development and local ownership as indicators of success in SME programmes, but notes an absence of such an approach at the time. The outreach programmes in EU countries described above may be indications that this lesson is finally taking hold.

More generally, SME policies in public procurement are not pursued in isolation. "Socio-economic policies" as summarised in the UNCITRAL Guide to Enactment include SME policies, community participation in procurement, strategically placed contracts, sustainable development environmental policies, and it is noted that they "may be aimed at a specific sector or general development, environmental improvements, enhancement of the position of disadvantaged groups and economic factors" (Guide, 2012), echoing a point also made by Erridge (2004). Zheng et al notes that there is limited knowledge of how to apply such policies systematically in purchasing decisions (citing Maignan, et al, 2002), and that there will inevitably be tensions among the policy objectives including as between regulatory, commercial and socio-economic goals (Erridge 2004).

A pertinent example can be seen in the context of contract aggregation as described above. Since value for money in procurement – often considered the primary goal of procurement systems – may indicate aggregation and SME policies may indicate disaggregation, a review of the implementation and interaction of the policies at a detailed level is warranted. In a "Study to identify options to ensure that the Government's ICT and SME policies are mutually reinforcing" (Government of Australia, 2013), the detailed consideration showed that the policies themselves were suitably aligned, but that there were problems in their implementation, such as a failure to take advantage of the ability to cap liability under ICT contracts that would facilitate SME participation. This example may be instructive, and policy-makers may also need to consider risk aversion particularly where efficiency and individual performance are included as goals of the public procurement systems concerned.

As regards "E", evaluation, the literature on SME policies in procurement indicate that surveys of suppliers and procuring entities are noted as generally effective at identifying market failures and the obstacles to SMEs, as the above analysis makes clear. However, in the context of public procurement and incentives to innovation, the policy solutions do not address these barriers adequately Georghiou, Edler, Uyarra and Yeow, 2013, a finding that would be of significant concern if relevant to all SME policies. Hence more enquiries of stakeholders on the impact of SME policies is also indicated.

The long shopping-list of possible policies to support SMEs set out above have been well ventilated in the literature, but there appears to be little evidence on the economic efficacy or otherwise of them (at both the aggregate and detailed levels), beyond small increases in some measures of contract awards to SMEs (EU, 2009, for example). Indeed, Smith and Hobbs (2001) asserted that only a limited number of SMEs were able and willing to sell to the public sector in the UK; a Small Business Service (SBS) survey in 2006 found only 7% of UK SMEs were interested in collaborating with the public sector (in Karjalainen et al); an earlier survey by the same grouping in 2004 had placed the figures at 14% (Zheng et al, 2006). Whether this fall is simply a data anomaly or the beginning of a trend and, if so, why, would merit examination.

Better or de-regulation may reduce the administrative burden on SMEs, such as through relaxation of reporting requirements, reducing compliance with regulatory requirements implied into public procurement procedures noted above, and other deregulation measures (EC, 2007). However, even deregulation can involve unintended costs. An ad hoc example from Austria may illustrate the problem: when postal services were deregulated, installing new post boxes was required. The costs of so doing were completely unknown at the time, though a model has now been designed. As direct intervention policies have the potential for even more costs than deregulation and other support measures, they should perhaps receive primary attention, but the administrative costs should not be ignored.

An initial mitigating step would be to enhance the collection of relevant data. As noted above, a primary objective in the procurement context is to enhance participation in procurement opportunities. From this perspective, data on awards are only a proxy for identifying participation. (It appears that this is to some extent a forced measure, because of the data that are available.) Although the SBS survey in 2006 highlighted pre-qualification and tendering processes as the most significant disincentives to participation, all later empirical studies identified for this paper continue to focus on award of public procurement contracts as the key determinant of whether or not regulatory simplification measures are working. A recent EU report recommends, for example, that an SME-marker (identifying whether a supplier is a micro, small or medium-sized enterprise) should be included in EU contract notices (EU, 2009), so as to improve the information base. It is suggested that this information should be collected from all participants downloading or otherwise requesting tender documents. That information could be analysed

against the nature and number of suppliers in the relevant market, by reference to the typology applied in competition policy to determine markets.

Assessing the level of contract awards, however, may be a key indicator of broader SME policies pursued using public procurement as a vehicle, a strategic use of public procurement that has become more accepted, reflecting an increasing awareness of the wider impact of public procurement decisions on "supply markets, local economies and society" has been noted (Zheng et al, citing Walker et al, 2005). The World Bank has found, however, that while a large SME sector is characteristic of successful economies, the data do not indicate that SMEs have a causal impact on growth (World Bank, 2004). Indeed, the link between SMEs and GDP growth may be a truism: given the high numbers of SMEs in economies at all levels of development, any per capita GDP growth must be to some extent attributable to SMEs.

An example of the difficulties of identifying causation is the use of SME policies to encourage job creation and/or economic growth through developing an "enterprise culture" and innovation. Here, too, there are some Gibbsian myths and policy confusions (initially identified in Curran, 2000), conflating SMEs, innovation and enterprise. Wong, Ho and Autio (2005) (among many others) note that SMEs create a substantial number, and perhaps the majority, of new jobs, citing studies in USA, Sweden and Canada. (It should be noted that Wong et al do not consider SMEs per se: their focus is on SMEs as a vehicle for entrepreneurship.) Statements on the issue are often made at the political level, without empirical justification and in some cases relying on sources that may have an interest in promoting SMEs (Curran, 2000). In ADB, 2012, for example, it is asserted that "according to the SME Finance Forum [no reference given], [SMEs] are crucial for growth and job creation, accounting for nearly 86% of employment opportunities in developing countries." ADB continue that it is now well-established that SMEs play an important role in job creation and are positively associated with GDP per capita growth, citing Beck et al (2004).

Wong et al recall the well-established links between technological innovation and economic growth, but note that the recent focus on this link (rather than the earlier Schumpeterian tradition of the "entrepreneur as innovator") does not provide any direct test of the creation of new firms and innovation. They draw on a suggestion in the literature surveyed that entrepreneurship contributes to economic growth by "introducing innovations, creating change, creating competition and enhancing rivalry". They also consider that the notion of entrepreneurship includes both new entrants to the market-place and "innovative and imitative entries" into new markets from established firms. They conclude that it is fast-growing new firms – and not new firms in general – that account for most of the job creation in SMEs in advanced countries. As they note, "truly significant contributions are made by the fast-growing 'gazelle' firms (Birch et al, 1997)", rather than new firms in general.

Freeman also comments on the misleading extent of apparent entrepreneurial activity in SMEs (Freeman, 2013), drawing on Nightingale and Coad's summary of data flaws (Nightingale and Coad, 2011). They note that conventional datasets often miss whole areas of SME activity and over-represent successful SMEs (only those that survive long enough to be included); unrepresentative samples and skewed statistics (most entrepreneurships perform poorly, but the stellar performance of a few bring up the average to a point where the 'average' is meaningless); regressions to the mean may lead to misleading analysis (citing the example of a high growth SME that grows large as a result; should it subsequently shrink, it will be classified as a fast-shrinking large firm). In addition, and as noted earlier in this paper, data are often not comparable and "conceptual slides", such as between net and gross figures, and definitions vary so significantly that there is no consensus on policy goals, what to measure and findings. Nightingale and Coad (2011) remind us that "while most (but not all) new firms are small, most small firms are old"; and of Storey's 1994 finding; "firms with less than 20 workers [are] responsible for 54% of gross job gains, which sounds remarkable until [we note] that they were also responsible for 54% of gross job losses".

In other words, not all new-business entrepreneurs create employment; new businesses may be started by what would be otherwise unemployed individuals, and thereby guarantee the owners' employment but do not generate growth. (These latter entrepreneurs – termed "refugees" – are more likely to be found in "lower-income nations with less-developed social security systems", in times of a decline in the business cycle, according to data from the OECD 1974-1994 cited by Wong). Storey (2008) and Freeman (2013) make a similar point about SMEs displacing earlier businesses.

Nightingale and Coad in their paper "Muppets and Gazelles" therefore suggest that the single category "entrepreneurial firms" be broken up along a continuum from the large number of economically marginal, undersized, poor performance enterprises ("muppets") to the small number of high performance "gazelles" that drive most positive impact on the economy. This, they say, would allow a more realistic evaluation of the impact of entrepreneurs by avoiding a composition fallacy that assigns the benefits of entrepreneurship to the average firm (Nightingale and Coad, 2011). A recent OECD publication on 'Innovative SMEs and Entrepreneurship for Job

Creation and Growth" provides data and suggestions towards this end (OECD 2010). Suggestions in some recent literature that SME policies should be harnessed to drive innovation, drawing on findings that demand and new requirements drive innovations rather than in-firm innovations (Edler et al, 2007, Georghiou et al, 2013), should perhaps be analysed through this prism.

More generally, there appears to be a dearth of data on the costs of preference policies and set-asides; these may be among the most difficult to measure, especially the "deadweight" and "displacement" elements noted by Curran (2000), along with the long-term costs of restrictions in the market that such policies may involve (higher prices, lower quality, innovation). Curran postulates that SMEs receive more subsidies and benefits than they merit: by analogy with "zombie firms" that recent bank lending may be keeping alive under policies designed to address recent recessions, there may be an argument that SME policies are maintaining "zombie SMEs". Curran also states that it seems to be universally accepted that more small enterprise is beneficial for the economy, but academics are demonstrating scepticism (Curran, 1993, Storey, 1994 and 1998, Gibb, 1998, all as cited in Curran, 2000).

Conclusions

It can be concluded that the time for a wholesale review of SME policies is ripe. Whether this will take place is, however, questionable. Indeed, it has been asserted that SMEs policies are "an intensely political issue" (Freeman, 2013), and a convenient proxy for pro-growth policies, and vote-winners to boot (Storey, 1998), indicating that the political goals will dominate the economic motivations. Indeed, many commentators allude to the fact that pro-SME policies have become an unchallengeable leitmotif (Freeman, 2013); the "value of entrepreneurs has become such a part of the cultural zeitgeist that to ask for evidence, or even question the robustness of that evidence has become the height of political correctness" (Nightingale and Coad, 2011). Nightingale and Coad's paper opens with a citation: *"He who makes 'the desert bloom' is often a very colourful person; a study of him in consequence is likely to turn into a romantic product … Cold-blooded appraisals of the role of the entrepreneur in economic development are rare: glorification is usual (G. H. Evans (1949).*" It is to be hoped that a cold-blooded appraisal will be undertaken for SME policies in public procurement as well as generally: public procurement systems are required to be transparent, objective, to demonstrate integrity and provide value for money. There is no reason that SME policies applied in public procurement should be exempted from these requirements.

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Construction Procurers' Perceptions of Value for Money

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Abstract

Value for money underpins public procurement policy in many jurisdictions, and is accepted as a logical basis for public procurement in justifying expenditure to taxpayers; however, little is known about how "value for money" (VFM) is perceived by managers who procure for public organizations. Large-scale public infrastructure projects are politically, socially and economically significant. Highly experienced project managers with backgrounds in architecture, building and engineering undertake the associated construction procurement activities. This paper explores project managers in Australian State government agencies and their perceptions of "value for money" in the context of their construction procurement work. The findings reveal the multi-dimensional nature of "value for money" and its inherent complexity on infrastructure projects. "Value for money" is viewed primarily as comprising of "economy" and "efficiency" drivers with less emphasis placed upon "effectiveness" drivers. The evidence highlights the pervasiveness of "value for money" discourse for those responsible construction procurement activities and across public organizations and State jurisdictions with Australia.

Keywords Value for money, Public procurement, Public sector organizations, Construction works, Road works, Australia.

Introduction

"Value for money" (VFM) is recognised as an important component of the market-oriented thinking underpinning New Public Management (NPM) (Haque, 1999; Diefenbach, 2009; Luke et al., 2011) and has pervaded the externalization of public services in many jurisdictions (Alford and O'Flynn 2012). Australia state governments have externalized much of their public works design, construction and maintenance capability (Furneaux et al., 2008). For public sector organizations/agencies charged with procuring construction projects and roads projects, justifying "value for money" both externally to taxpayers and communities, and internally to authorizing and or client departments within government is crucial but challenging. This is particularly so given the multiplicity of objectives sought as part of projects outcomes (Love et al., 2008; Love et al., 2010; McCabe et al., 2011) and the increasing complexity of projects (Flyvbjerg, 2007; 2009).

The importance of the role of middle managers in implementing strategy is addressed in the private sector literature (Floyd and Woolridge, 1992; Floyd and Lane, 2000), and increasingly being recognised in the public sector, where the alignment of strategy between senior and middle managerial levels in public organizations is associated with better performance (Andrews et al., 2009; 2012). Construction procurement activities undertaken by public agency project managers include tendering, evaluation, selection and contract award and might also include project planning, and contract management post award. Further, they are responsible for implementing procurement strategy and receive little policy guidance detailing how to implement strategy via procurement (Staples and Dalrymple *unpublished*). These processes are heavily reliant on the professional and technical expertise of those procuring. Bovaird (2006) notes that public sector organisations were increasingly appreciating that market relationships were socially constructed in the procurement process, and not simply a product of market conditions. These project managers are, therefore, central actors in designing procurement processes that construct markets and create public value (Moore, 1995). The way in which procurers' perceive "value for money" has potential implications for the way markets are constructed and value delivered.

Combining their responsibility for the implementation of strategy with their expertise, these project managers become the arbiters of VFM and reflect community, political, and multiple government agency perspectives

(treasury, cabinet and client department) of "value for money". How these managers perceive value for money is likely to influence how they procure. This paper focuses on construction procurement by Australian state governments and provides qualitative insights into how these public managers perceive "value for money" (VFM) within the context of their procurement work.

In Australia, Federal, State and Territory government procurement policies' emphasise the pursuit of VFM but contain only a limited description of what value for money means. The Australian Procurement Board (2011) outline in their strategic plan 2011-13 the objective of establishing a practical guide for public authorities on what "value for money" in government means, which further highlights the ambiguous nature of "value for money" for those charged with delivering it. In a survey of 47 UK local authorities, "value for money" was perceived as the primary objective of purchasing by 89% of the leaders of council, 84% of chief executives and 77% of purchasing managers (Murray 2001). "Value for money" is frequently the objective and mantra of those spending public money (Murray, 2001); however, there is little in the literature that elucidates what "value for money" means to the public sector beyond efficiency, economy and effectiveness (Glendinning, 1988). The key research questions addressed in this paper are, first, to what extent is value-for-money an objective for those procuring construction projects? and second, how do construction procurers' perceive value-for-money?

The paper begins by highlighting "value for money" as a key plank of the market orientation espoused by New Public Management (NPM) and describing the introduction of "value" based externalization procurement policy in Australia and the UK. It then highlights the interest in "value for money" from scholars in construction management and public management. An overview of the research design and the methods used to generate primary data is then provided. The findings and discussion shows the multi-dimensional nature of "value for money" and its inherent complexity on infrastructure projects. The evidence is that "value for money" is viewed primarily as comprising of "economy" and "efficiency" drivers with less emphasis placed upon "effectiveness" drivers. Finally, the paper concludes by considering the pervasiveness of "value for money" discourse for those responsible construction procurement activities and across public organizations and State jurisdictions with Australia.

Literature review

New public management (NPM) related reform and the externalization of public services is an area that has received considerable coverage in the extent literature (Pollitt and Bouckaert, 2011; Alford and O'Flynn, 2012; Walsh 1995). "Value for money" encapsulates the market orientation of NPM that has been introduced globally and impacted all public service sectors (Diefenbach, 2009). Boyne (1998) posited that in the UK its impact was felt most strongly at a local government level when subjected to compulsory competitive tendering (CCT) with a mandate for procuring and contracting on the basis of lowest cost. In both the UK and Victoria, Australia the emphasis on economy ("money") under CCT was replaced with "best value", retaining the competitive element of the market, but emphasising "value", rather than lowest cost as the guiding principle governing the externalization and delivery of public services (Boyne, 1998; Bovaird and Halachmi, 2001; Boyne et al., 2002).

