



EU DA 2019 ANNUAL CONFERENCE - 14 NOVEMBER 2019

"Sustainable Public Procurement of Waterborne Infrastructures"

SUMMARY & KEY MESSAGES

Conference's Summary:

Public procurement is the process by which public authorities, national, regional and local, purchase work, goods or services from companies at all stages of a project. In total, public procurement accounts for 15-20% of global GDP and represents a substantial portion of the EU economy and of many other economies around the world.

Transport infrastructures, including waterborne infrastructures represent a significant portion of EU public procurement. The Connecting Europe Facility (CEF), for instance, which is a key EU funding instrument for investing in infrastructures, has allocated €23.7 billion out of €30.4 billion for Transport infrastructures.

In addition to the primary function to be procured, public authorities are progressively introducing specific requirements in their public tenders that aim at reducing environmental impact throughout the life-cycle of their procured goods, services and works. This process can be qualified as **Sustainable Public Procurement**, when additionally to purchasing work, goods or services, it also seeks to achieve the appropriate balance between the three pillars of sustainable development (economic, social and environmental). The EU 'Green Deal' may well accelerate this process and generalise it throughout Europe.

Moreover, a key dimension in this approach is the sustainable financing of the public authority, which, if overlooked, can open the gates to a debt trap for the unsuspecting administrations. There is more and more evidence that the unfair tied financing practices by State-owned Enterprises (SoEs) from third countries, especially from China, are closing down dredging markets around the world and getting closer to Europe. In Europe, the main competition distortions from third countries stem from the unchallenged access of their EU State Aid non-compliant SoEs to European public procurement markets.

Well-designed requirements for Sustainable Public Procurement can provide opportunities to effectively improve the level playing field inside and outside Europe as well as focus on the quality of the infrastructures, long-term value for money and lifecycle costs (rather than price only).

With their long-term investment in technology and novel approaches, such as Building with Nature, European Dredgers are providing significant added value to the European and Global economy, ecology and society when executing waterborne infrastructure projects and jointly reflected with speakers from the European Commission, the International Institute for Sustainable Development and the Dutch administration on how to possibly shape requirements on sustainability in public tenders to provide a better level playing field and long-term added value. The speakers presented their respective strategies on sustainable public procurement highlighting the points of view from the policy, funding and implementation sides. The Keynote Speaker Karel De Gucht gave the closing address that opened the floor to lively discussions and a constructive debate.



EuDA 2019 Conference on

Sustainable Public Procurement of Waterborne Infrastructures

Welcome and Opening

▷ **Mr Alan Lievens**, EuDA Chairman

Introduction to the Conference Theme and Speakers:

▷ **Mr Paris Sansoglou**, EuDA Secretary General, *Conference Moderator*

European Commission's Strategy for Sustainable Public Procurement - **Policy:**

▷ **Mrs Anna Lupi**, Policy Officer, DG GROW Unit on Public Procurement Strategy

IISD's Strategy for Sustainable Public Procurement - **Financing:**

▷ **Mrs Oshani Perera**, International Institute for Sustainable Development, Director, Public Procurement and Infrastructure Finance Programme

Dutch Strategy for Sustainable Public Procurement - **Implementation:**

▷ **Mr Maarten Neelis**, Rijkswaterstaat (The Netherlands), Directeur Markt in Transitie

Keynote Closing Address - **Call for Action:**

▷ **Mr Karel De Gucht**, Former European Commissioner for Trade, Belgian Minister of State and President of the VUB Institute for European Studies

Open Discussion and Conclusions.



Summary of the Conference's key messages:

