

Proportionality Guide

1st revision, April 2016

Introduction to the translation of the Dutch Proportionality Guide¹

The translation

The European Procurement Directive of 2014 pays specific attention to the principle of proportionality. Point 1 of the Preamble states the following:

‘The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.’

The provisions on proportionality are continued in Points 15, 66 and 83 of the Preamble.

The Directive does not specifically indicate how to deal with this principle. The Dutch experience shows that contracting authorities have great difficulty in applying this principle. In order to help the contracting authorities, the Proportionality Guide was published following the introduction of the Dutch Public Procurement Act (Aanbestedingswet) in 2012. The Guide contains a detailed explanation of what the principle of proportionality means, or should mean, in all stages of the procurement procedure and in the terms and conditions of the contract.

The Guide has received attention outside of the Netherlands on various occasions and has always been well-received. It is clear that the problems that the Guide seeks to solve are problems all European countries are confronted with. That is why the Instituut voor Bouwrecht (Netherlands Institute for Construction Law), whose director is currently the chair of the European Society of Construction Law, has taken the initiative to translate the Guide into English.

The Institute is of the opinion that the Proportionality Guide truly helps contracting authorities and can also do so at European level. If its guidelines are followed, requirements and criteria will be more predictable, more understandable and more proportional, so that tenderers will have a better idea of what they are dealing with and in addition the requirements will better comply with the European regulations. Consequently the translation will also contribute to promoting a clear interpretation of the European Directive, which will stimulate cross-border transactions.

1 This ‘Introduction to the translation of the Dutch Proportionality Guide’ is not a part of the Dutch Proportionality Guide’.

This translation has been made possible thanks to the financial support of the following organisations:

- Vereniging voor Bouwrecht-Advocaten (Netherlands Society of Construction Lawyers)
- Nederlandse Vereniging voor Aanbestedingsrecht (Netherlands Society for Procurement Law)
- Bouwend Nederland
- Belgian Society of Construction Law
- BNA, Branchevereniging Nederlandse Architectenbureaus (Royal Institute of Dutch Architects)
- Ministerie van Infrastructuur en Waterstaat, Rijkswaterstaat, (Ministry of Infrastructure and Water Management, Rijkswaterstaat)
- ProRail
- NEVI (Dutch Association for Purchasing Management)
- Benthem Gratama Advocaten
- Loyens & Loeff
- Witteveen+Bos
- EFCA, European Federation of Engineering Consultancy Associations

I would like to thank these organisations for making this translation initiative possible.

Explanations of some terms

Tender for Works Regulations:

The Dutch Works Procurement Regulations 2016 (Aanbestedingsreglement Werken 2016; ARW 2016) describe the procedures for putting works contracts out to tender. On the basis of the Dutch Public Procurement Act 2012 and the Dutch Public Procurement Decree (Aanbestedingsbesluit) a contracting authority is obliged to apply the ARW 2016 to public contracts for works below the European threshold values according to the ‘comply or explain’ principle. This only applies to contracting authorities within the meaning of the Dutch Public Procurement Act and not to other parties putting contracts out to tender (see also paragraph 4.3 of the general explanation). Contracting authorities are free to use the ARW 2016 for contracts for supplies and services. In addition, contracting authorities are free to use the ARW 2016 for contracts above the European threshold values. Every procurement procedure is set out in full in the ARW 2016.

SME:

Small and Medium-sized Enterprises

UAV 2012:

Uniform Administrative Conditions for the Execution of Works and Technical Services 2012; these general terms and conditions are intended for use with the model contract whereby the principal assigns a contractor the realisation of construction works in accordance with a design made available to him by the principal.

UAV-GC 2005:

Uniform Administrative Conditions for Integrated Contracts 2005; these general terms and conditions have been established for the model contract whereby the principal charges a contractor with the design and execution of construction works.

Status of this translation

This translation was made by a professional translation agency, JMS Textservice BV (Volendam), and was subsequently carefully reviewed by Laurence Gormley (Professor of European Law & Jean Monnet Professor, Groningen University). It is important, however, to be aware that the translation is not an official translation issued by the Dutch authority which publishes the Proportionality Guide.

Lastly

It is my firm belief that this translation is of great use and importance for anyone involved in public procurement: contracting authorities, tenderers or academics, all over Europe and beyond.

Prof. dr. Monika Chao-Duivis

Director of the Netherlands Institute for Construction Law; Professor of Construction Law, Delft Technical University; President of the European Society of Construction Law, 2019.

Table of contents

1.	Introduction	7
1.1	Explanation of the principle of proportionality	7
1.2	Effectiveness and legitimacy	8
1.3	Relationship between purchasing and procurement	8
2.	Pre-tender stage	9
2.1	Introduction	9
2.2	Needs	10
2.3	Goal	11
2.4	Purchasing strategy	11
2.5	Market consultation	12
2.6	Schedule of Requirements	13
2.7	Tender, evaluation and award	13
3.	Drafting tender documents	14
3.1	Introduction	14
3.2	Defining the subject-matter	15
3.3	Scope of the contract	15
3.3.1	Proportionality in combining contracts	16
3.3.2	Lots	19
3.3.3	Framework agreements	21
3.3.4	Central purchasing body/purchasing cooperation	24
3.3.4.1	Forms of purchasing cooperation	25
3.3.4.2	Shrinking of the market and proportionality	26
3.4	Choice of procurement procedure	26
3.4.1	Character of the market	27
3.4.2	Common procedures	27
3.4.3	Less common procedures	30
3.4.4	Procedure rules	30
3.5	Requirements & criteria	31
3.5.1	Exclusion grounds	31
3.5.1.1	Mandatory exclusion grounds	32
3.5.1.2	Optional exclusion grounds	33
3.5.1.3	Self-Declaration/proof	37
3.5.2	The elaboration of suitability requirements	37
3.5.2.1	Requirements relating to financial and economic strength	38
3.5.2.2	Requirements relating to technical and professional skill	43
3.5.3	Selection criteria	46
3.5.4	Requirements for consortiums	47
3.5.5	Award criteria	48
3.5.6	Sustainability/social conditions	50
3.5.7	Relationship with other legislation	53
3.6	Time limits	54
3.7	Variants	57
3.8	Tendering costs	58
3.9	Contract terms and conditions	59
3.9.1	Individual contract clauses	61
3.9.1.1	Liability clause	61

3.9.1.2	Intellectual property	62
3.9.1.3	Most-favoured customer clause	62
4.	Tender stage	63
4.1	Questions for and notices of contracting authority	63
4.2	Formal requirements	63
4.3	Standstill period	64
4.4	Complaints procedure (proportionality aspect of complaints procedure)	64