Whilst "best value" has not been applied in the same manner within Australian state and federal governments as it was in Victorian local government, this discourse emphasising "value" has resonated at these levels of Australian government (see Table 1), and there has been clearly articulated recognition that "value for money" does not equal lowest cost when externalizing public services (Commonwealth Procurement Rules, 2012).

FEDERAL, STATE or TERRITORY GOVT.	Value for money Policy Guidance
FEDERAL	Achieving value for money is the core rule of the 2012 Commonwealth Procurement Rules (CPRs). Approvers (definition) must be satisfied, after reasonable enquires, that the procurement achieves a value for money outcome. Value for money in procurement requires: encouraging competitive and non-discriminatory processes; using Commonwealth resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth; making decisions in an accountable and transparent manner; considering the risks; and conducting a process commensurate with the scale and scope of the procurement.
ACT	Section 22a, Procurement Principle – Value for money (1) A territory entity must pursue value for money in undertaking any procurement activity. (2) Value for money means the best available procurement outcome. (3) In pursuing value for money, the entity must have regard to the following: (a) probity and ethical behaviour; (b) management of risk; (c) open and effective competition; (d) optimising whole of life costs; (e) anything else prescribed by regulation.
NEW SOUTH WALES	"The Government's procurement policy provides the framework for agencies to achieve value for money from their procurement whilst being fair, ethical and transparent. Public sector expertise resources, facilities and products should be used in preference to engaging the private sector, subject to value for money considerations. Where the private sector is to be engaged, opportunities to gain government business are encouraged through effective competition."
NORTHERN TERRITORY	There are five procurement principles underpinning the NT Governments Procurement Framework, of which the first is Best Value for Money.
QUEENSLAND	The Queensland State Procurement Policy is about maximising value for money and reducing costs of procurement; linking agency procurement and the priorities of Government.
SOUTH AUSTRALIA	In the public sector, the purchase of goods and services opens us to public scrutiny; therefore, we must obtain value and behave appropriately when spending public money. The aim of the State Procurement Act (2004) Act is to make certain that government bodies: obtain value for money when they spend public money; treat all participants ethically and fairly; ensure probity, accountability and transparency in procurement.
TASMANIA	Buyers must behave ethically and comply with a code of conduct. They must also enhance opportunities for local businesses by ensuring that suppliers that wish to do business with the Government are given the opportunity to do so.
VICTORIA	"The VGPB is committed to delivering value-for-money outcomes for Victoria, while also developing procurement capability, minimising risk and enabling access to procurement opportunities for all businesses." (VGPB 2012)
WESTERN AUSTRALIA	WA Government Procurement states that: "GP's aim is to ensure services are responsive to customers' needs and to provide value for money outcomes for government through goods, services and human services procurement."

TABLE I: Value for money in Australian Federal, State and Territory governments.

Public procurement policy guidance provided by the UK government and the devolved parliaments of Northern Ireland, Scotland and Wales has emphasised the pursuit of "value for money" (see Table II).

The U.K.'s Her Majesty's (HM, Treasury 2006, p.7). Value for Money Assessment Guide	Value for money is defined as the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirement. The term whole-of-life is used to refer to the lifecycle of the good or service. VFM is not the choice of goods and services based on the lowest cost bid.
Scottish Value for Money guidance for describes it (Value for Money Assessment Guidance: Capital Programmes and Projects 2011)	at a project level is defined as the optimum available combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the users' requirements. VfM is not the choice of goods or services based on the lowest cost bid It is important to note that vfm is a relative concept which requires comparison of the potential or actual outcomes of alternative options. VfM is central to Best Value but it should not be regarded purely in terms of balancing quality and cost. In considering the most viable, desirable and achievable method of procurement VfM must also take due regard to the other elements of Best value, including sustainable development, equalities and the capacity for continuous improvement.
Northern Ireland Public Procurement Policy Version 8 (2012)	Public procurement is the process of acquisition, usually by means of a contractual arrangement after public competition, of goods, services, works and other supplies by the public service. Best value for money defined as: The most advantageous combination of cost, quality and sustainability to meet customer requirements.
Community Benefits: Delivering Maximum Value for the Welsh Pound (2010)	The Welsh Government is committed to achieving best value for money in all our public services. The Value Wales Division of the Welsh Government has the role of supporting public sector organisations in making the Welsh pound go further.

TABLE II: UK Government value for money policy guidance.
Sources: (HM UK Value for Money Assessment Guidance 2006; Community Benefits 2010; Commonwealth Procurement Rules 2012; Scotland Transforming Procurement: Accelerating Delivery 2010; Northern Ireland Public Procurement Policy (Version 8) 2012)

The concept of "value for money" in the public sector has attracted attention from scholars and practitioners interested in several related fields: construction procurement, public private partnerships (PPPs), public management and accountability/auditing. There is considerable evidence that value-based procurement approaches, rather than lowest cost, are important to those responsible for construction procurement (Kenley et al., 2000; Wong et al., 2000; Tookey et al., 2001; Kelly et al., 2002; Palaneesweran et al., 2003; Kelly et al., 2004; Walraven and de Vries, 2009).

There is an emerging focus on construction procurement by Australian State governments (Staples and Dalrymple, *unpublished*; 2011; McCabe et al., 2011; Love, et al., 2010; Love, et al., 2008; Furneaux et al., 2008). Love et al (2008) provide insight into the selection of procurement approaches by public sector clients highlighting the risk averse nature of Western Australian State Government clients finding that uncertainty avoidance was a major factor in choosing predominantly, a traditional lump sum (TLS) approach. The perceived strength of a lump sum approach was that it provided cost certainty to the client and avoided the risk associated with cost escalation. Love et al (2008) found that government perceived the capacity of the supply side to deliver non-traditionally as limited, and that cost certainty and the issues associated with probity and accountability were important elements of public

sector procurement. The authors further commented that public clients are under increasing pressure to obtain "value for money" from the services and projects they deliver and are considering the procurement methods selected so as to obtain better "value for money". Love et al (2008) noted the sheer volume of criteria used to select priorities for projects and how this demonstrates the complexity of best value as a concept. The authors concluded that a "procurement framework should be able to guide the decision maker rather than provide a prescriptive solution"(p.). Staples and Dalrymple (*unpublished*) found there was a level of alignment between the strategic plans of Australian State governments and the construction projects pursued – if a project was not in the strategic plan then it would not be funded in the budget cycle. The authors also found that strategic plans have little impact on the way construction procurement is undertaken, and that this interpretative step is the frequently the work of project managers who are located in centralised public works and roads agencies. Love et al (2010) found that there was an inconsistent understanding of project objectives amongst public officers procuring construction projects, and they also reported that the public sector client made a point of stating that cost certainty was achieved with a traditional lump sum (TLS) approach. They authors concluded that repeatedly using a TLS method is not an effective way to obtain "value for money".

The Public Private Partnership (PPP) literature attempts to define and assess "value for money" largely in financial measures to decide whether it is a viable procurement approach. The focus is on undertaking cost-benefit analyses to determine whether the PPP procurement route is financially advantageous (Nisar, 2007; Grimsey and Lewis, 2005). VFM over these longer contractual time periods is complex and riddled with uncertainty (Burger and Hawkesworth, 2011). The idea that the procurement approach chosen is a driver of "value for money" is a view consistently held in the construction procurement literature (Walker and Hampson 2003, pp.43-54), where "value for money" differs according to the project and procurement approach adopted (e.g. alliance projects, see McDonald et al., 2012; 2013).

The goals of public procurement are frequently multiple and conflicting (Murray et al., 2012; Murray 2009b; Erridge 2007), adding complexity to the commissioning and delivery roles (Bovaird, 2006), and requiring value laden judgments by those involved. Murray (2001) found that "value for money" was the primary goal for UK local government procurers, whilst Erridge and McIlroy (2002, cited in Erridge (2007)) outlined three sometimes conflicting goals of public procurement (commercial, regulatory and socio-economic). Economy, efficiency and effectiveness are the commonly described dimensions of "value for money" (Glendinning 1988), however Erridge and McIroy (2002) describe these "value for money" goals as largely "commercial" goals, and that public procurement has important "regulatory" (competition, transparency, equality, compliance) and "socio-economic" goals (public interest, employment concerns, social exclusion, economic development, environmental policy).

Strand	*Key themes*	*Achieved through*
Commercial	value for money economy efficiency effectiveness	competition/competitive tendering closer relationships with suppliers longer contracts facilities management
Regulatory	competition transparency equality compliance	EU public procurement directives HM Treasury Tendering procedures organisational tendering rules
Socio-economic	public interest employment concerns social exclusion economic development environmental policy	Best Value contract compliance Transfer of Undertakings (Protection of Employment) (TUPE) Green buying guides

Table III: Competing strands of Public Procurement.
Adapted from: Erridge and McIlroy (2002)

The accountability/auditing field focuses on the auditing of public sector expenditure to determine whether it has achieved "value for money" (Gronlund et al., 2011; Johnsen et al., 2010; English, 2007). As governments have increasingly externalized services (Alford and O'Flynn 2012) the subsequent associated auditing activities have increased in importance and complexity (Gronlund et al., 2011). Gronlund et al (2011) focused on the types of audits undertaken and described prominent "value for money" elements as efficiency, economy and effectiveness.

Methodology

As the aim was to explore the construction procurers' perceptions of value for money, a qualitative approach was adopted. Data were generated from ten public sector agencies (5 roads and 5 works) in five Australia States: New

South Wales (NSW), Queensland (QLD), South Australia (SA), Victoria (VIC) and Western Australia (WA). These states were selected as they are the major investors in construction projects. Over $40 billion of infrastructure expenditure is outlined in the 2013-14 State Governments budgets (NSW 2013; QLD 2013; SA 2013; VIC 2013; WA 2013). This investment comprises both the commissioning of new infrastructure and recurrent expenditure on existing projects.

Data were collected using three approaches: (1) telephone interviews; (2) face-to-face interviews; and (3) document analysis. Telephone based semi-structured interviews were undertaken with twelve participants drawn from five roads and five construction agencies states and ranged from fourteen to twenty minutes in duration with participants. The telephone based interviews focused on "value for money" and provided contact information for potential participants in the face-to-face interview phase. In order to further explore "value for money", thirty-seven (20 (C)onstruction and 17 (R)oads) project managers who were involved in the preparation, evaluation and awarding of construction contracts through a tender process were interviewed face-to-face in their place of employment. These project managers had, on average, over twenty years of public sector procurement experience. The average duration of the interviews was 66 minutes (range: 44 minutes to 123 minutes) and featured a mixture of open-ended and closed questions designed to explore perceptions of "value for money", and the extent to which it was an objective. Open-ended questions were used in a stem-plus-query design (Cavana et al., 2001, p.139), which allowed room for other issues to emerge, and for the researcher to prompt and probe, based on the answers provided by participants. The pattern of the interview was designed to be a series of funnel sequences (Cavana et al., 2001, pp.142-143) starting with a broad, unstructured, open-ended question and then proceeded to more structured, less open questions and closed questions directly related to the research questions (see Table IV). These interviews were supplemented by analysis of procurement and construction procurement policy documents and a limited amount of observation during site visits for fieldwork.

Open-ended question: I am very interested in value-for-money. Would you tell me about Value for Money?
Closed question focused on RQ 1a: To what extent is purchasing value for- money an objective?
Open-ended question focused on RQ 1: What does value-for-money mean to your department?

TABLE IV: Value for money interview approach.

Scenarios and reflections on current procurement practice were then used to further probe the issues of value for money (See Tables IV and V).

CONSTRUCTION SCENARIO:

The Department of Education wants to build a Primary School in (a regional town). The project is estimated to cost $9.5 million

- How would you procure in this case?
- What would Best Value be in this case?
- What Government priorities that you would seek to advance?
- Who would determine these priorities?

B: The policy changes decreeing that all Schools should all have solar panels which will reduce the running costs for hot water and electricity in conjunction with supporting environmental technologies (holding tanks for hot water etc). By installing the solar panels for this project the budget is exceeded by $600,000.

- Which decision do you take?
- Who would determine the priorities?

TABLE V: Scenario for construction works procurers - procuring value for money

ROADS SCENARIO:

You are going to widen and upgrade an existing road in regional _____. The project is estimated to be worth $38.4 million.

- How would you procure in this case?
- What would Best Value be in this case?
- Are there Government objectives that you would seek to advance?
- Who would determine these priorities?

There is a policy change advocating the local purchase of materials. To source environmentally friendly natural gravel materials locally there will also be a significant environmental compliance costs for the quarry to begin new works and extract the materials. By sourcing gravel materials locally for this project the budget is exceeded by $6.5 million

- How do you deal with this?

TABLE VI: Scenario for road works procurers - procuring value for money.

Policy, procedure and process documents from all of the locations were analysed to see what light they shed on value for money. Interviews were audio recorded and Nvivo software was used to manage the data and create broad bucket coding (Richards, 2005; Bazeley, 2007; Richards and Morse, 2007). These broad bucket codes were then further analysed in a manner consistent with what Strauss and Corbin (1998) described as axial coding following the steps laid out by Dey (1993) including: reading and annotating, creating categories, assigning categories, linking data, making connections and producing an account.

The nature of procurement undertaken by the sample cohort of project managers is strategic, complex and focused on the delivery of best value-for-money outcomes. The project managers procuring infrastructure for state government agencies are highly experienced and almost entirely male. Only one respondent from case C(C) was female from an architectural background with roads projects all procured by males from a civil engineering background. Those procuring have either spent an overwhelming proportion of their career in the public sector or have been career civil servants. They have, on average, more than 20 years experience in both the public sector environment and the procurement of infrastructure. Most project managers are degree qualified in the areas of architecture, construction and engineering.

Findings & Discussion

When asked about the extent to which "value for money" was an objective all thirty-seven project managers interviewed responded that "value for money" was important. One roads project manager (SA) commented on the importance of "value for money" that:

> I think it's a very, very, very strong objective; it's probably the biggest factor in anything that we do – (R13 SA).

The responses from construction agency project managers also reflected the importance of "value for money". A works project manager (SA) stated:

> It's a major objective. All our tendering systems are really focused on doing just that [delivering value for money]. It seems obvious to me, sorry [Laughing]. I mean, I suppose it is obvious, but that's what we have been trying to do for years – (C9 SA).

The overwhelming response from project managers was that "value for money" is extremely important; a fundamental objective, and the primary driver of their procurement work. This was illustrated by one project manager (WA) who stated:

> Oh look its critical [value for money], at the end of the day the Government is looking at the most effective and efficient means of expending the taxpayers dollars – (C8).

The finding that "value for money" is the primary objective and driver of construction procurement within Australia state governments is consistent with Murray's (2001; 1999) findings on procurement in UK local government. That "value for money" was reported as the primary procurement objective suggests that "value for money" discourse is extremely pervasive within government institutions. Value based policy influencing the externalization of services

(for example "best value") has not been implemented by Australian state governments as it was in UK local governments (Bovaird and Halachmi, 2001). Best value was pursued at a Local Government in Victoria between 1999 and 2008 (Local Government (Best Value Principles) Bill 1999).

There was a high level of similarity as to the importance of "value for money" reported by project managers from both roads and construction backgrounds. One works project manager explained this in terms of extracting the most out of public funds:

> [...] we're always looking for value for money, and we want to achieve that, get the most out of the money we've got to play with so to speak – (C14 NSW).

One roads project manager described "value for money" as being the total focus because it is a priority for because of societal desires and expectations:

> To what extent? About a hundred [percent]. It might be 101 [percent] actually. Because the public expect to get value for money. They not only expect to get it, they actually want to see we're getting it too – (R1 QLD).

There was little difference in the extent to which "value for money" was an objective for roads and construction works agencies. Further, there was little difference between the states, which suggests that there are institutional forces that prioritize "value for money" across jurisdictions and government agencies. The likeness of the responses from participants suggests that the neo-liberal rhetoric or discourse of "value for money" is embraced and espoused by both sides of politics in Australia, although its meaning can differ as to the relative emphasis placed on economy, efficiency or effectiveness.

Under Compulsory Competitive Tendering (CCT) "value for money" was viewed as primarily focusing about "economy" and procuring on the basis of lowest cost, whilst "best value" emphasized the 3E's "economy, efficiency and effectiveness". In Australia, the terms "value for money" and "best value" are not strongly related to policy regimes of particular political parties as in the UK and are used interchangeably and synonymously by the project managers.