Sustainable Public Procurement for Waterborne Infrastructures

Strategies for Policy

- the rising challenges in today's world include: climate change adaptation and mitigation, the increasing influence of populism vs democracy and its root causes, as well as role of technology in societal progress; one important economic instrument for governments is public procurement, which represents 14% of the EU GDP; if used strategically, public procurement has huge potential and can provide key opportunities for Europe to tackle the root causes of many of the above-mentioned global challenges;
- the European Commission published in October 2017 its Communication on 'Making public procurement work in and for Europe' (COM(2017)572); in this document, the Commission identified 6 priority areas for action :
 - ✓ boost strategic procurement;
 - ✓ professionalise public buyers;
 - ✓ increase access to procurement markets;
 - ✓ improve transparency, integrity, data;
 - ✓ boost the digital transformation of PP;
 - ✓ cooperate to procure together;
- **Strategic Procurement** considers public procurement as a policy instrument that can, in addition to its primary purpose, pursue priority goals, such as reducing environmental and climate impact (of public purchases), social & professional integration, social & labour law compliance, human rights due diligence, promoting equality; Strategic Procurement aims at promoting sustainable growth and development in an open, non-discriminatory and transparent public procurement market; Strategic Procurement can also be used to promote these core European Values in the other parts of the world;
- to be effectively implemented, Strategic Procurement needs:
 - ✓ a legal framework providing the technical specifications and award criteria that will restrict decisions based on price only and impose practical and effective sustainability criteria (including ecological, social and economic aspects) in the decision-making process;
 - ✓ specific education and training to help public buyers to acquire the necessary soft skills, as well as to understand the market and its products/services;
 - ✓ an adapted governance, or even a **governance mind shift**, is needed to facilitate the right decision-making to purchase both assets and asset expertise; it is important to provide the right governance frame for a shift from pure asset procurement to performance-based procurement, for a shift from monopurpose infrastructures to multipurpose infrastructures (providing added value to the local/national economy, ecology and society);
- a huge step forward came from the **EU guidance** on participation to public procurement from third Countries; this guidance specifies that there will be no secured access for companies coming from countries that have not signed a free trade agreement (FTA) with the EU or that have not signed the WTO Government Procurement Agreement (GPA); in other words, this means that companies can be excluded from tendering for no other reason than coming from countries not signatories of an EU-FTA or WTO GPA;



Strategies for Financing

- one of the major hurdles to 'sustainabilising' public procurement stems from the availability of budgets and other sources of financing; for instance, infrastructures need to be adapted to climate change and the estimated **global infrastructure gap for the period 2013-2030 amounts to 90 Tn US\$**; in some cases, delaying or not building the necessary infrastructure can have serious financial consequences locally: indeed, in some vulnerable areas, the estimated risks are so high that insurers (and reinsurers) refuse to cover them and these insurance issues can significantly affect local individuals as well as businesses;
- budgetary limitations should not be the excuse for keeping buying cheap and paying manifold the acquisition price over the lifetime of the asset: in most cases, the cheapest solutions at the point of purchase or procurement also mean a more expensive asset to own and manage; by considering the **total cost of ownership**, sustainable public procurement offers long term opportunities and allows decisions to take into account innovative financing instruments (including blended capital), the sharing of risks and the selection of innovative and sustainable solutions; risk sharing often translates into sharing the financing; one possible way forward for public administrations can be found in the Design-Build-Finance-Maintain-Operate (DBFMO) contracts; progressively, the costs of climate change mitigation (with combinations of grey/green/blue infrastructures) will be internalised in new valuation approaches; Public Sector Accounting Boards allow the inclusion of 'natural capital' as **tangible capital assets**;
- by aiming at learning lessons from the past (and avoiding repetition of mistakes), Europe can improve the level playing field in its internal public procurement market and tackle the issue of **abnormally low tenders**; by developing criteria of sustainability with ex-ante assessment and ex-post evaluation, Europe can further refine, elaborate and improve its assessments and price/quality ratios of the **most economically advantageous tenders**; although the main difficulty remains how to properly compare the quantitative and qualitative aspects;
- as world leaders, European dredging companies have developed a significant expertise and a global competitive advantage in innovative solutions such as **Nature-based Solutions (NbS¹)**; however, in order to mainstream NbS, financing should also become part of the European competitive advantage; in order to do that, it is important to realise that the financing of NbS needs predictability, comparability and certainty, with or without bended capital;

Strategies for Implementation

- the Netherlands plans to reduce by -49% its CO₂ emissions by 2030, with as its ultimate objective to achieve climate neutrality and circularity (circular economy) by 2050; as a consequence, the Dutch **green public procurement** is evolving from technical solutions to functional (focusing on the infrastructure performance with a technology-neutral approach);
- the **Dutch strategy** towards climate neutrality aims to be clear and long-term; this strategy aims at enabling the Dutch administration to act as launching customer for innovations, to stimulate the front runners and to actively support knowledge and innovation; in this approach, it is essential that the public procurement processes reward the frontrunners with the lowest environmental costs (for instance with discounts) and at the same time avoid rewarding the non-participating (e.g. US, China); moreover, it is also important to force the standards up, requiring the delivering of work on time and within budgets, with CO₂ targets to be defined soon (by the Dutch administration's own climate neutrality instrument: Dubocalc); the **contracts** should cover content and process, stay technology neutral, and stimulate investments in fuels/energy for the future;

¹ Cf ThinkNature NbS Handbook ([click here](#)).



