Mediation between contracting authorities and economic operators

Summary

Mediation[1] in public procurement represents an alternative channel for dispute resolution between contracting authorities and economic operators, supported by the use of impartial arbiters. The appeals process is often associated with delays, which are time-consuming and costly for both parties. Going to court is often perceived as too high of a barrier for economic operators, in particular SMEs, due to the burden associated with lawsuits. Additionally, in a number of MS, appeals result in ongoing procurement procedures being halted, thereby causing further disruption and costs for economic operators and contracting authorities.

To address these issues, some MS have introduced a mediation process as a 'soft measure', which provides an alternative dispute-resolution mechanism. Depending on its design, mediation can resolve potential conflicts before a contract is concluded or after it has been signed. The mediator can either act as a neutral third party that facilitates a dialogue between two parties or as an impartial arbiter that issues a non-binding judgment.

If mediation is available before the contract is signed, economic operators and contracting authorities may file a complaint if they believe they have been treated unfairly or are dissatisfied with the actions of an economic operator. Alternatively, if mediation is available after the contract has been signed, it involves questions related to contract execution, such as contractual agreements being disregarded, payment delays etc.

Typically, the plaintiff files a complaint with the mediator, indicating their reason for complaining, providing information relevant to their case and including a potential resolution. The mediator decides whether to accept the case, taking into account various aspects, such as its independence, the applicability of procurement law, whether the claim is sufficiently substantiated etc. While the plaintiff can file a complaint on their own, both parties must agree on pursuing mediation for the case to continue. If the case is accepted, the mediator handles the complaint either by mediating between the parties or by issuing a non-binding decision. The parties can either accept the decision by the mediator or disregard it, as it has no formal legal power. The finalised opinion may subsequently be published to serve as a reference for contracting authorities and economic operators to interpret the law.

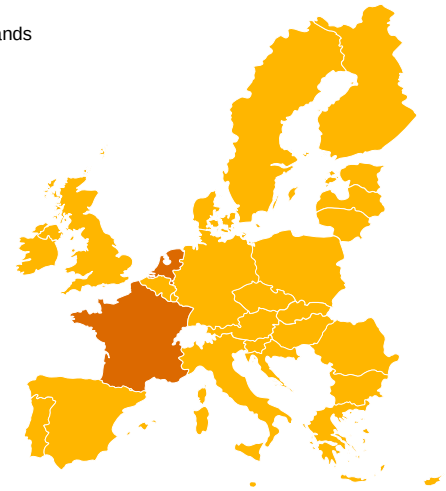
Mediation in public procurement brings about several positive effects. It ensures that there is an effective and efficient instrument to address procurement disputes, available at a lower cost than going to court. Furthermore, it contributes to improved relations between businesses and public administration and to the professionalisation of procurement practice if opinions are published and disseminated. Mediation is mostly used in cases related to the following: award criteria and the assessment of bids, award decisions and their justification, poor communication by contracting authorities, tender requirements (specifications, including draft terms), selection criteria, and the selection process.

Related Good Practices

Feedback channels for economic operators

Good Practice Examples

✔ France
✔ The Netherlands



Impact

Reduce administrative burden

A flexible, cheap and quick alternative to judiciary proceedings by raising a complaint in procurement reduces the administrative burden for economic operators and contracting authorities.

Increase competition

Reducing the burden of potential costs related to complaints in procurement is an incentive for firms to participate in procurement, particularly for SMEs, which are often unable to afford legal action. Furthermore, the availability of mediation instruments signals greater openness on behalf of the public administration to respond to concerns by economic operators, thereby improving relations between businesses and public administration.

Promote professionalisation

If the decisions of mediating bodies are publicly available, they can provide greater clarity in the interpretation of public procurement rules and thus promote a more professionalised procurement practice.

Increase transparency

If mediation is conducted confidentially, there is a slight negative impact on the transparency of procurement, as in the absence of such a channel, the decision of an appeals body would be published and available to the broader public.