Perceptions of "value for money"

There were two major strands of findings about the project managers' perceptions of "value for money". Firstly, the project managers commented extensively on the nature of "value for money", and secondly, they highlighted the complexity of "value for money" drivers that are considered when undertaking construction procurement.

They commented on "value for money" not being able to be universally defined, and "value for money" being a relative concept, echoing Glendinning (1988) who referred to attempts to define "value" in the economics literatures. Further, project managers commented extensively that "value for money" required interpretation by them as procurers, necessitating their judgment, and because of its relative nature it differed from project to project depending on several factors including: location, financial environment, and forward plans. As one as one procurer of roads projects commented:

> We keep getting these discussions where people are trying to get a universal formula or calculation of what is value for money. I think value for money can change on a network depending on the section of the road you're talking about, the environment you're in, how much money is available, what your forward plans might be and so on, which makes it very difficult to come down and argue or demonstrate value for money – (R4 QLD).

One building procurer suggested government needed to take a location based perspective, particularly to regional projects, where greater cross-government collaboration was needed to both contemplate and coordinate the achievement of the planned impacts for regional communities.

If there is no universally applicable definition of "value for money", and the procurers professional expertise is crucial in creating public value (Moore 1995), then the procurers' role becomes even more central in implementing strategy (Floyd and Woolridge, 1992; Floyd and Lane, 2000). The nature of "value for money" as perceived by the project managers and their role in creating value creates challenges in the policy environment as how to provide appropriate guidance on procuring "value for money" (see Community Benefits 2010). It may also require creative thinking about how the tacit knowledge of procurers can be codified through policy and systems, and shared between project managers, and across institutions and jurisdictions.

There was only one project manager (SA) out of the thirty-seven project managers and twelve project executives interviewed who offered an official definition of "value for money". This definition was focused on balancing price with achieving objectives:

> I can give you the official definition [of value for money] … the fulfilment of objectives for the lowest whole-of-life cost, maximisation of the objectives – (C17 SA).

Governments are now providing policy advice (see Table 1) to departments and procurers about what VFM is, but how this policy information is both used and perceived is worthy of further exploration.

Politically value-laden judgments

Project managers were conscious of how the political environment could influence "value for money" on a project and the role of politicians in defining "value for money". One participant (NSW) commented on the overarching authorization that is needed from the political environment to legitimize interpretations of "value for money":

> Yeah value for money is really quite subjective and has to be driven from the top. Really from the top, and the ministers, at the higher levels. Ministers are there to decide what is value for money. Not us. We try to represent, to a large extent the minister has to be aware of what is value for money – (C14 NSW).

The implication of this desire for political authorization is that without it project managers may not feel empowered to use their skills in their procurement solutions.

The second major theme was focused on the drivers of "value for money" on a project, and highlight the multi-dimensional nature and complexity of "value for money" for those procuring construction projects. This supports the findings of scholars who detail the large amount of criteria upon which projects are procured (Love et al 2008) where a multiplicity of objects are frequently sought (McCabe et al 2011). "Value for money" was viewed as comprising many drivers and factors. However, the evidence showed that project managers still predominantly view "value for money" through commercial 'economy' and 'efficiency' lenses (Erridge and McIlroy 2002). Further, "value for money" drivers that initially appear unrelated to commercial imperatives are frequently viewed as drivers of good commercial outcomes, be it (for instance: relational contracting, getting good design etc).

Another important finding was the plurality of institutional perspectives with Government. Project managers noted that government departments: treasury, premier, cabinet, and client agencies all have an opinion on what "value for money" is. Frequently these departments have their own commercial agendas, but sometimes they are focused on the socio-economic uses of a facility. Within works agencies there is a strong commercial incentive to listen, and develop good relationships with client departments, as the clients commission projects and works procures for them. This theme of listening to client departments was noticeably stronger in state jurisdictions where client departments are not mandate to procure through a centralised works department. In other words, the works agency needs to good relationships with clients to ensure ongoing work which makes the works agency a viable entity within government.

Roads agencies both commission and procure projects and are then responsible for the maintenance and upkeep of the infrastructure procured. The connected nature of expertise within the domains, and the fact that they will be responsible for the ongoing maintenance may mean they are in a better position to make value for money judgments over issues of life cycle.

Conclusion

"Value for money" is the major objective for the managers responsible for procuring buildings and roads construction projects on behalf of Australian state governments. It is viewed as the main driver of procurement activities by experienced project managers responsible for construction procurement of over $40 billion of infrastructure expenditure is outlined in the 2013-14 Australian State and Territory Governments budgets.

> Oh, ultimately to me, it's the objective – (C1).

The discourse of "value for money" has been powerful within Australian state governments but relies on interpretation by, and the expertise of project managers to translate into procurement strategy, highlighting opportunity for creative policy. This is further supported by the finding that only one project manager cited an

official definition of "value for money" and the definition was sufficiently open ended that it required interpretation by a project manager to operationalize it through procurement. Project managers are, therefore, very important for these types of specialized procurement. The importance of the project managers role is further enhanced by the perceptions of "value for money" expressed that believe it is a relative term that requires interpretation and judgement by project managers in order to operationalize the concept. The complexity of value for money was highlighted by project managers as they listed multiple drivers that can then be viewed as fitting into the auditing perspective of the 3Es or the Erridge and McIlroy (2002) three goals of procurement (commercial, regulatory, and socio-economic). What is clear when you analyses the responses through these two lenses is that most of the drivers of "value for money" are commercial goals or viewed through economy and efficiency lenses, and far less consideration of socio-economic or effectiveness drivers is perceived to a driver of value for money.

Perhaps this is because project managers believe that effectiveness and socio-economic criteria are politically value laden and therefore require the approval/authorization from politicians. Further exacerbating the complexity was the finding that it was acknowledged by project managers that there were multiple institutional perspectives on "value for money".

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PolicyImplementation of Sustainable Public Procurement in China

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Abstract Public procurement is an ideal task force for promoting sustainable purchasing to serve the triple bottom line: economy, environment, and society. As the most influential purchasers in a national economy, spending typically 15-30% of GDP, governments can drive the market for sustainable products and services through their procurement policies and purchasing practices. Furthermore, different countries and regions must construct different public management systems, because of their diverse political systems, distinct socio-cultural forces, and various economic developments. This is particularly true for a developing country like China, given the fact that China has its own unique political and economic systems. This paper aims to promote sustainable purchasing by China's public procurement. We first summarize a suitable policy implementation model for China's public procurement. Then, we investigate policies, relationships between implementation agencies, and the purchasing process in China's sustainable public procurement. In particular, we provide empirical feedback and evaluation from practice to close the loop by making improvement suggestions at all four layers of policy implementation: The law and regulation should provide clear goals and specific criteria for congruent implementation; the supervisory agency needs to conduct unified and open oversight; the administrative agency should manage centralized purchasing for all public resources with transparency in the whole purchasing process; the vendor needs to register into the public procurement database and participate fairly in the transparent purchasing process.
Key words Public procurement; Sustainable Purchasing; China

1 Introduction

Procurement is essential to the success of the whole supply chain (SC) because the purchased materials are the bases for any subsequent SC members to work on. Companies tend to focus on their own economic performance when deal with purchasing. The majority of supplier evaluation criteria consist of just three: cost or price, quality, and delivery (Simpson, Siguaw, & White, 2002; Monczka, Handfield, Giunipero, & Patterson, 2009). Degraeve and Roodhooft (1999) argue that supplier evaluation is most often based on price, because other factors in turn result in additional cost due to unreliable delivery, limited quantities, inferior quality, and inadequate communications. This typical behavior is understandable because companies have to spend their own money mostly for their own economic good in today's touch markets. In other words, only the shareholders have a legal claim on the purpose of the firm they own (Emiliani, 2001; Weiss,2003), although the general public is stakeholder (Freeman, 1984), affected by the environmental and social achievement (or damage) of a firm. Environmental and social responsibilities can be viewed as externalities for companies in the private sector.

On the other hand, public procurement(PP) spends public money by government agencies to serve the general public. The general public is not only stakeholder but also shareholder (i.e., pay tax to contribute and own public money). Environmental and social responsibilities thus become internalities in PP. Moreover, as the most influential purchasers in a national economy, spending typically 15-30% of GDP, governments can drive the market for sustainable products and services through their procurement policies and purchasing practices. (The Marrakech Process, 2012). Therefore, sustainability is constantly promoted and regulated by countries all over the world, for example in the Brundtland Report (1987). In particular, sustainable PP (SPP) becomes a trend in new policy implementations (e.g., The World Summit

On Sustainable Development, 2002). The United Nations Environment Programme (UNEP） and the United Nations Department of Economic and Social Affairs (UNDESA) in the Marrakech Process

have thus far identified seven task forces, one of which is SPP (The Marrakech Process,2012). In essence, SPP extends the traditional focus on economy only to include environment and society, as in the sustainable supply chain management literature . This triple bottom line in SPP indicates that PP provides legitimate value for money; PP covers environmental protection including energy saving, water saving, material saving, air pollution control, recycle, and appropriate disposal; and PP protects human rights and employee safety, supports small and medium-sized enterprises (SMEs) and community equity, and prevents labor discrimination (Carter & Rogers, 2008.).

Furthermore, different countries and regions must construct different public management systems, because of their diverse political systems, distinct socio-cultural forces, and various economic developments (McCourt, 2008; Commission on Growth and Development, 2008). This is particularly true for a developing country like China, given the fact that china has its own unique political and economic systems (Zhao, Flynn, & Roth, 2006). Research on how to promote SPP in China is warranted.

So, this paper is organized as follows: We first review the legal context for China's SPP (CSPP) and we summarize a suitable policy implementation model for China's PP (CPP). Next, we present our research method with emphases on CSPP policies, relationships between implementation agencies, and the purchasing process. We then present our results and conclude the paper.

2 literature Review

2.1 China's Policy Implementation Model

China has a unitary state system, meaning that the Central Government has legitimate authority and credibility while local governments obey the Central Government (The Constitution of the People's Republic of China, 1982). Moreover, the Central Government controls most tax revenue (Zhang & Qi, 2005), and Chinese culture inherits a strong totalitarian ideology(Sun & Yu, 2010). So, the policy implementation in China follows a top-down model. Under this top-down regulatory model, CPP has clear hierarchical tiers from top to bottom: Central Government, province, and prefecture-level city. Then, at each tier, the municipal government sets up the environment and resource for its administrative agency, including a supervisory agency. The separation between administration and supervision in CPP is required by the Government Procurement Law of the People's Republic of China (GPL) (2002). Last, the administrative agency manages the whole purchasing process. Figure 1 summarizes the current policy implementation model with four layers for CPP, where the arrow shows the flow of influence.

Research in industrialized countries indicates that for congruent implementation the topdown model should emphasize on the limitation of the number of links, centralization, and goal clarity (Pressman & Wildavsky, 1973;Van Meter & Van Horn, 1975): The longer the causality chains, the more numerous the reciprocal relationships amongthe links, and the more complex implementation becomes. It is also more likely that policy goals are diluted and distorted. Moreover, centralization is a key factor. The more direct lines of authority would foster greater policy commitment, attention to rules, and adherence. Supervision and control can be exercised more straightforwardly to the degree the relationship between formulator and implementer resembles a one-to-one relationship. Policy goals are supposed to be formulated in a way as uncontested as possible, clearly defined, and not too difficult to operationalize.

However, due to unique reform and open policies, the development of CPP relies more on practices, also known as an approach of 'crossing the river by feeling the stones' (Deng, 1993,p. 224). CPP has started after 1979 when China's economy began to transit from central planning to market. Currently, characterized by dynamic and transient, institutions and mechanisms are still in the process of gradual improvement. Numerous organizational models for PP exist in different regions across China. Firstly, the separation between administration and supervision is required by GPL but with divergent practices. This is mainly manifested in the various affiliations of procurement centers: financial departments, government agencies, state-owned asset management sectors, etc. Secondly, supervisory organizations are dispersed. In some places, construction projects, office supplies and services, and pharmaceuticals and medical devices belong to different procurement departments and

different supervisory agencies; some areas are gradually integrating all PP into a single trading platform and considering a unified monitoring. Thirdly, organizational structures and processes are different. In some places the organizational structures are determined by the purchasing processes; some set up organizational structures and processes in accordance with the goods and services purchased.

Moreover, transparency, one key element in PP, remains as a daunting task in Asia (Kim, 2008; Zhang, 2010). Transparency is a principle, a goal, and a tool because the publicized open procedures allow a wide variety of stakeholders to scrutinize public officials' and contractors' performance and decisions. This scrutiny helps keep officials and contractors accountable (OECD, 2007) and serves as a vital ingredient for corruption control (Transparency International, 2006), which are desperately needed in present China (Wang, 2006). Although there is increasing data exposure of PP activities on the Internet, the scope is still very limited to online information bulletins and downloadable forms only (Wang, 2006).

2.2 CSPP

To meet the need for CSPP, some laws and regulations have been issued to promote sustainable practice. Article 9 in GPL states that government procurement should endorse economic and societal development goals: protecting environment, supporting undeveloped and ethnic minority regions, and assisting SMEs. In the green PP, China's Ministry of Finance (MOF) and the National Development and Reform Commission (NDRC) jointly issued *the Opinions of Implementing Government Procurement of Energy Saving Products* in December 2004, giving these products certain priority; then, MOF and the Ministry of Environmental Protection (MEP) published a list of green product inventory in October 2006. Products in the list were required to meet the energy saving standards and the environmental protection measures set by MEP. In March 2007 and August 2008, the list was expanded from 14 categories to 19; the number of enterprises from 444 to 760; the product models from the 2979 to 7159 (Qiao & Wang, 2011).

In the blue PP, Article 36 of the Law on the Protection of Persons with Disabilities of the People's Republic of China (2008) states that PP should give priority to products and/or services from the welfare institutions of the disabled when other conditions are equivalent. MOF and the Ministry of Industry and Information Technology (2012) jointly issued the interim measures for promoting SMEs by allocating at least 30% budget to SMEs in PP.

However, actual implementation is still largely unclear. Evaluation and feedback are greatly needed in order to advance CSPP. To this end, this paper aims to provide meaningful insights from the angle of policy implementation. Results from our empirical study can be applied into the further reform of CPP policies and implementation in the near future.

3 Research Design and Method

3.1 Theoretical framework

We aim to investigate CSPP policies, relationships between implementation agencies, and the purchasing process under the China's context of the top-down model through field study. Applying literature results in developed countries, we formulate following hypotheses:

H1: Goal and criteria clarity enhances congruent implementation in CSPP.
H2: Centralized procurement enhances congruent implementation in CSPP.
H3: Information and evaluation transparency in the purchasing process enhances congruent implementation in CSPP.

In spring and summer 2012, we interviewed the chief official or manager in each organization unit at three layers: supervisory agency, administrative agency, and vendor. Table 1 lists the details of their units. These agencies represent three tiers of government: Central Government, province, and prefecture-level city. They locate within three representative environments, balanced: Central Government and Beijing; conservative: Inner Mongolia and Luoyang, and innovative: Shaoxing. Our intention was to study the same event from different key stakeholders in a systematic manner – data triangulation.

Table 1: Organizations interviewed

	Supervisory Agency (5 interviewees)	Administrative Agency (6 interviewees)
Central Government	□ Supervision Office of Government Procurement of China's MOF	□ Procurement Center of Central Government □ Procurement Center of the People's Bank of China
Province	□ Supervision Division of Government Procurement of Beijing Municipal Bureau of Finance □ Supervision Division of Government Procurement of Inner Mongolia Bureau of Finance	□ Procurement Center of Beijing Municipal Government □ Procurement Center of Inner Mongolia Autonomous Region Government
Prefecture-Level City	□ Supervision Division of Government Procurement of Shaoxing Municipal Bureau of Finance □ Supervision Division of Government Procurement of Luoyang Municipal Bureau of Finance	□ Trading Center of Shaoxing Public Resource □ Procurement Center of Luoyang Municipal Government

The Central Government and the Beijing Municipal People's Government are located in Beijing, the capital of China and also the country's political and cultural center, representing a balanced environment. Inner Mongolia and Luoyang in Henan Province are in inner China, representing under-developed regions. Shaoxing City has the country's oldest trading centre of public resources in the developed coastal regions, representing the frontier of China's reform.