Strategic Considerations on International Trade

- following the realisation of the systematic and broad-ranging acquisition of strategic European assets, companies and technologies by Chinese companies (e.g. the German jewel of robotics KUKA), a mind shift occurred in Europe with regard to EU-China relations that led the European Commission to **identify China as a “systemic rival”** and to propose to take action² on:
 - ✓ addressing **foreign State ownership and State financing** that significantly distort competition in the EU internal market and restrict access to third country markets;
 - ✓ reforming the **WTO subsidies** and forced technology transfers;
 - ✓ promoting **reciprocity** and opening up procurement opportunities in China by adopting the **International Procurement Instrument (IPI)** by the end of 2019;
 - ✓ ensuring that **not only price** but also high levels of labour and environmental standards are taken into account;
- the **State Aid Regulations** have helped European Member States to progressively move away from operational aid and more effectively apply market economy principles; however, these regulations are not applicable to all companies active on the EU territory: they do not apply to non-EU companies and create a reverse discrimination in Europe favourable to the heavily subsidised non-EU companies; these regulations should be complied with by all companies active in Europe or benefitting from EU funding; the current procedures should be revised to be applied to non-EU companies, with the burden of proof reversed: e.g. in the specific case of non-EU State-owned Enterprises, the access to the European public procurement should be conditional to effective demonstration of their full compliance to the EU State Aid Regulations;
- both in WTO and EU law, there are **no effective instruments** against unfair trade practices, such as dumping and illegal subsidies, that distort competition in trade in services; this gap could be filled by applying to the services the same procedure as under the Trade Defence Instruments and currently only applicable to goods; the creation of new **Trade Defence Instruments for Services** should be considered as a vital priority for Europe;
- moreover, the EU has the authority of its own to introduce such an instrument because it has exclusive competence over the **common commercial policy and international trade**; as stipulated in Art 207 TFEU: “*The common commercial policy shall be based on (...) measures to protect trade such as those taken in the event of dumping or subsidies*”; so within this remit, the EU acts as a sovereign and is the only one to decide and/or act unless it is explicitly prohibited or stipulated otherwise;
- as the current public procurement directives do not contain a definition for **abnormally low tenders**, the Member States and their respective contracting authorities have to determine their own definition and apply their own criteria; however, this also means that these authorities are in a situation of being both ‘judge and party’, as it is their interest to get the procurement executed as cheaply as possible; in practice, this means that the contracting authorities will tend to apply a price only approach and not to scrutinise in too much detail the bids that fall well within their budgetary limits; this also means that the doors of the EU public procurement markets are open to heavily subsidised non-EU State-owned Enterprises (SoEs) that do not have to comply with the EU State Aid regulations; in the case of Chinese SoEs, not applying market economy principles, abnormally low tenders are part of business as usual until they

² European Commission and European External Action Service (EEAS) Communication on the EU-China Relations of March 2019 ([click here](#)).



have reached a monopoly or oligopoly, meaning that the targeted markets are fully under the control or influence of one or several of their SoEs;

- the current procedure for Trade Defence Instruments works because industry can activate it: for instance, when a representative sample of an industrial sector (e.g. 15% or more) hands in a complaint to the Commission, the latter has to act, investigate and take the appropriate measures; the same trigger mechanism should be considered when introducing the new defence instruments, such as TDI for services or abnormally low tenders;

Conclusions

- the currently changing winds of trade are inciting Europe to take a more appropriate set of actions; **Europe has an opportunity to seize**, as its companies, like in the dredging sector, still have competitive advantages, including in environmental and technological knowledge;
- **sustainable public procurement** is strategic and should also be used as a policy instrument;
- Europe is the largest donor in the world and its **development financing and aid**, inside and outside Europe, should be granted to companies complying with a minimum set of European rules, ethics and values;
- the future of European sustainable public procurement depends on setting the right framework and set of requirements that will award tenders only to companies that respect and apply the same European (environmental, social and economic) values, ethics and rules;
- Europe needs to tackle the **unfair trade practices** that distort competition in its own territory and apply the same competition rules, including State Aid Regulations, to all companies active in Europe; while subsidies are difficult to prove, the burden of proof should be reversed and compliance to State Aid regulations should be demonstrated in the specific case of non-EU State-owned Enterprises before they can access the EU Internal Market;
- finally, sustainable public procurement offers long-term opportunities for which a governance mind shift is needed towards performance-based procurement and multipurpose infrastructures and for which a broader partnership is needed to share knowledge, risks, financing and benefits.