Input

Cost – €€
- Medium set-up cost
- Medium operation cost (1.5 FTEs employed as independent mediators, secretariat for administrative tasks requiring approximately 2 FTEs, additional experts on an ad hoc basis)

Time – 6 to 12 months

Complexity – High
- Change in the law to create an independent body
- Awareness raising with the support of e.g. large business organisations
- Hiring mediators with the required expertise both in practicing procurement law and having practical experience in the field

Key success factors and potential pitfalls (1)

Raise awareness about mediation
Contracting authorities and economic operators must be aware of the mediation services and how to make use of them. This is particularly true for SMEs, which are often the main target group for mediation in procurement.

Maintain the mediator's independence, neutrality and authority
The independence, neutrality and impartiality of the mediators is key to their success and their reputation as authoritative institutions. To this end, there must be a strict procedure for ensuring independence in place.

Handle matters confidentially
The confidentiality of certain complaints must be ensured; otherwise, economic operators will have no incentive to participate in it, as they may see potential damage to their reputation from an open complaint.

Ensure transparency and equal treatment when renegotiating
The mediator must take care to uphold the principles of transparency and equal treatment, in particular if it intervenes once the contract has been signed. For instance, renegotiating essential elements of a contract, such as the price, completion period and specific clauses, may alter the general economy of the contract and could therefore have an impact on the tenders submitted. In such cases, renegotiation may be considered in breach of the principles of transparency, equal treatment and sound financial management.

Make it approachable and cheap
In order to reduce barriers to solve procurement disputes, mediation services should be easy to request and offered at a cost that is comparable to or less than the appeals route. Furthermore, the mediation process should be more flexible than judicial intervention, signalling clear benefits for choosing the mediation channel.

Keep track of your results
Monitoring the work of the mediation body and keeping track of its results enables lessons to be learned for improving the way in which mediation is conducted and how it can be further shaped to best fulfil its objectives.

Make sure economic aspects of procurement are taken into account
While legal expertise is important in a mediation exercise, there is a risk of a legal view taking a dominant role over other types of expertise, especially the economic aspects of procurement. As a result, mediators should bring different types of expertise to the table and should not have an exclusively legal background.

Do not create a parallel court
Mediation is meant to be a flexible instrument that provides a clear alternative route to the judiciary. However, there is a risk of mediation taking a shape that is very close to a court. Indeed, opinions are often crafted in such a way that they are difficult to challenge, instead of having a strictly non-binding character. However, excessive thoroughness comes at the expense of speed, which is one of the main benefits of mediation in the first place.
Furthermore, mediators are often hesitant to engage in mediation and prefer to issue an opinion. This is mostly the case because, from a legal point of view, a bilateral contact between an economic operator and a contracting authority is problematic. However, the benefit of mediation lies in the fact that it helps parties to understand each other better instead of maintaining their opposing views, which often happens when an opinion is issued.

Key success factors and potential pitfalls (2)

Timing is key

For mediation procedures before the contract is signed, it is key that the decision comes quickly; otherwise, the non-binding judgment may come too late, i.e. when a contracting authority has already taken a final award decision.

Target SMEs and entrepreneurs

Entrepreneurs, who are among the primary audience for mediation services, are often the ones who are least aware of the availability of such channels, thereby undermining the goals of increasing accessibility to procurement.

Case Studies

The Netherlands – Commission of Tender Experts*

In the Netherlands, the Commission of Tender Experts, which is part of the Ministry of Economic Affairs, was introduced at Parliament's request in 2013 as a means to reduce the barriers and costs related to dispute settlement in public procurement by providing rapid, accurate and accessible opinions on a complaint. Economic operators can consult the Commission before signing a contract if they feel they have been treated unfairly, while contracting authorities can do so if they want to voice a complaint against economic operators. To date, no complaints have been received from contracting authorities.