We also interviewed sales managers at four major vendors: Lenovo, Huawei, Beijing Hyundai, and Meide. These companies are China's fortune 100 company,representing industries in electronics, automobile, and office equipment. All together we interviewed 15 chief personnel: at supervisory agencies, 6 at administrative agencies, and 4 at vendor companies.

Our interviewing approach was guided by well-defined case study protocols (Eisenhardt,1989; Miles & Huberman, 1994; Yin, 2003): We conducted a focused and constrained multiple case study in three areas: policy goals and criteria, relationships between implementation agencies, and the purchasing process. All interviews were conducted face-to-face, while each interview lasted about one hour. We maintained an open and pleasant interview environment to ensure trustworthiness: Participants did not avoid interview questions and responses were kept anonymously; open-ended questions allowed respondents to reflect on experiences; evidences from respondents at multiple organization units used to support a same concept.

After all interviews, the research team first conducted a within-case analysis; each interviewee represented one case - one organization. The detailed interview notes and our literature review articles were examined, and key findings were identified and tabled. This step involved numerous discussions and reviewing of texts and various tabular displays, resulting in an in-depth result of each interviewee's view on policy goals and criteria, relationships between implementation agencies, and the purchasing process. Next, a cross-case analysis was performed by using tabular displays to seek similarities and differences among interviewees. Because we studied the basics of policy goals and criteria, relationships between implementation agencies,and the purchasing processes, we found vast similarities and consistent patterns between interviewees. We also intermittently checked our interview notes to sharpen our constructs and inter-linkages. With this iterative process, we were able to raise the abstraction level and our constructs' grounding in data was verified.

To ensure rigorous data collection and analysis, we followed appropriate tests of construct validity, content validity, internal validity, external validity, and reliability (Churchill,1979;

Churchill, 1987; Eisenhardt, 1989; Miles & Huberman, 1994; Yin, 2003). The construct validity tests whether the research measures what it is supposed to measure. The construct validity was established by examining multiple sources of evidences (5 supervisory agencies, 6 administrative agencies, and 4 vendors) and letting interviewees review the case write up. The content validity refers to the extent to which a measure represents adequate coverage for the construct domain or essence of the domain. The content validity was established by grounding our measures in existing literature and our interviews with key officials/managers. The internal validity focuses on causal effects. We built the internal validity by investigating logical consistency across supervisory agencies, administrative agencies, and vendors. The external validity looks at whether the findings can be extended to the populations and the settings of interest. We built the external validity by the cross-case analysis. Reliability demonstrates repeatability. We maintained reliability by a consistent, refined case study protocol.

4.Results

4.1CSPP Policy Goals and Criteria

All 15 interviewees strongly supported the top-down model, which is China's reality. CSPP has made substantial progress after ten years of development, thanks to the vigorous promotion by MOF as a key administrative organization, close cooperation between the Central Government and local governments, and the consistent regulations by the Central Government.

Especially in the green procurement, the policy goal has been lucid. The green product inventory has been published ten issues so far jointly by MOF, NDRC, MEP, and China Quality Certification Center. In 2012, the list details product brands, model numbers, and vendors' contact information. All governments must give priority to these published certified products. However, the blue PP has remained largely as abstract legal provisions only: no apparent policy goal yet, no strong supervision from the Central Government, and no enough attention at administrative agencies. There is no certification standard and no product list in the blue PP.

On the next level, the implementation criteria guide how to implement specific purchasing based on policy goals. Examples include the proportion of green purchasing, the proportion of blue purchasing, bonus evaluation scores of sustainable products and services, and financial incentives on sustainable products and services. In our interviews, the majority of officials at the supervisory agencies (3 out of 5) thought that the product inventory list was sufficient. There was no need for specific implementation criteria in different purchasing categories; moreover, a universal standard was not even appropriate. The administrative officials should have the discretionary right to make their own judgments. However, all 6 interviewees at the administrative agencies expressed the opposite opinion. They strongly suggested the need for concrete implementation criteria, especially in the evaluation scores and the score card calculation. The green product inventory list only requires that the green product should have the priority under the equivalence with conventional products. What if sustainable products have higher costs? How to balance sustainability and higher cost? How to award a higher score to sustainable products and services? There were no detailed guidelines so far, which caused difficult SPP implementation in practice. All four vendor managers agreed the need for concrete implementation standards, more control on the discretionary right on administration officials, and gradual improvement towards transparent evaluations on purchasing.

For future development and improvement, all 15 interviewees recommended more specified policy goals (especially in the blue procurement). To increase operability, 12 (80% of all 15 interviewed) recommended more concrete implementation criteria with product lists and bonus calculation methods for sustainable products and services by the Central Government.Overall, our interview results support *H1: Goal and criteria clarity enhances congruent implementation in CSPP.*

4.2 CSPP Policy Implementation Agencies

13 (87% of interviewed) interviewees believed a strong organizational control in order to have a real impact on CSPP, and advocated a centralized PP center as the choice of the administrative agency. The centralized PP center should execute all PP including office and general equipments, construction projects, medicines and medical devices, land transfers, and property transactions.

Also, a unified supervisory agency should be established accordingly, responsible for all

governance on PP. This supervisory agency has the administrative law enforcement power in inspection and oversight.

The proposed consolidated organizational structure by 13 interviewees suits pretty well to the People's Congress system in China - a unitary political regime, providing a unified model for deviating practices in current CPP. Thus, governments at three tiers (central, province, and prefecture-level city) can execute efficient and timely control on all public purchasing activities. Thanks to economies of scale, the procurement center can thoroughly accumulate all related skills and knowledge in CPP.

Only 2 interviewees (13% of interviewed) suggested keeping current decentralized purchasing, due to transient nature of current CPP. They emphasized caution against dramatic change in CSPP.*H2* is thus supported: *Centralized procurement enhances congruent implementation in CSPP*.

4.3 CSPP Purchasing Process

All 15 interviewees supported that CSPP had to be implemented into the purchasing process, including tendering, bidding, bid evaluation, contract awarding, contract execution, and aftersales service. Most important elements were tendering and bid evaluation (13 interviewees or 87% of all 15 interviewees), followed by contract execution (10 interviewees or 67%).

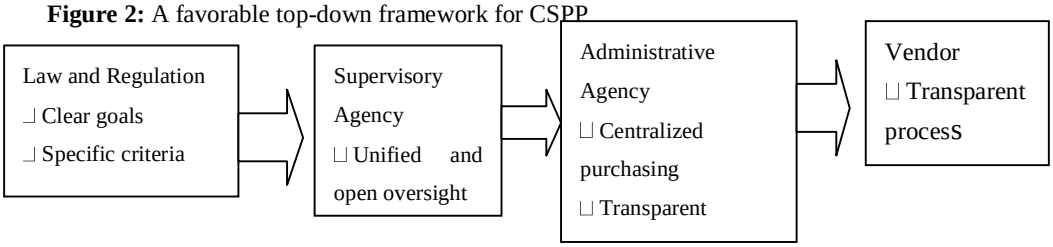
All 5 interviewees at supervisory agencies thought that CSPP had been implemented well in the purchasing process. But, all 6 interviewees at the administrative agencies thought differently that CSPP was not implemented favorably as should; CSPP still largely existed at the policy level, not in the purchasing process, mostly due to economic self-interest at local governments, procurement centers, and vendors. All 4 interviewees at vendor companies agreed that CSPP had made progresses in saving energy, protecting environment, and supporting disadvantaged groups; however, CSPP in the purchasing process was still vague and abstract.

For future improvement, 14 interviewees (93% of interviewed) proposed systematic transparency on the purchasing process. Tendering documents should be open to public in advance; the administrative agency may solicit public comments or undertake an expert demonstration procedure by an independent, ad hoc committee of registered bid assessment experts of MOF in complex purchasing. Bid evaluation should be transparent as well, including the evaluation process, the evaluation criteria, and the evaluation resolutions. All these important documents should be published online to accept public scrutiny.*H3* is thus supported: *Information and evaluation transparency in the purchasing process enhances congruent implementation in CSPP*.

5 Conclusions

We summarize our interview results under China's top-down framework Figure 2. From top to bottom, the solid line arrows show the flow of influence; from bottom to top, the dotted line arrows show the flow of feedback and evaluation. Our major contribution is to collect empirical feedback and evaluation from practice to close the loop by making improvement suggestions at all four layers: The law and regulation should provide clear goals and specific criteria for congruent implementation; the supervisory agency needs to conduct unified and open oversight; the administrative agency should manage centralized purchasing for all public resources with transparency in the whole purchasing process; the vendor needs to register into the public procurement database and participate fairly in the transparent purchasing process.

Figure 2: A favorable top-down framework for CSPP



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"ASSESSING THE NEED FOR STANDARDIZING SUSTAINABLE PUBLIC PROCUREMENT ACROSS DIFFERENT LEVELS OF GOVERNMENT"

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Abstract

As a public policy tool, adoption of sustainable procurement practices holds out hope of a potentially large payoff in terms of promoting public purchasing practices that are socially desirable, financially sound, and environmentally friendly. However, public procurement takes place within a complex, nested environment brimming with potential pitfalls. Based on a recent survey of 339 public procurement practitioners in the U.S. and Canada, this paper assesses the current state of sustainable purchasing in the public sector. Coming from a broad range of government organizations, practitioner's perceptions of their own organizations' sustainable purchasing practices are investigated. Several quantitative measures are used to examine how SPP is thought to play a potentially important operational role in transforming the public procurement supply chain. Results show that public procurement practitioners believe government should play a prominent role in providing reliable, standardized information in encouraging sustainable public procurement. The paper concludes by discussing these findings within a framework of the potential payoffs and pitfalls associated with government leading the initiatives in this area.

Introduction

It is little secret that researchers in numerous disciplines have largely ignored the purchasing function (MacManus, 1992). Subsequently, many people are probably largely unaware of public procurement practitioners' roles and responsibilities and when scholars take notice of procurement issues, their studies tend to be dominated by purchasing activities in the private sector. However there tend to be stark differences between organizational objectives in the public and private sectors. For instance, the public sector is more likely to be concerned with issues such as equity and environmental impact while the private sector would tend to focus more on profitability and existing supply chain compatibilities, even when companies begin to include environmental aspects on their corporate agenda (for instance, see Vachon and Klassen, 2007). Given this situation, it is reasonable to expect differences not only in how these two sectors of the economy operate, but also, in the ways in which procurement practitioners think about what their respective organizations are doing – the priorities they have, the benefits to capture, and the ways in which they view their roles in carrying out their organizational objectives.

One increasingly important area where these differences might be observed is in sustainable public procurement (SPP) – how practitioners view its benefits, drivers, and resources, to name a few. Considering these issues in SPP requires that in addition to up-front procurement costs, government authorities will also take into account environmental and social elements when procuring goods, services or works at all stages of the project and within the entire life-cycle of procured goods. Indeed, studies of profit-driven organizations have examined management support, expected costs, standards and regulations, among other things (for example, see Berns et al., 2009; Giunipero et al., 2012; and Nidumolu et al., 2009).

Procurement is called sustainable when it integrates requirements, specifications and criteria that are compatible and in favor of the protection of the environment, and in support of economic development, while also accounting for other societal considerations, such as social justice and equity (Schwerin and Prier, 2013; also see Brammer and Walker, 2011). Commonly these three pillars associated with sustainable purchasing are also known as the "triple bottom line" or "profit, people, and planet." Through the adoption of the principles of sustainable development within public procurement procedures, public authorities can provide industry with both production signals and incentives to develop new and better technologies and to encourage sustainable patterns of behavior.

Terms like green growth, green public purchasing, and sustainable public procurement are often used interchangeably, and that is done here also. Public procurement is defined as the "designated legal authority to advise, plan, obtain, deliver, and evaluate a government's expenditures on goods and services that are used to fulfill stated objectives, obligations, and activities in pursuit of desired policy outcomes" (Prier and McCue, 2009; also see Thai, 2002). When utilizing SPP, this implies that public procurement practitioners serve a central role in determining how governments across the world allocate resources that produce the goods and services demanded by citizens in an economic and just manner. Furthermore, although we agree with Green et al. (1993) that in terms of public procurement, what its practitioners do, and why, requires an understanding of its basis in fact and in law, we contend that an understanding of practitioner's motivations – how they understand what it is that they are doing or not doing is also important. This article helps to shed light on this issue.

Prier and McCue (2009) explain that there are at least three important dimensions that need to be recognized by those engaged in public procurement and they include 1) the legal basis

for practitioners' activities in discharging their responsibilities; 2) the organizational and structural boundaries of operative activities; and 3) the functional activities and intended outcomes of the practices used in the pursuit of governmental obligations. While the legal authority provides the basis for action of government, it also can prescribe specific procedures in how to do things or how to set up the institutions involved in procurement. The organizational dimension connects and structures the authoritative basis for pursuing any procurement action by aligning the functional activities and the choices practitioners make in a specific context. The functional procurement activities consist of the practices used in the pursuit of governmental obligations all of which operates within a particular institutional environment.

Prier and McCue (2009) find that the total mix of procurement decisions creates the governmental outputs that are thought to produce desired effects or consequences of government policy. Detailed rules and procedures are typically established to ensure best value for money; equal treatment of bidders; and transparency of specifications and criteria. In essence, the widespread use of best practices legitimizes standardized procedures that can be helpful in aligning procurement practices in both public and private sectors. Furthermore, within these boundaries, the way public procurement practitioners think of sustainability issues in terms of their jobs becomes relevant to shaping the knowledge necessary to successfully discharge their duties in more sustainable ways. Herein we identify their perceptions' of the benefits of sustainable purchasing as well as other issues as a first step in understanding the state of sustainable public procurement in North America.

There are at least three important reasons to pay attention to the public sector, especially in terms of issues surrounding sustainability. The first is that public procurement can dominate national (and possibly international) markets due to the sheer size of government. For instance,

public procurement often constitutes a large share of the economy and in general, the relationship of economy size (and thus level of economic development) and public procurement spend is negative – the less developed a nation's economy, the greater the share of the economy devoted toward to public procurement, and in some cases, this can easily exceed 50 percent of GDP (see ADB, 2011; Eurodad, 2009; IISD, 2007; and UNDP, 2010). Hence given the amount of money spent by governments (in both GDP percentage terms and in absolute monetary terms), and the reach of their dictates as measured by the wide variety of goods and services procured in the public space, the importance of public procurement is hard to miss (Preuss, 2009).

A second reason to pay attention to the area of sustainability in the public sector is the potential for cost savings. While it is commonly believed that green products cost more, they can often cost the same or less. For instance, recycled paper products typically match conventional paper in quality and costs. Moreover, there is mounting evidence that at least for some products, overall life-cycle costs for sustainable products can be less than those purchased when they were the cheapest option at the time of purchase. This is because the sustainable option can result in lower operating costs, maintenance and disposal costs (see PricewaterhouseCoopers, Significant and Ecofys, 2009).

A third reason why sustainable public procurement is important is that it is likely to be a market driver and thus create positive ripple effects throughout society, not only in the areas of the environment, but also in social policy areas such as economic development, etc. (see Preuss, 2009; also see Schwerin and Prier, 2013). Performing as a catalyst in the market and leading by example, stakeholders of all kinds can become more aware of potential environmental and social impacts of utilizing sustainable products and services (Kjollerstrom, 2008). Indeed, substantial

spillover effects have been seen in the U.S. in the past. For example, the shift to compliance with 'Energy star' standards for the majority of IT equipment on the market was a direct result of a decision by the U.S. Federal government to purchase only 'Energy star'-compliant IT equipment (Bosch et al., 2012).

