

Procurement & Procurement
Processes:
International Perspectives on
Why They Matter --
And The Current Topics Where
Those Processes Are At Issue

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LAW

Why Public Procurement Matters

- It's a lot of public money
 - Approximately 15-20 percent of GDP
 - U.S. federal level: Approx. \$500 billion / year
 - EU procurements covered by Directives: same amount, or more

Why Public Procurement Matters More Now

- Growing, as public sector shrinks and relies more on purchases, esp. of services, from private sector
- Growing recognition of the link between procurement and corruption (see February 2014 EU Commission Anti-Corruption Report) – and between procurement and development

Why Public Procurement Processes Matter

- “Normal” purchasing incentives to achieve goals of value for money and purchasing speed don’t function as well, so we impose process rules as surrogates for those incentives
- And we add further goals, due to concern about possible waste, fraud and abuse of public funds: competition, transparency, accountability
- And then many systems add additional goals of furthering public policies from outside the procurement realm: serving sustainability & other environmental needs; helping domestic businesses, domestic small businesses, and/or particular social or ethnic groups
- Process rules are meant to ensure those various goals are served

Result: Tensions

Constant tension, in every system, between and among:

- Those saying that public bodies should buy just like businesses buy
 - They advocate giving public buyers the discretion and flexibility that businesses have, and they criticize the public procurement system's failure to meet the goals of any purchasing system: the slowness of public procurement, high prices paid, and low quality received
- Those saying that public bodies must be transparent and accountable
 - They are worried about giving public buyers discretion, because they worry about fraud and corruption, and personal & organizational conflicts of interest
- Those saying that public procurement is failing to serve non-procurement public policy goals
 - They advocate more and stricter rules to ensure purchases of environmentally preferable goods and purchases from domestic sources, etc.

Recent International Developments

- The UN Commission on International Trade Law (UNCITRAL) revised its Model Procurement Law in 2011 (and published an excellent Guide to Enactment in 2012)
- The WTO Agreement on Government Procurement was revised and is currently being adopted
- The European Union has just revised its Procurement Directives

Current Topics in Which The Above-Mentioned Tensions Play Out

- Use of Internet-based (e-) procurement, including electronic reverse auctions
- More inclusive assessment of price
- Use of non-price factors
 - ... including those rated on a sliding scale (not pass/fail)
 - ... and allowing tradeoffs between non-price factors and price

More Current Topics

- Framework contracts
 - Note link to aggregating demand, joint purchasing & use of a centralized purchasing agency
- Complaint mechanisms for vendors
 - Difficulty of measuring & ensuring effectiveness

And More Current Topics

- Increased focus on the process for exclusion of bidders
 - Issue of remedial measures and how (if at all) they should be taken into account
- Permitting negotiations with vendors
- Domestic preferences & preferences for (domestic) SMEs

Two Important Topics That Are Not Addressed in Any of the Revised International Instruments

- Growing recognition of the need to focus on acquisition planning and contract management – including in the fight against corruption and the promotion of results
 - Key international instruments treat the procurement process as ending with award of the contract: WTO GPA, UNCITRAL Model Procurement Law, and EU Procurement Directive
- Heightened awareness of the importance of the acquisition workforce and their training