The Commission is set up as an independent and impartial body, and may act both in the capacity of a mediator between contracting authorities and economic operators and in the form of an arbiter issuing non-binding opinions. Once a case is submitted, the Commission decides whether to accept it. It has outlined a number of principles on the basis of which to make the decision. For instance, it only takes cases if the economic operator has informed the contracting authority of its complaint, and if the contracting authority has had enough time to respond to the complaint. Furthermore, it only accepts complaints that are sufficiently substantiated and where it can play an effective role in treating them. Importantly, if the Commission cannot guarantee sufficient independence with respect to the case, it does not accept it.[2] Having processed the complaint and issued a non-binding opinion, it publishes the opinion on its website in an anonymous format.

The Commission of Tender Experts is designed to be lean: it consists of a Chairman, a Vice President and a Committee Member with legal expertise, who are assisted by a secretariat and a pool of over 80 experts who can be called upon depending on the level of expertise needed for the case at hand. The experts cover a variety of topics, including non-legal expertise. In the period from March 2015 to March 2016, the Commission of Tender Experts received 117 complaints from tenderers or potential tenderers. Out those, 99 complaints were from SMEs and 4 from trade associations on behalf of SMEs. The complaints dealt mainly with award criteria and evaluation of tenders, tender requirements and specifications, and award decisions.[3] Even though the Commission can both mediate and act as arbiter, in the majority of cases it chooses to issue an opinion, and only rarely engages in mediation between the two parties.

The Commission has been mandated for a four-year term, which can be renewed following an assessment of its performance. So far, it has established itself as a well-known and authoritative body, being widely used and accessible to companies. Thanks to its work, about half of the cases submitted result in disputes being resolved.

France – Amicable settlement of disputes in public procurement

In France, economic operators and contracting authorities have the choice between two alternative approaches for settling disputes in public procurement, apart from the regular appeals process, as defined in Art. 142 of Decree 2016-360 of 25 March 2016 on Public Procurement.[4] On the one hand, the business mediator (*médiateur d'entreprise*[5]) intervenes as an independent third party, supporting the dispute resolution by encouraging dialogue and problem resolution between the affected parties. The business mediator may be involved in both business-to-business (B2B) and business-to-public administration transactions (B2PA). On the other hand, so-called Advisory Committees for Amicable Dispute Settlements (*Comités consultatifs de règlement amiable des litiges*[6]) are exclusively dedicated to public procurement, and take the role of an independent arbiter that issues a non-binding judgment. Importantly, both amicable dispute settlement tracks are applicable once a contract has been signed and therefore deal with issues related to contract execution, i.e. disregard of contractual agreements, payment delays, dissatisfaction with contract execution etc.

***Feasibility study on implementing mediation between contracting authorities and economic operators based on the Dutch case study - available on the e-library of public procurement good practices.**

Contact

Commission of Tender Experts, **The Netherlands** https://www.commissievanaanbestedingsexperts.nl/ +31 70 379 74 80 info@commissievan-aanbestedingsexperts.nl	Advisory Committee for Amicable Dispute Settlements, **France** https://www.economie.gouv.fr/daj/reglement-amiable-des-litiges +33 1 44 97 05 39

[1] Mediation in the context of this good practice refers to various forms of alternative dispute resolution mechanisms in procurement, which involve an independent third party acting as mediator or arbiter; [2] Commission of Tender Experts, “Rules of the Commission of Tender Experts”, see: https://www.commissievanaanbestedingsexperts.nl/indienen-klacht/reglement-commissie-van-aanbestedingsexperts [3] Commission of Tender Experts, “Revised Periodic reporting of the Committee of Procurement Experts 27-09-2016 (March 1, 2015 - March 1, 2016)”, see: https://www.commissievanaanbestedingsexperts.nl/sites/commissievanaanbestedingsexperts.nl/files/afbeeldingen/herziene_versie_periodieke_rapportage_van_de_commissie_van_aanbestedingsexperts_27-09-2016_1_maart_2015_-_1_maart_2016.pdf [4] Legifrance, “Article 142” (2016), see: https://www.legifrance.gouv.fr/eli/decret/2016/3/25/EINM1600207D/jo/article_142
[5] See: http://www.economie.gouv.fr/mediateur-des-entreprises [6] See: http://www.economie.gouv.fr/daj/reglement-amiable-des-litiges