Through sustainable procurement, both public and private organizations can use their buying power to give a signal to the market in favor of sustainability and base their choice of goods and services on 1) economic consideration such as best value for money; 2) environmental aspects such as the impacts on the environment that the product and/or service has over its whole life-cycle; as well as 3) social aspects, i.e., effects of procurement on societal issues such as poverty eradication, equity in the distribution of resources, labor conditions, and human rights (McCrudden, 2004). Given the importance of this issue, it was not until very recently that scholars have begun to investigate sustainability in public procurement within and across governments (for example, see especially Walker and Brammer, 2012; also see Bratt et al., 2013; Goswami, Meher Diljun, and Srivastava, 2013; Lehtinen, 2013; Morgan and Sonnino, 2007; Preuss, 2009; Schwerin and Prier, 2013; Thomas and Jackson, 2007; Swanson et al., 2005; Walker and Brammer, 2009a and 2009b; Walker and Preuss, 2008; and Warner and Ryall, 2001).

Having laid the case for sustainable public procurement, one may rightfully wonder: why aren't all goods and services procured in a sustainable way? One answer is because public procurement is conducted within a complex, nested environment, this setting is replete with multiple stakeholders who often have conflicting goals (McCue and Prier, 2008; also see Loader, 2007). On top of competing interests is layered a chain of agency that promotes divided loyalties. This situation can make it difficult to hold individual actors accountable for their actions, even

though procurement procedures are subject to transparent public scrutiny by citizens and taxpayers (Walker and Brammer, 2009a). In turn, numerous challenges remain to successful implementation of SPP and these include the lack of tangible incentives and political support; the perception that green products cost more; the lack of legal expertise in applying environmental criteria; the lack of training, appropriate tools, and information; a dearth of cooperation between authorities and upper management; and limited established environmental criteria for products/services (Schwerin and Prier, 2013). Given this background of SPP in the public sector, the current study empirically investigates the extent to which sustainable public procurement (SPP) practices are used and the views held by practitioners within public sector agencies.

Data and Research Design

The exploratory design of the research is intended to gain a better understanding of the state of government purchasing covering sustainability concerns and issues. Based on quantitative data from different levels of governments in the United States and Canada, the units of analysis are the procurement agency and/or the practitioner within the agency who was the respondent to a 2012 survey gathered from the National Institute of Governmental Procurement (NIGP), a member driven professional association with more than 16,000 members across the U.S. and Canada. An email was sent to the NIGP members on June 29th and again on July 9th informing them of the survey issuance. The survey was administered online using surveymonkey.com. July 19, 2012 was the last date when responses were accepted.

A total of 2,280 procurement practitioners were invited to participate in the survey. Out of those contacted, 340 (15%) completed the survey by the closing date, and after appropriate data-cleaning, there remained 339 usable responses. For a number of questions, respondents

were provided open-ended response categories to qualify and provide more detailed answers than the close-ended options available.

There are a number of challenges to using a sample pool based on organizational affiliation, not least among them is the external validity or generalizability of the findings. Determination of the population of the study is difficult because no list of all procurement practitioners exists – let alone their characteristics, entity or agency affiliations, etc. Thus a major assumption of the data is that they are comprised of appropriate cases of agencies and their respondents who are most likely to be knowledgeable of the facts and specifics concerning each question. A counterfactual assumption is that the average agency-respondents – when clustered into groups – typically reflect those who were excluded. Preliminary agency-respondent examination reveals a diverse range and representation of NIGP's membership across different levels, types, and size of governments and organizational architectures (as well as respondent organizational position), so the relative confidence of generalizing the results to other agency and national settings – although it invites caution – also sufficiently contributes to knowledge to warrant consideration.

When appropriate, preliminary checks of variable distributions were made against those agency-respondents who were excluded from the analysis, and there did not appear to be any systematic bias between those who were included or excluded, and although there is no good way to deal with the issues associated with missing data, this has been adequately discussed elsewhere (see Tabachnick and Fidell, 2013, 62-72; also see Cohen and Cohen, 1975; and Rummel, 1970). It was elected to rely on the data available as opposed to imputing and extrapolating data that was not obtained, either through the intentional withholding of the data or

due to other reasons for its absence. Hence the resulting analysis and findings rest upon firmer ground for the exploratory purposes herein.

The data analysis package used in this study was SPSS Version 21. In this paper, there are statistics reported on unconditional responses and other statistics that are contingent upon other variables in order to evaluate sustainability issues in the public sector. Table 1 and table 1a report the distribution of agency-respondents by their respective institutional positions and type of government.[1] In essence, columns 1 through 3 in table 1 have non-manager respondents while columns 4 and 5 are comprised of managers. From a total of 339 usable respondents, 73.7% (n=247) of the procurement positions are management while 26.2% (n=88) are either agent; buyer/specialist; or staff/other. Moreover, there is good variation across the three categories of government type which enhances the robustness of any conclusions.

[INSERT TABLE 1/TABLE 1A ABOUT HERE]

Not shown in the table is the fact that there is also a wide range of organizational size that is encouraging in terms of generalizability. For example, in terms of the total number of full-time equivalent (FTE) employees in the respondent's procurement office, the mean is 15.8 FTEs and a median of 4.0 FTEs. Further, the 25th percentile is 2.0 or fewer FTEs while the 75th percentile is 9.0 FTEs or more.[2]

Findings and Data Analysis

[1] The original dataset had six entity types that given the small numbers in some categories and the easy reclassification, these were collapsed into three categories shown in Table 1a. In addition, nineteen respondents who indicated working for "other" entity were identifiably categorized into the row labeled "Education or Special District."

[2] All analyses were checked for differences between median groupings and none were statistically significant at the traditional level of p=.05.

As a background on the organizational architecture under which practitioners operated within their government, figure1 reveals the variation in the procurement organizational structures reported by the respondents, and it shows that the largest group of practitioners operates under a centralized procurement system with delegated authority, and this is consistent with previous surveys of the NIGP membership (see Prier and McCue, 2014 forthcoming). The smallest group conducts procurement within a purely centralized regime, while a mix of decentralized with central review and centralized contracting with decentralized buying off established contracts comprises a majority of respondents.

[INSERT FIGURE 1 ABOUT HERE]

As mentioned previously, we wanted to know how practitioners thought about the perceived benefits from engaging in sustainable public procurement, and results are reported in table 2. Looking at the first three rows in the table, we can see the three pillars comprising the triple bottom line, and it suggests that by far, the environmental pillar appears to be the most important as 72% of respondents believe that it is often or always a perceived benefit from SPP. Among the three pillars, the social aspects of SPP are deemed to be often or always beneficial by 57.1% of the respondents, and trailing at the back of the pack of these three is the financial benefits where only one-third say it is often or always beneficial.

Looking at the remaining five perceived benefits in the table, one can see that the most important is as "an example to others" as 73.8% of respondents identified this as perceived benefit. Perhaps surprisingly, one in five respondents don't know the benefits to employment flowing from SPP. Taken together, it appears that being an example to others would be a primary motivator that explains practitioners' attitude towards SPP, but future research will be needed in order to robustly confirm this hypothesis. However, it has been known for a long time that question wording can have unwanted effects on answer choices (see Rasinski, 1989), so we designed the survey to permit some reliability checks on our findings, and preliminary results are reported in table 3.

[INSERT TABLE 2 ABOUT HERE]

Table 3 describes the perceived primary drivers of sustainable public procurement, and one can see in the data that consistent with the response "example to others" finding in table 2, "doing what's right for the planet and what is environmentally beneficial" is the top primary driver of SPP. However, when thinking about the second most important perceived primary driver, while a majority of respondents think "cost reduction and savings" are a primary driver of

SPP, this appears to be slightly at odds with the one-third respondents in table 2 who thought that there were "financial benefits" from its use. Although the way the survey was designed limits further analysis of these two results, it does suggest that practitioners may be less clear about the financial and economic aspects of SPP and its potential relationship to cost savings. Finally, if a majority agreement threshold is adopted, there are only three listed in table 3 that are perceived to be primary drivers of SPP, and as one goes down the table, it can be seen that the drop-off is dramatic – all of which suggests that there is little consensus in identifying primary drivers across organizations or across practitioner positions, and this is subsequently confirmed.

Crosstabulations were run on these drivers to find systematic differences across government type and practitioner position. There were only three drivers that were statistically significant for government type (chi-square p-values are reported in parentheses). The first driver with differential significance was "responding to concerns of public customers/clients" and this driver was more likely thought to be important by 1) City / Municipal / Township (p=.006); 2) Education or Special Districts; and then 3) County / Regional/ State / Province / Federal, in that order. "Interest from political leadership" (p=.000) was thought to be a driver of SPP for practitioners operating in 1) City / Municipal / Township; 2) County / Regional/ State / Province / Federal; and then 3) Education or Special Districts, in that order. "Building brand image" (p=.081) was a driver for 1) City / Municipal / Township; 2) Education or Special Districts; and then 3) County / Regional / State / Province / Federal.

There were only two drivers showing a significant difference across positions: "availability" (p=067) and "avoiding risk" (p=.084). While the Purchasing Manager was most likely to think availability was a driver and the Clerical Staff / Buyer / Contracting Specialist / Purchasing Agent the least likely of the three positions, Clerical Staff / Buyer / Contracting Specialist / Purchasing Agent positions were most likely to think that avoiding risk is a primary driver of SPP and the Purchasing Manager the least likely to think it is a driver. In summary about the primary drivers of SPP, there were very few patterns and a lack of consensus on what are the primary drivers of SPP across governments and across practitioner positions.

[INSERT TABLE 3 ABOUT HERE]

Perhaps this lack of consensus is related to the level of strategic thinking about SPP within their organizations. Up to now, there is no analysis of which the authors are aware that examines the extent to which governments in North America have integrated SPP into strategic planning and operations. To help understand this question, respondents were specifically asked

about the status of their organization's strategic plan or policy for sustainable purchasing, and 34.9% (106) had no plan for sustainable purchasing; 37.5% (114) were developing or have an informal plan for sustainable purchasing; while the remaining 27.6% (84) have a formal plan for sustainable purchasing. In fact of this latter group, merely 13.6% (46) have a completed plan that is part of the overall strategic plan for their organization. This latter group tells the story of very little strategic penetration in terms of SPP, and we wondered if this lack of strategic sustainable purchasing was contingent on the type of government or the procurement organizational architecture referred to in figure 1. Subsequent analysis, however, revealed no statistically significant differences in the status of a respondent's organization's strategic plan or policy for sustainable purchasing when accounting for type of government or procurement organizational architecture – either at the p=.05 or p=.10 levels. This suggests that there is little difference across governments or across different configurations of procurement architecture within the organization in their respective likelihoods to adopt a strategic use of sustainable public purchasing.

From the literature, we identified ten different potential resources that might help practitioners implement SPP practices and policies within their organization, and the results are reported in table 4 where they are broken down by procurement position. The table reveals a story previously untold in that two resources appear to be more important to some practitioners than to others. The data suggest that there is a negative relationship between a practitioner's managerial responsibilities and one's perceptions about the use of a sustainability index that conveys supplier performance information across the three pillars of SPP: the more managerial responsibilities a position entails, the less likely one is to perceive that a sustainability index would be useful (compare columns 1 and 2 to column 3). This is an interesting finding because those who are most likely to be doing actual purchasing across numerous goods and items are most likely to perceive that a sustainability index would be helpful in implementing SPP practices and policies, while those furthest removed (CPOs et al.) see relatively little value in an index. Although we do not have data that is likely to shed much light on why this relationship exists, subsequent research should be devoted toward finding out the reasons for, and the potential impact of managerial resistance to the use of this type of tool. Whereas a majority of both purchasing agents and purchasing managers feel that an index would be helpful, only 39% of upper management believe similarly.

[INSERT TABLE 4 ABOUT HERE]

Table 4 also tells us that based on procurement position, there is a statistically significant difference in one's likelihood to think that new skills and knowledge on conservation and waste principles would help to implement SPP in their organization. While there appears to be little difference between purchasing managers and their bosses (compare column 2 to column 3), those line staff such as contracting specialist buyers and purchasing agents (column 1) appear to think differently than their bosses. Column 4 tells us that while a sustainability index is probably the most helpful of the ten resources listed (where 49.9% of the total respondents thought this would be a helpful resource), nearly the same percentage (48%) of respondents thought that more product performance information would be a helpful resource in carrying out SPP. Moreover, better information on product environmental impacts was thought to be helpful by 42.7% of respondents. This strongly suggests that information – whether in a standardized format via a sustainability index or by way of having more product information – is highly prized by practitioners on the front line of purchasing in the public sector.

The remaining helpful resources listed in table 4 garner no more than one-third of respondents, and trailing up at the bottom is a "colleague giving recommendations" with only 13% of respondents thinking that this would be a helpful resource in implementing SPP in their organization. On a final note, the fact that only 15% of respondents thought that information technology would be a helpful resource in implementing SPP is interesting in light of the conclusions of Walker and Brammer (2012) who find that e-procurement and communication with suppliers supports some types of sustainable procurement while hindering others.

We informally talked to with several practitioners in the field, and there was a general feeling that four instruments are commonly used to incorporate SPP criteria into current procurement practices. These practices are listed in table 5, and they reveal a couple of things for the purposes of this analysis. Firstly, communication information-based tools appear to be the most prominent of these four in that roughly 70% of respondents currently use these to help in their SPP operations. Secondly, majorities on average use these four tools to incorporate SPP criteria into current procurement practices. Thirdly, it was interesting to note that one in five respondents did not know whether regulatory instruments were currently used to facilitate SPP practices. Of course, this could be due to the respondents' lack of knowledge on the purpose of the regulatory instruments, or it could be mere ignorance of the legislative history behind regulations. Nonetheless, additional analysis revealed no statistically significant differences in

the instruments currently used when accounting for type of government or procurement organizational architecture at either the p=.05 or p=.10 levels.

[INSERT TABLE 5 ABOUT HERE]

But the relative lack of knowledge on these four instruments is notable, so much so that we delved deeper into this phenomenon. Quite simply, we were surprised by the relative levels of knowledge respondents had about SPP practices based on the positions they held, and the findings were interesting. In order to examine this more closely, the forced choice answers of "yes" and "no" were recoded to be 0, and "don't know" responses were coded 1, and the interesting results are reported in table 6.[3]

[INSERT TABLE 6 ABOUT HERE]

First, look at the fourth column which reports the percentages of those respondents who don't know the use of these four instruments in carrying out SPP in their organizations. On average, 17.4% do not know if these four instruments are used. Second, three of these four instruments indicate statistically significant differences across procurement positions, and the only instrument that does not show a significant difference is communication and information-based instruments. Third, when there are statistically significant differences at the p=.05 level or better, the position with the lowest levels of responsibility (e.g. those in column 1), are consistently the least likely to have knowledge concerning these instruments and how they are used to carry out SPP policies within their organizations.[4] To see this more clearly, the bottom row of the table shows that on average, one in four practitioners in column 1 do not know if these four instruments are used to carry out SPP policies, compared to at most an average of one in six for upper management (it is one in nine for purchasing managers).

Finally, we were interested in knowing what role the government should play in promoting, guiding, or encouraging SPP, and the responses were curious. As the data in figure 2 show, the number one role that government should play in promoting, guiding and encouraging SPP is to lead by example with 76% of respondents selecting this answer. We gave them the option of selecting none or all of these potential roles, and one of the points of interest that stand out is that only one in four believe that governments should impose legislative regulations to promote SPP. If you look more closely at the figure, you will see that majorities favor setting up

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[3] Note that the variables in this table might be considered ordinal given that the data indicate what respondents don't know about the instruments used for SPP in their organizations, and the signs were in the right direction – lower level positions are associated with higher levels of ignorance on the use of the instruments for SPP.

[4] Remember that the reported percentages are the proportions that "don't know" if the instruments are used.

product standards; setting up a database of green products; information dissemination; and identification of green commodities. Clearly there is a preference on the part of public procurement practitioners to have government standardize information in ways that can help encourage sustainable public procurement.

[INSERT FIGURE 2 ABOUT HERE]

Again, we wondered if respondents' opinions significantly differed by the position that they held in the procurement organization, and we found that information dissemination was significant for Chi-square at the p=.10 level, while imposing legislative regulations was significant at the p=.05 level. In terms of the information dissemination role of government, upper management practitioners (52.4% | N=66) were the most likely to think government should be taking on this role to encourage SPP while the position category of purchasing agents and buyers (38.6% | N=34) was the least likely to think along those lines. As for the belief that government should encourage SPP through legislative regulations, purchasing managers (26.4% | N=32) were the most likely to believe in that role for government while purchasing agents and buyers (13.6% | N=12) were the least likely.

Discussion and Conclusions

The exploratory nature of this analysis is self-evident, but it does provide a blueprint for future scholarship on several fronts. There are some clear patterns in the data that are important to revisit here. First, there is little confusion that environmental concerns leap to the top of the list in SPP while a concern for social and economic benefits of SPP practices are not as widely observed. This can be seen by a list of the three pillars comprising the triple bottom line, and this appears to be consistent with the small amount of literature on this subject (see Walker and Brammer, 2012).

Second, we know of no other study that specifically looks at the individual psychological predispositions of practitioners concerning how government can enhance or encourage sustainable public procurement. The fact that 73.8% of respondents identified "an example to others" as a perceived benefit of SPP either "often" or "always" is remarkable and surely worthy of future research. Furthermore, the fact that "doing what's right for the planet and what is environmentally beneficial" is the top primary driver of sustainability in public procurement is quite striking. Indeed, when one considers the array of primary drivers that respondents were allowed to choose – remember, they could choose all of them – this finding surely reveals that

government leading by example is extremely important in the way that practitioners think about sustainability in the public space.

Third, there were several instances where significant differences were observed across levels of government and across practitioner positions. To take but one example, the negative relationship between a practitioner's managerial responsibilities and one's perceptions about the utility of a sustainability index that conveys supplier performance information across the three pillars of SPP invites additional analysis.

Fourth, a consistent finding is that more and better information would be useful in instigating and carrying out sustainable public procurement operations and practices.

Fifth, the level of information and knowledge was specifically tested through comparison of four instruments that have the potential to help in carrying out SPP. It was shown that there were statistically significant differences across procurement positions as to the role that these potential instruments might have in SPP. Clearly, those on the line, such as a contracting specialist or a buyer or a purchasing agent, have less knowledge about the role of these four instruments than either purchasing managers or heads of the organization. Although we remain cautious on the interpretation of this fact, it is consistent with our finding that there is a perceived lack of availability and depth of information surrounding green and sustainable practices, products, services and impacts.

Sixth, data in figure 2 puts more emphasis on this finding that according to those involved in the process, government should play a prominent role in providing reliable, standardized information in encouraging sustainable public procurement. Since majorities favor setting up product standards; setting up a database of green products; information dissemination; and identification of green commodities, this suggests to us a belief on the part of public procurement practitioners to have government subsidize and standardize information in ways that can help encourage sustainable public procurement.

Given these findings, further research should investigate the environmental and economic impact of products and services in order to generate databases. In turn, this might help provide the basis for enhancing best practices and an improved body of knowledge that can be leveraged for education and training through seminars and workshops anchored in SPP practices, and products and services which help organizations align their environmental, social and economic long-term needs and benefits. In addition, it is clear that a utilitarian sustainability index that can

help rate the performance of various environmental, social and economic practices along the supply chain would be useful to those closest to the actual procurement activities.

In summary, results reported here clearly indicate that governments need to be the "example" with respect to the use and deployment of SPP practices. Specifically, it is believed that governments at all levels need to encourage information and data pertaining to various products, services and practices. However, this finding begs the question: should it be the role of government to encourage the collection of information or should it merely assist in creating uniformity of practices and the sharing of vital information reflecting aspects of sustainability in public procurement? It is to this question we now turn.

Perhaps the most surprising finding in the data is the limited impact that economic pressures have on utilizing sustainable practices. Indeed, the data scream that there is a real shortage of information pertaining to practice, products, services and impacts relating to SPP. Data is in short supply and uniformity is evidently lacking and the responses seem to identify government as the organization charged with developing a systematized database as well as a line of communication pertaining to the information collected. Yet the authors currently remain agnostic as to whether government is the proper mechanism for addressing these shortcomings.

We have documented the relative lack of knowledge held by some practitioners about four instruments that could be useful in their organization's SPP. Furthermore, the low levels of strategic placement of SPP in the average organization's strategic plan makes us question whether the market may be better positioned to offer this kind of information resource. Given the nested complexity of the public procurement environment, and given the wide range of organizational architectures as well as the variation in level and purposes of governments, we suggest that it is unlikely that any one government or cooperative government enterprise would be able to appropriately standardize information along the range of government supply chains in the United States or in Canada. We recognize that considerable standardization is essential for the successful application of machine methods – standardization of values, goals, practices, and equipment. However, doing this while maintaining specialization among several organizations and governments remains a daunting if not Sysyphean task. Consequently, it is hard to conceive of any single government creating a specialized procurement bureaucracy deputized to gather and then share information with numerous other governments – indeed, there are few incentives unless subscription fees are paid by member governments, or there is some subsidy or federal or state statute requiring such an arrangement.

If we are correct, an alternative solution might be a market-based sustainability index that can provide standardized information at a low price. There is little doubt that the globalized world within in which businesses and public organizations operate exhibit supply chains that are becoming increasingly complex. Moreover, as complexity intensifies – both on the supply side and on the demand side, the structural and operational uncertainty of supply chains likely deepens as well. Within this environment is the growing need for accurate information gained in an efficient way, and this need has substantively been documented in public procurement here. Procurement and logistics is one obvious area in which individual organizations focus on constraining and managing their own risks, yet without integrating SPP within the public sector, practitioner's behaviors may actually be contributing to placing society and the planet at risk. Again, one need only remember that the size and reach of government can help or hurt sustainability efforts.

The complexity of the supply chain also implies that as transaction costs rise through the use of an increasing number of suppliers, without a technological counterbalance, the supply system itself becomes more opaque and evermore subject to downside liabilities that can be hidden through unexplored information asymmetries and organizational ignorance. Indeed, opaque systems provide numerous opportunities for suppliers to hide risk and moral hazard. This means that suppliers can benefit from the upside when things go well (pocketing contracts), yet not account for the social costs associated with planetary climate change.

It seems to us, and apparently to many practitioners, that one possible way of reducing the hidden risks along the supply chain is to standardize the supply chain information – to effectively adopt widely-accepted informational exchange mechanisms that homogenize informational disclosure both across and within sectors and industries, especially in the area of sustainable public procurement. We think that this can be done through a sustainability index that accounts for all three pillars of the triple bottom line.

According to the now-famous Bruntland Commission Report (UN 1987), sustainability involves "development that meets the needs of the present, without compromising the ability of future generations to meet their needs," and procurement is an obvious area that may help produce positive externalities that have lasting constructive effects on the environment, economic development, and social outcomes. The three pillars comprising the triple bottom line are relevant to procurement practitioners who oversee many billions of dollars in private and government spend every month, because they are uniquely positioned to influence sustainable

strategies that not only will propel their own organizations, but could potentially drive sustainability behaviors within their supplier bases – all to the benefit of society as a whole.

Table 1. Distribution of Respondents Across Five Positions and Three Government Types

	Procurement Position					
Government	**(1) Clerical Staff[a]**	**(2) Buyer / Contracting Specialist**	**(3) Purchasing Agent**	**(4) Purchasing Manager**	**(5) CPO / Purchasing Dir. / Finance Head**	**Total**
Education or Special District[a]	3.0% (3)	8.1% (8)	7.1% (7)	36.4% (36)	45.5% (45)	29.6% (99)
City / Municipal / Township	3.7 (4)	13.9 (15)	18.5 (20)	36.1 (39)	27.8 (30)	32.2 (108)
County/Regional/ State / Province/Federal	2.3 (3)	12.5 (16)	9.4 (12)	35.9 (46)	39.8 (51)	38.2 (128)
Total	**3.0% (10)**	**11.6% (39)**	**11.6% (39)**	**36.1% (121)**	**37.6% (126)**	**100% (335)**

Table 1a. Distribution of Respondents Across Three Positions and Three Government Types

	Procurement Position			
Government	**(1) Clerical Staff[a]/Buyer / Contracting Specialist / Purchasing Agent**	**(2) Purchasing Manager**	**(3) CPO / Purchasing Dir. / Finance Head**	**Total**
Education or Special District[a]	18.2% (18)	36.4% (36)	45.5% (45)	29.6% (99)
City / Municipal / Township	36.1 (39)	36.1 (39)	27.8 (30)	32.2 (108)
County/Regional/ State / Province/Federal	24.2 (31)	35.9 (46)	39.8 (51)	38.2 (128)
Total	**26.3% (88)**	**36.1% (121)**	**37.6% (126)**	**100% (335)**

[a]Includes the category "other"

Figure 1. Distribution of Respondents' Procurement Organizational Structures

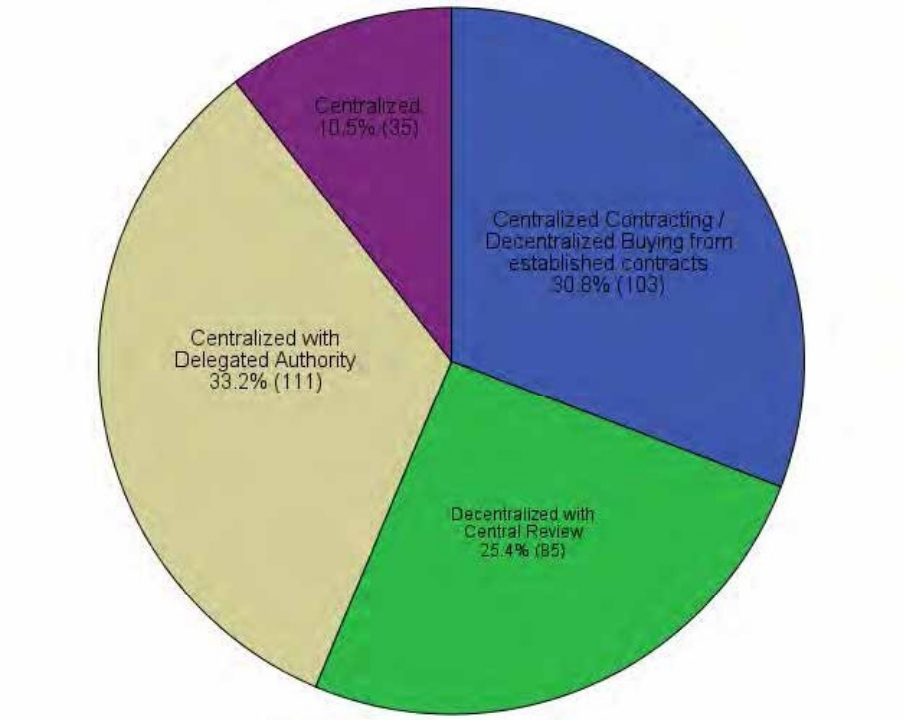


Table 2. Perceived Benefits from Sustainable Public Procurement

Benefit Type	Never	Sometimes	Often	Always	Don't Know
Environmental (282)	1.1% (3)	19.5% (55)	40.1% (113)	31.9% (90)	7.4% (21)
Social (280)	2.1 (6)	28.2 (79)	40.7 (114)	16.4 (46)	12.5 (35)
Financial (282)	2.5 (7)	56.0 (158)	28.0 (79)	4.6 (13)	8.9 (25)
Example to Others (282)	1.1 (3)	15.2 (43)	39.0 (110)	34.8 (98)	9.9 (28)
Product Innovation (277)	2.2 (6)	30.3 (84)	43.0 (119)	13.0 (36)	11.6 (32)
New Markets (279)	2.5 (7)	35.5 (99)	36.6 (102)	10.8 (30)	14.7 (41)
Employment (280)	5.7 (16)	46.4 (130)	23.6 (66)	4.6 (13)	19.6 (55)
Best Value-for-Money (281)	2.8 (8)	62.3 (175)	22.1 (62)	4.3 (12)	8.5 (24)

Table 3. Perceived Primary Drivers of Sustainable Public Procurement

Drivers	Responses
Doing "what's right" for the planet/environmentally beneficial	55% (186)
Cost reduction/savings	51.5 (181)
Green factors	51.5 (174)
Human health considerations	49.4 (167)
Compliance with legal and regulatory requirements	48.5 (164)
Product performance	42.6 (144)
Availability	39.3 (133)
Increased efficiency	39.3 (133)
Compliance with organizational requirements	34.6 (117)
Durability	32.8 (111)
Responding to concerns of public/customers/clients	32.5 (110)
Improving public relations	31.1 9105)
Interest from senior management	27.8 (94)
Interest from political leadership	27.5 (93)
Social impact	26.3 (89)
Employees	23.1 (78)
Government incentives or taxes	16.3 (55)
Avoiding risk	13.6 (46)
Tax incentives	12.1 (41)
Competitive advantage	10.4 (35)
Building brand image	9.8 (33)
Recruiting environmentally concerned staff	9.5 (32)
None	5.3 (18)

Total Respondents: 308

Table 4. Helpful Resources by Procurement Position

Helpful Resources	Procurement Position (1) Clerical Staff[a]/Buyer / Contracting Specialist / Purchasing Agent	(2) Purchasing Manager	(3) CPO / Purchasing Dir. / Finance Head	(4) Total
Sustainability Index**	55.6% (70)	52.1% (63)	38.6% (34)	49.9% (167)
New skills and knowledge on conservation and waste principles*	48.4 (61)	36.4 (44)	36.4 (32)	40.9 (137)
More product performance information	45.2 (57)	52.1 (63)	46.6 (41)	48.1 (161)
Better information on product environmental impacts	42.9 (54)	43.0 (52)	42.0 (37)	42.7 (143)
Better selection of green products	32.5 (41)	32.2 (39)	38.6 (34)	34.0 (114)
Codes, standards, legislation	32.5 (41)	30.6 (37)	29.5 (26)	31.0 (104)
Technical support and training	28.6 (36)	21.5 (26)	20.5 (18)	23.9 (80)
Government leadership	19.8 (25)	19.8 (24)	20.5 (18)	20.0 (67)
Information technology	17.5 (22)	13.2 (16)	13.6 (12)	14.9 (50)
Colleague recommendations	11.9 (15)	13.2 (16)	14.8 (13)	13.1 (44)
Average	**33.5% (42)**	**31.4% (38)**	**30.1% (27)**	**31.9% (107)**

[a]Includes the category "other"
**Chi-square significance at .05 level or better; *significant at .10 level or better
Total N=335

Table 5. Four Instruments Currently Used To Facilitate The Incorporation Of SPP Criteria Into Procurement Practices

Instruments	Used	Not Used	Don't Know
Communication and Information-based (N=309)	69.7 (216)	12.9 (40)	17.4 (54)
Education and Training for Purchasing Staff (i.e. Seminars and Workshops) (N=309)	57.1 (177)	32.6 (101)	10.3 (32)
Financial and Contractual Instruments (N=304)	55.4% (169)	25.6% (78)	19.0% (58)
Regulatory Instruments (N=302)	49.2 (149)	28.1 (85)	22.8 (69)
Average	**57.9% (178)**	**24.8% (76)**	**17.4% (53)**

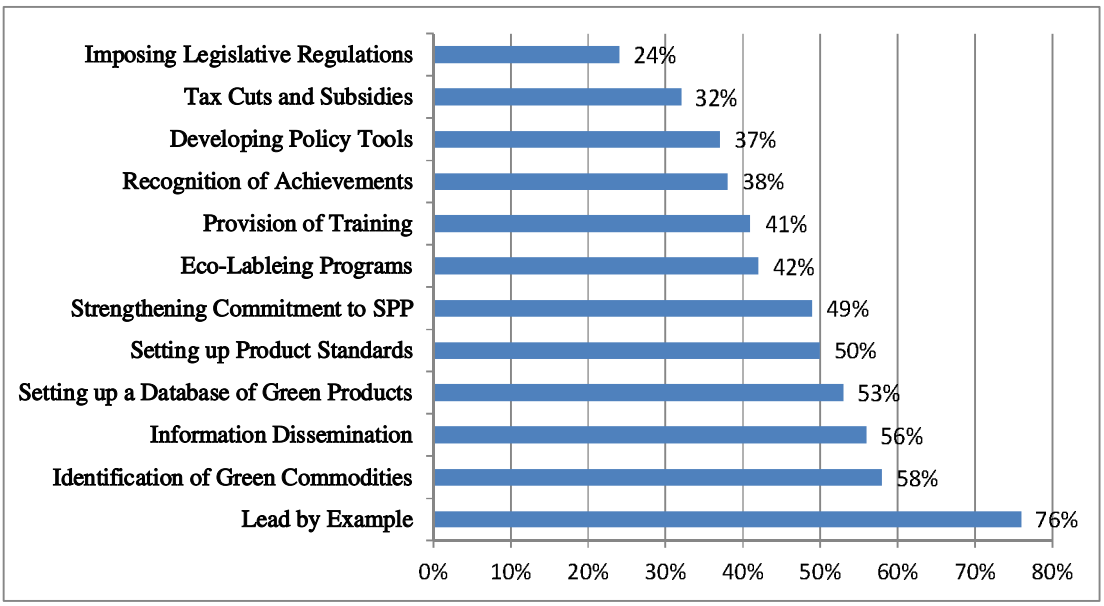
Total N for each instrument in parentheses

Table 6. Knowledge of Organizational Use of SPP Policy Instruments by Procurement Position

	Procurement Position			
	(1)	(2)	(3)	(4)
Instruments	**Clerical Staff[a]/Buyer/ Contracting Specialist Purchasing Agent**	**Purchasing Manager**	**CPO / Purchasing Dir. / Finance Head**	**Total**
Regulatory Instruments (N=302)**[a]	33.8 (27)	18.3 (20)	19.5 (22)	22.8 (69)
Financial and Contractual Instruments (N=304)**	27.5% (22)	14.7% (16)	17.4% (20)	19.1% (58)
Communication and Information-based (N=309)	22.2 (18)	11.7 (13)	18.8 (22)	17.2 (53)
Education and Training for Purchasing Staff i.e. Seminars and Workshops (N=309)**[a]	19.8 (16)	6.3 (7)	7.7 (9)	10.4 (32)
Average	**25.8% (21)**	**12.8% (14)**	**15.9% (18)**	**17.4% (53)**

**Chi-square significance at .05 level or better; *significant at .10 level or better
[a]significant at .05 level or better for ordinal statistics (Gamma, Sommer's d, Kendall's tau-b)
Total N for each instrument in parentheses

Figure 2. Roles Government Should Play in Promoting, Guiding, and Encouraging SPP



Total N=272

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Towards sustainable public procurement: case about the new EU Directives

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The social, green and economic pillars – such as in the profit-oriented procurement environment – represent the main characteristics of the definition of sustainability. SPP has the potential to improve environmental performance, deliver financial benefits and develop markets for more sustainable goods and services. National governments can exert a direct beneficial influence through their procurement practices. When adopting and implementing a sustainable public procurement policy, however, several development levels have to be mastered for a government to be able to integrate and achieve sustainability objectives via public procurement. This article intends to establish a conceptual framework for this, citing primarily the new European Public Procurement Directives as examples. Its conclusion is that it is not possible to speak about sustainability without laying sound foundations, aligning objectives, specifying directions and developing a conceptual framework. The direct consequence of omitting these steps would be that issuers are unable to follow the general and unelaborated directions offered by a demonstrative and highfaluting but detail-free sustainable public procurement regulation.

The paper formulates a critique regarding the modernization of the directives whereas policy declarations appear to have much bigger role than exploring connections, relations and interdependencies.

Introduction

In interpreting sustainable public procurement, reference is made to the opinions of several stakeholders in order to underline the fact that market agents today apply a substantially broader interpretation of sustainability in public procurement than ten years ago. In the traditional sense, sustainability in public procurement means the assertion of green, social and economic criteria. We wish to question the commonplace according to which the assertion of sustainability criteria is an indicator of the advanced state of public procurement. We argue this in the sense that when a government or issuer is able to implement a truly sustainable public procurement policy, it is then the result of the interaction of several levels of development and a fortunate as well as successful strategy. We use the model by Telgen et al (2007)[1] to demonstrate that truly sustainable public procurement is possible only above a certain level of development.

Accordingly, in the first half of this paper, by laying the foundations for a theoretical background, the relationship between the level of development of public procurement and sustainability will be established. Then the misunderstandings, deficiencies and weaknesses will be presented, based on international examples, primarily those of the new EU Directives, owing to which the development of sustainable public procurement can at best be a long term objective, against a background of legislation being renewed.

Sustainability and the Development of Public Procurement

In a traditional sense, we do understand the social, green and economic criteria of public procurement. This, however, does not mean that everyone attributes the same meaning to the above criteria. The framework of interpretation of sustainable public procurement keeps expanding, which does not mean that the understanding of life-cycle costing or the implications of the joint management of green and social criteria would be fully unambiguous for all. Several researchers point out that, in the course of applying sustainability criteria, attention should be paid to the balance between them[2].

The initiatives, which include public procurement carried out in the interest of sustainable development, the procurement of innovative goods and services or pre-commercial public procurement under the notion of sustainable procurement, have contributed to the broadening of sustainability. The reason behind this is that, from the viewpoint of policy, all these serve some kind of longer term sustainability and yet frequently have only an obscure relationship with the true sustainability criteria In their article on innovative public procurement, Edler-

Georghiou (2007) expressly call attention to the fact that "...a sophisticated risk-management are needed in order to cope with innovations in public services. A new cost-benefit rationale that translates into life-cycle costing and the criteria of the so-called Most Economically Advantageous Tender (MEAT) are needed to replace the lowest initial cost rationale."[3]

It is therefore not enough to give new names to the methods applied in traditional public procurement procedures; deeper analyses are needed in the course of their application to ensure that the assertion of sustainability criteria carries genuine added value.

The definition of sustainable public procurement is constantly evolving and changing; to get the overall picture, however, the novelties should not be disregarded. The subject matter of innovative public procurement, for instance, is at least as closely tied to that of sustainability as supporting SMEs, whose direct impact of reducing unemployment could even turn the preference given to SMEs into a social criterion. For example, Preuss L. (2009)[4] handles the preference to SMEs and local companies under the economic criteria. The place of objectives, which are at times handled as social, at other times, as economic objectives, is not unambiguous. The simplification of the question, namely, applying it as a sustainability criterion is not enough. This is what Tátrai-Nyikos (2012)[5] pointed at in their case study analysing the interaction of objectives applied in public procurement arriving at the conclusion that these objectives frequently extinguish one another, i.e., they fail to reach the consequence for which the legislator built it into the regulatory environment in principle. The theoretical assertion of sustainable policy is therefore prevented by contradictory objectives damaging the perception of the credibility of the entire sustainability issue.

Approaches keep on changing, the subject matter is extending. For instance, in her Spanish case study, Medina-Arnáiz T. (2010)[6] focuses on integrating gender equality into public procurement. Another good example is Coggburn J. D. (2004)[7], who wrote about managerial values through green procurement. Preuss L. and Walker H. (2011) [8]discussed the psychological barriers along the road to sustainable development from a public procurement point of view.

The initiatives broadening the above interpretation point out that public procurement itself by enhancing the contribution of the activity to sustainability can become a driver of both ethical and cultural issues and innovation or even economic development. It is this broad environment of interpretation which is taken as the basis when we analyse the levels of development in public procurement with regard to sustainability, with the help of a model developed in 2007. By way of a point of departure, it is worthwhile clarifying that the model intends to demonstrate the levels of development in public procurement whose highest (5-6-7) levels can be the closest levels with regard to sustainable public procurement according to our interpretation.

In interpreting sustainability, we built on the model by Telgen et al (2007). "Public procurement internationally exhibits major differences in the way it is organised, the way it operates and in terms of the stage of development."[9] Researchers observed some fundamental differences between countries in the way they organize their public services. The different organisational structures, different regulatory, legislative and funding arrangements and different cultures are those aspects which helped to elaborate a new model about the developments in public procurement.

The original model did not distinguish the distances between the stages, i.e., it did not consider that there were increasingly large leaps between the individual levels or stages of development. In this research our hypothesis was that a thinker who wished to create a higher-standard framework for public procurement would have an increasingly more difficult task.

The essence of the 7-stage model is the followings:

1. Sourcing and delivery of goods and services
2. Compliance with legislation/regulation
3. Efficient use of public funds
4. Accountability
5. Value for money
6. Supporting of broader government policy objectives
7. Delivery of broader government objectives

Below, a few theoretical works related to sustainability selected by us will be identified and positioned within the 7-element model. The heart of this is the question whether sustainability means the path of development taken in the traditional sense, i.e., the more social, efficiency or green aspects are involved in procurement, the more sustainable we are. Or, it is worthwhile to follow the logic of the 7-stage model offering a way towards achieving sustainable

public procurement? We do not think that sustainable public procurement would presuppose fully developed, ethical, efficient, flexible and perfect public procurement environment but we do think that presumably in a cultural sense there is a strong relationship between the sustainable public procurement aspects of the individuals levels and the maturity of public procurement in a state.

Level 1 Sourcing and delivery of goods and services

It is in the case of the first level that we can speak about an activity where the issuer would at all like to provide goods and services on time. In other words, we presume that genuine public procurement activity is taking place under relatively well organised conditions.

Level 2 Compliance with legislation

Compliance with legislation is conditional upon having the appropriate legal regulations at hand which can be complied with and is worth complying with, because it provides an efficient, transparent and innovative environment for the issuer. A good example of this is the opinion of McRudden (2007)[10].

"The use of public procurement to achieve increased compliance and its relationship to law is complex and multi-faceted. Whilst public procurement policy has assiduously tracked government policy more generally, government procurement law has generally lagged behind changes in policy developments, leaving lawyers and policy makers to either interpret the existing law to conform to the changing policy preferences, to change the existing law to reflect these preferences, or to restrict linking public procurement with the delivery of these policy preferences."[11]

That is to say, the policy level and the legislative level are built on one another according to McCudden (2007)[12], they cannot be envisaged without one another; a poor legislative work results *ab ovo* in a tremendous backlog for the legal environment.

Level 3 Efficient use of public funds

At the next level, available public funds are spent in the most efficient way possible. Parikka-Alhola – Nissinen (2012)[13] brilliantly match the relationship between environmental aspects and the economically advantageous tender. Although their article points far beyond the issue of the efficient use of public funds, yet case studies unambiguously demonstrate that in order for an issuer to apply green criteria and the evaluation criteria related to the most economically advantageous tender, it is necessary that its set of conditions, the environment of public procurement, should *ab ovo* be about efficient use of public moneys. In order to be able to speak about life-cycle costing or green cost calculation, there must be transparent and efficient methods of spending public money available. Because of this, levels 3 and 4 presuppose the application of best value for money. That is, the availability of the appropriate information[14], the use of well-trained experts and transparent, unambiguous planning methodology are needed in the course of spending public moneys for the high-standard implementation of spending as well as the proper planning and administration of procurement. The article addresses the importance of developing the evaluation criteria, the clarification of the methodology and of the issue of weights in detail which can take place only if the issuer knows what it has money for, how much, what is its degree of freedom in the course of spending its budget, whether it has a possibility at all to choose not the cheapest bid or the regulatory environment makes it mandatory to apply the criterion of the lowest possible price. That is to say, the efficient use of public funds does not mean a perfect budgeting at government and issuer level but it does mean a secure, unambiguous environment also providing flexibility and freedom for a well prepared issuer where it can carry out its activities.

Level 4 Accountability

The next level is that of transparency which presupposes the availability of as much and as useful information as possible both at government level for the policy maker and at the issuer's level for the issuer. It is not surprising that the issue of accountability arises in relation to sustainability. Preuss L. (2009) stated that "the strategic and transparent integration and achievement of a public sector organisation's social, environmental and economic goals in the systematic coordination of key interorganisational commercial processes for improving the long-term performance of the organisation and the territorial base for which it is democratically accountable for, in line with overarching public policy priorities."[15]

Incidentally, the article using the theoretical background of supply chain management highlights the role of transparency as well as the advantages based on a broader interpretation of procurement, namely: "the dissemination of sustainability, information within and beyond the local authority." [16] Publicity, strategy, culture and risk management are regarded factors which support the development of public sector SCM.

Level 5 Value for money

An efficient and accountable public procurement environment is the precondition for any issuer to assert the best value for money criterion at the next level. In his article, Dimitri's (2013)[17] point of departure is that the shift from a price-based set of evaluation criteria to the evaluation criteria of the most economically advantageous tender with a view to economic efficiency points towards best value for money (BVM). According to Dimitri (2013)[18], the reason is that "effective procurement can be a fundamental support to pursue fiscal, industrial and innovation policies by best employing the available financial resources effective procurement could be a crucial driver for the socio-economic development and growth of a state."

The application of the appropriate BVM approach is conditional upon good preparation and monitoring, and the latter is, as a matter of fact, a condition of the accountability condition at Level 4. The life-cycle perspective closely related to the subject matter is also discussed; understandably, an accurate specification, however, of the way in which an issuer is able to handle its preferences is a matter of designing public procurement. One of the most interesting set of issues in the economic aspect of sustainability is BVM whose genuine application requires much more penetrating preparation, specification of preference and planning provided that is what the issuer wants. Parikka-Alhola – Nissinen (2012) call attention to this when underlining in particular that "...due to the purchaser's preferences, not all of the relevant aspects may be taken into account or the weightings for different aspects may not relate to the true impact of such aspects. For example the durability, guarantees, opportunities for repairs and service upgrading opportunities, flexibility, which contributes to the environmental impact question but are not environmental impacts as such."[19]

So, the application of BVM means the first level of development where sustainability criteria can genuinely and unambiguously be met but their application can be rather multi-layered. Just because the MEAT criteria are applied, it is not yet certain the BVM methodology will be asserted, because all this needs to be aligned with the contents of the contract. Or, to start out from the previous example, just because an issuer applies environmental criteria, it is not yet certain that the activity will have meaningful consequences which could be rated also from an environmental point of view. BVM is therefore a good basis for applying sustainability criteria, i.e., it is from this level of development that one can truly take into account the elements and consequences of sustainable public procurement.

Level 6 Support for broader government policy objectives

The next level is when sustainability matures to such importance at governmental level that, as a policy objective, its application could bring advantages for the issuer. For this, however, it is necessary to make the objectives which the government intends to support unambiguous at this level of development. If ideas are formulated only at general level, issuers will not understand exactly what target groups need to be preferred and for what reason, thus the government message can easily be misinterpreted.

McCrudden (2004)[20] writes about how to use public procurement to achieve social outcomes. He describes the linkage of procurement to labour standards, international human rights norms, gender equality, and employment. He states that we have to clarify "social procurement practices as a basis on which future legal and policy analyses can build."[21] If it is not clarified what we mean by social criteria, for instance, would we include support to SMEs and through it an increasing in employment, we cannot even speak about a policy demand even in a general sense and the regulatory environment will also not be appropriate for those applying it, because they will not know which social criteria enjoy priority and which are the ones that do not (for instance, businesses owned by women). McCrudden (2004) also substantiates that the relationship between the legal and policy aspects and their juxtaposition are the conditions of ensuring sustainable public procurement.

Level 7 Delivery of broader government objectives

The highest level means the peak of the model where, theoretically, sustainable public procurement is fully implemented, because public procurement itself mediates the government's objectives. A good example of this is the article published by Kattel R., Lember V. (2010) under International Public Procurement Conference 4 (2010), which handles public procurement as an industrial policy tool. The question is that "is it an option for developing countries? Is it advisable for developing countries to use public procurement efforts for development and should more developing countries join the WTO GPA?"[22]

Researchers believe that "using public procurement for development assumes high levels of policy capacity."[23]

But there is a consequence, namely, that it is complicated for the developing countries to benefit from public procurement for innovation. The article by Kattel R. and Lember V. (2012) that triggered heated debate wished to outline an opportunity for breakthrough for developing countries for promoting innovation and development. They

created four strategies for countries to design and implement public procurement policies in the context of economic development.

1. Public Procurement as a level playing field, where the main goal is transparency, non-discrimination and free competition.
2. Discriminatory Public Procurement which is based on protectionism.
3. Public Procurement for Innovation where the competition is dependent on existing market competitiveness.
4. The soft Public Procurement Measures option focuses on the policy capacity of the government and it can be used easily to start the learning-by-doing process. [24]

Another good example is based on the article by Fisher E. (2013) about the power of purchase[25], who asks questions about how sustainable development is to be achieved through procurement functions. She recognises that "sustainable public procurement is a strategic concern and political project".[26] Fisher E. (2013) calls attention to the need to strike a balance between the objectives set; similarly, Tátrai-Nyikos (2012) also addresses the importance of exploring the contradictions between the objectives applied in relation to this aspect. Finally, Fisher effectively declares: "It is all too easy to focus on rules, regulations and legal technicalities; while obviously essential, they [sustainable development goals] need to be part of a bigger picture about sustainable development to enable government to achieve better things through sustainable public procurement."[27]

All this is to say that the theoretical background is given for slightly improving the model by Telgen et al (2007). The essence of the improvement is that in actual fact the model can also be evaluated from a sustainability point of view.

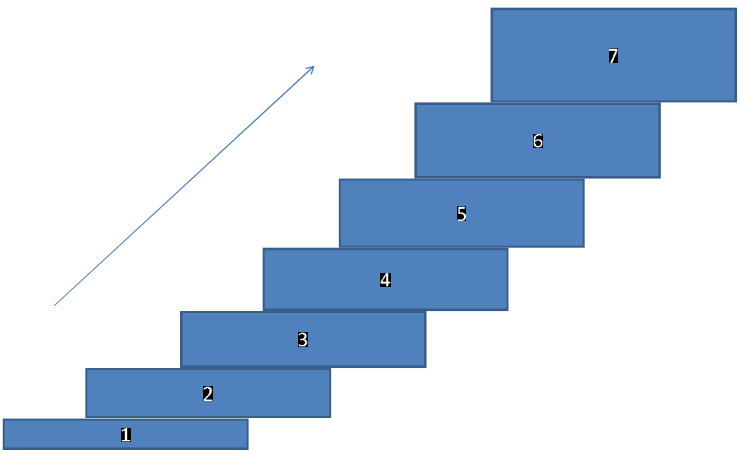

Figure 1: 7-stage model for SPP - Based on the "Developments in public procurement"[28]

The above point out that if approaching sustainability from another dimension, from another aspect, it can be defined that this is the buzzword capable of dynamising the development of public procurement and moving on to the next stages of development where we can have genuinely sustainable public procurement. Telgen et al (2007) cites examples at Levels 5-6-7 which presuppose the existence of a legal and economic environment for public procurement that represents a higher standard and is carefully considered.

All this, however, does not mean that otherwise the non-sustainability criteria also develop the same way. Moreover, it is necessary to interpret the assertion of ethical forms of behaviour as part of sustainability. The distances between the individual grades or levels of development are increasingly large as they require changes in attitudes and much more extensive ways of thinking. That is why we modified or rather slightly supplemented the model by Telgen et al (2007) by gradually increasing the individual scales thereby indicating that stepping on to the higher levels of development requires major changes in attitudes and, accordingly, it is more difficult to achieve such levels. In our view, therefore, any improvement in levels of development is more and more difficult.

At the same time, we accept the assumption that if we wish to make our public procurement genuinely sustainable, it will presumably be necessary to go through the individual levels of development and will not immediately be able to conduct sustainable procedures by specifying objectives not in the traditional sense and including a couple of social or green elements. On that basis, a procedure which includes a green evaluation criterion cannot be regarded as sustainable because in order for this to be the case, a precondition should be met: generally, the maturity of the available public procurement regulatory system, the transparency of the assertion of green criteria and the enforcement of the value for money principle. It is only then that the fact that the weight of the green criterion, its definition and its true added value in the course of performance will be able to bring about the result of public procurement based on long-term thinking from an environmental point of view is credible. That is why the juxtaposition of the model is essential, which is not yet shown in European statistics. For it is unclear whether the statistical data concerning the appearance or green or social criteria in public procurement are truly meaningfully utilised or it is the issuer itself that sticks of an issue, such as the employment of unemployed strata using this as an evaluation criterion without monitoring performance to see whether the bidder really employs unemployed people.

In his article, Hettne J. (2013) holds a similar view: "Hence, the proposed Directives on public procurement show a possible way to foster innovation, improve the environment, public health and social conditions, but should not be seen as a particularly simple or highly efficient way. Sustainable procurement seems rather to be a complementary instrument to other policies in their field, which should be integrated in the overall Union policy."[29]

Methods

Following the presentation of the theoretical background, we intend to evaluate the guidance needed for the achievement of the individual development levels primarily with respect to the new EU Directives. Choosing from other international examples, we call attention to the environment of interpretation in which the final text evolved in the course of the enactment of the Directives and what sort of consequences this will imply later.

Guide to Sustainability

The above shed some light on the new directions that can be detected in the interpretation of sustainable public procurement. While searching for new ways, we do not claim that every idea should be channelled into everyday practice. A conclusion, however, can be drawn. It is not enough to operate with phrases and goal identifications, it is much more important to develop the concrete environment of interpretation and not only at policy level well before the legislator creates it.

Let us review a few international examples concerning the interpretation of sustainability as well as what was done to assist in everyday practice and to interpret the law.

Let us take the UNEP definition as our point of departure: "Sustainable Procurement is a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of Procurement generating benefits not only to the organisation, but also to society and the economy, whilst minimising the appropriate balance between the 3 pillars of sustainable development i.e. economic, social and environmental."[30]

What makes this definition interesting? Because UNEP has set up a separate guideline to ensure practical implementation. The guideline which supplements its set of rules includes separate interpreting provisions and accurate definitions. It addresses the application of Eco-labels, contract management, the importance of monitoring just as much as the objectives and scope of SPP Policy. There is a separate part on training because it is exactly these added values which enhance the importance of assisting interpretation. If the procurement manager in everyday practice understands why a policy is born, how the procedure is to be administered and what kind of staff must be available, he will be able to follow the rules and implement the objectives specified therein.

Following the UNEP example, it is worth mentioning the revised WTO Government Procurement Agreement which does not really show any substantial innovation. Yet, according to Tosoni L. (2013), the "importance of the changes introduced in some key provisions should not be underestimated"[31].

For example, technical specifications to promote conservation of natural resources or the protection of the environment can be used based on Art. I[32] (u) (i) "technical specification means a tendering requirement that lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision."

According to Tosoni's point of view "GPA has clearly missed the opportunity to make a significant step forward for sustainable procurement."[33] For instance, the qualification criteria limit the possibility to promote sustainable development through public procurement. At the same time, WTO works on the Work Programme on Sustainable

Procurement that should offer solutions and guidance on how to devise procurement procedures and performance more sustainable, and how to draw up sustainable development objectives in technical specification, qualification, evaluation and performance in detail.

It is expected that WTO shall follow a similar road, i.e., it intends to provide detailed assistance for the interpretation of its renewed, although not much altered set of rules. WTO has lagged somewhat behind in terms of the renewal of sustainability criteria; nevertheless, a separate Work Programme is expected to be developed on Sustainable Procurement and a different one for SMEs. It should be noted that a separate work programme is in the making on providing statistical data (Work Programme on the Collection and Reporting of Statistical Data), which incidentally will serve as the basis for subsequent policy formation and with respect to which the EU set of regulations is lagging behind seriously. [34]

The EU case

The new EU Directives were adopted on 11 February 2014, whose sustainability aspects are summarised briefly based on the preamble. This reveals what goals and what subject matters are to be understood under sustainability based on the policy.

Initially, the revision was undertaken for the following reasons:

"The revision should 'underpin a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs'." [35]

The renewal of the Directives was preceded by serious preparation which made ***inter alia*** statistical data available on the basis of which it should be possible in principle to draw conclusions concerning the sustainable public procurement status of the individual Member States. The following data should be underlined as examples:

"most (56%) contracting authorities or entities were aware of their national action plans for green public procurement. The level of awareness in the UK, Norway and the Netherlands is above 80%. In Sweden, Slovenia, Denmark, Cyprus, France, Belgium and Lithuania awareness ranges from 72% to 60%."[36]

From a monitoring point of view, all this does not constitute green procedures; it is at best capable of indicating the European situation. Perhaps this can be regarded the greatest weakness of the stage of preparation, namely, that the new Directives had to be drafted on the basis of so few and frequently unrelated data or data of uncertain meaning. When there are no adequate data and sufficient information, it is not possible to achieve sustainable public procurement even in principle on the basis of the 7-stage model. Before drawing this conclusion, there is one more aspect that is worth calling attention to. In the course of preparation, the interaction of certain green, social and innovative criteria was also discussed, of which the Evaluation Report contained an expressly interesting summary.[37]

Specific topics	Environment	Social	Innovation
Anti-social dumping		x	
Biodiversity	x		
Chemical treatment	x		
Climate change, reduction of CO^2 emmissions	x		
CSR (including human rights and ILO Core Labour Standards)	x	x	x

Energy efficiency and management, use of renewable energy	x		
Environmental technology	x		x
Green IT	x		x
High-tech, research and technology			x
Integration of people with disabilities		x	
Promotion of SMEs		x	
Sustainable development	x	x	x
Sustainable economic growth and employment	x	x	x
Sustainable farming and food	x	x	
Sustainable production and consumption	x	x	x
Sustainable timber	x	x	
Sustainable transport	x		
Waste management	x		

Table 1. Topics included in broader policies integrating other policy objectives with procurement (Source: Adelhi)[38]

The above statement is highly interesting, it calls attention to the fact that "based on preliminary surveys, many countries also have broader sustainable development policies which impose some environmental as well as social or innovation considerations on procurement at one or more level of public administration. That is to say, theoretical knowledge, the awareness of the close relationship between the criteria were given in order that the renewal of the Directives take place on an adequate theoretical basis. In spite of this, the output fails to show this.

The preamble to the Directives refers to the Europe 2020 strategy several times, which is set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth'. The strategy refers to public procurement in traces; we can see them on 8 occasions, sometimes in relation to innovation, sometimes in relation to efficient public spending. No detailed information is, however, given on sustainable public procurement.
The Directive does not include definitions; it refers to the subject matter of sustainability in relation to innovation and efficiency. The text mingles sustainable development and sustainable growth as goal definitions. Policy-level ideas fail to tie the details of the regulations of the subject matter leaving it to the discretion of the reader whether he can find the relationship between innovative partnership and sustainability, to cite an example. Or will it be seen whether the appearance of ethical elements have an added value in terms of the new directives on sustainability (new conflict of interest definition).

From this aspect, the Directive formulates sustainability at European level simply and in many ways in an unworthy manner. It is not clear how the legislator intends to render European public procurement sustainable, whether it means sustainable development by it, or whether it regards innovation as a part of it. For the time being, we see an approximate solution at policy level but the regulatory environment does not help much in becoming the ground for ensuring sustainable development. If this is not there, additional levels of development can be hart to achieve which was detailed in the part on the theoretical background.

Of the few concrete issues, it is worth highlighting that the European Directives envisage the interpretation of sustainability in a green, social, efficiency and innovation environment. All the help they provide in concretising it is that they indicate that it should not be mandatory to apply the sustainability criteria. For the time being, that is all the assistance for application.

The reserved contracts, which do not constitute anything novel from a social point of view, or the application of labels affecting both environmental and social elements or the reference to contract award criteria in relation to green and social criteria cannot be regarded as sufficient results. At the same time, it is a right approach that the issue of sustainability appears in relation to performance also:

"Article 70 Conditions for performance of contracts: Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations."

The possibility to use looser rules with regard to social services reflects a different logic. There are two issues that should be underlined as concrete, well definable novelties in relation to sustainability: life-cycle costing (Article 68) and innovative partnerships (Article 31). The Directive, however, fails to solve a number of practical problems occurring in the course of the application of life-cycle costing, for instance, how the issuer should make its calculations in establishing estimated value, but it does contain a list of costs, that is, specific items.

As to innovative partnerships – presumably according to the Directive, one of the elements of sustainability is innovation – the question arises that if the issuer and the bidder develop something together and then the issuer requires the partner to compete again, why should the partner compete against others if so far they have been working on the joint project together. The Directives mention PCP, i.e., pre-commercial procurement, as a positive example, in spite of the fact that there has only been negligible experience accumulating concerning PCP in Europe. The new type of procedure can be, for the time being, regarded as something unique, a novelty which really wishes to incorporate a novelty of procedural law and through this new ideas as well. The initiatives are praiseworthy, but the legislator is presumably going to meet additional information for implementation by the Member States.

Successful sustainability is conditional upon not mixing growth with development and being innovative with the use of labels. The definition of sustainability criteria is needed with regard to technical content, eligibility criteria, evaluation criteria, the content of the contract and the condition of performance in order that market agents understand what is needed in order to administer their procedures in accordance with the sustainability criteria. The new Directives address these elements only in part and contain genuine novelties only to a minor extent.

It could also serve demonstrative purposes if the subject matter of sustainability was handled in a uniform manner and not with varying content. The criteria applied in the text define the green, social and economic elements in a narrow sense as independent objectives rejecting even the simple interrelation that these objectives should also be aligned as their joint application could even lead to the levelling off of the objectives. The Evaluation Report drafted in the course of the preparation of the Directives contained examples of such interrelations. We find it wanting that there is no interrelation between supporting SMEs and a decline in unemployment, there is no relationship between ethical public procurement and efficiency. The value-for-money approach is in the wind, while it is possible to develop evaluation criteria applying the principle of life-cycle costing. The theoretical background is relatively clear, which may provide a great deal of assistance to the legislator. If, however, there is no genuine assistance to those applying the law, it will not be possible to obtain the information needed for the individual Member States to reach higher levels of sustainability. There are Member States that will exceed the environment of interpretation in the Directive taking their own experiences as the point of departure, but there are Member States also that will expressly take the directives as the basis when managing the issue of sustainability.

In the course of analysing the sustainable elements of the Directive, it is worth making a few statements to conceive what a European Member State having to implement the Directive needs to do.

- It will not remain at the level of principles.

- It will not wish to introduce trumped up social rules, for instance, try direct disbursement to subcontractors, although the Directives contain this.
- It will not permit that innovation partnership should mean only that the issuer need not deal with conflict of interest if it wants to co-operate with an innovative partner.
- It will not allow that issuers apply the employment of the unemployed as the only evaluation criterion which would make their procedure "social".
- It will not believe that requiring labelling systems would be amply sufficient for appearance in sustainability statistics.

The above ideas are only of an indicative value and wish to call attention to the misunderstandings and errors that can be conceived in the knowledge of the final text of the Directives. We agree with Tosoni L. (2013) that "further clarification is needed about how to practically implement sustainable procurement practices that are consistent both with the new Directives and GPA is welcomed."[39]

Summary

In presenting literature, we specified several milestones which substantially exceed the interpretation of sustainable public procurement taken in the traditional sense. Based on the 7-stage model of Telgen et al (2007)[40] aimed at specifying the stages of development in public procurement, we establish that there was a great need for the appropriate development of the environment of interpreting sustainability in order that issuers or, for that matter, the legislator be able to make progress in the course of implementation, that they should apply the value for money approach so that they should operate in an accountable and transparent manner and use public procurement gradually for better things. It is not possible to create sustainable procedures simply by applying a green or social criterion because the evaluation criteria, the technical content, the contractual obligations should serve more than just demonstrative purposes. The goal is to render the entire procurement process sustainable at the level of issuers and to raise public procurement to the level of policy and its inclusion in sustainability strategies at government and international level.

Short of this, the 7-stage model pointed out that through the poor management of sustainability at regulatory level, *ab ovo* substantially less can be achieved because if it is not clear what a legislator wishes to achieve and in what manner, the solutions of those applying the law can only achieve levels 3-4-5 in a mixed way and these are the levels which contain some elements of sustainability. In our view, even the European states having an advanced procurement culture would only be able to reach level 7, i.e., the level of sustainable procurement where public procurement genuinely becomes the engine of economic growth if they set up their own guidelines, help the issuers and develop their practice taking into account their cultural differences and data. Every European Member State must pay the price for the weakness of a uniform public procurement policy. If therefore the foundations set by legal regulation are weak, high-standard performance cannot be expected, no matter how the same text is implemented by the Member States or issuers try to understand it.

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