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1 of 9

# BEST VALUE PROCUREMENT IN THE DUTCH COURT ROOM

- An analysis of 17 rulings  
with 3 conclusions, including  
BVP's legal Achilles' heel.

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# Best Value Procurement In The Dutch Court Room -

An analysis of 17 rulings with 3 conclusions, including BVP's legal Achilles' heel

## A Summarising Introduction

- The Best Value Approach (BVA), which is based on Information Measurement Theory (IMT) - both developed by Dr. Kashiwagi from the early 90's - minimises risk by utilising expertise.
- Experts, by definition, know what has to be done to achieve a goal. To them the situation is transparent. They don't have to make decisions. If decisions cannot be avoided, they treat them as risks. Risk is minimised by avoiding decision making.
- That risk is minimised by avoiding decision making follows from IMT, and also from simple logic. The Oxford dictionary definition of a ['decision'](#) is 'a conclusion or resolution reached after consideration'. When something needs to be considered, it is not totally transparent. When a conclusion is reached when something is not totally transparent, risk is increased. The risk that is increased is the risk the aim will not be achieved. Decision making thus increases risk the aim will not be achieved (see also [\(Verweij, 2016\)](#)).
- BVA applied to procurement results in the method of Best Value Procurement (BVP). BVP sets out to replace the buyer's decision making, Management, Direction and Control (MDC), and thinking with the utilisation of the vendor's expertise.
- In BVP the conditions have to be created for i) the buyer to identify the vendor best able to achieve the buyer's aim (Selection phase), and ii) for the identified vendor to make it transparent to the buyer how the aims will be achieved (Clarification phase).
- In the Selection phase tenderers will be ranked, and the vendor ranked first will be 'pre-awarded' and progress to the Clarification phase. Other tenderers will receive a motivation why they did not rank first (and do not progress to the Clarification phase).
- The vendor progressing to the Clarification phase will be awarded *only after making it transparent to the buyer* that with the vendor's solution the aim will indeed be achieved.
- How to run a 'BVP-tender' is well documented, but a BVP-tender is not defined by a certain 'template'. Based on the buyer's unique circumstances - and selected (European) procurement procedure - each BVP-tender will look different.
- Instead of following a template, a BVP-tender is to follow the guiding principles derived from IMT, which result in the avoidance of all types of decision making. In [\(Verweij, 2016a\)](#) and [\(Verweij/Kashiwagi, 2016b\)](#) it is put forward that these principles are Transparency, Objectivity, No details, No requirements, No relationships. These principles are collectively labelled as TONNNO.
- In the wider BVP community there continues to be an interest in learning how the BVP-method, when used in an European public procurement procedure, relates to the three guiding principles of transparency, equal treatment, and proportionality (as following from case-law). This topic has been addressed before, see [\(Apostel, 2011; van Leeuwen, 2011; Verberne, 2013/2016, Verweij, 2017\)](#).
- In an attempt to provide further clarity, Dutch court rulings involving buyers who used the BVP-method in their procurement procedure, have been analysed here. Seventeen (17) rulings - in the period from 2014 till March 2017 - were identified. A summary of the findings is provided.

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- Based on these rulings three conclusions have been drawn:
    1. Calling a tender a BVP-tender doesn't make it so.
    2. A well executed BVP-tender (abiding the TONNNO-principles) automatically abides the European public procurement directives, as interpreted in case-law.
    3. The legal 'Achilles' heel' of BVP-tenders is providing the information that allows rejected tenderers to verify that the assessment validates the pre-award decision.

## Method and summary of findings

- On the website 'uitspraken.rechtspraak.nl' keyword searches resulted in the identification of 17 BVP-related rulings in the period from February 2014 till March 2017.
- The cases had the following distribution in time: 2014 (5), 2015 (5), 2016 (5), 2017 (2)
- Of the 17 cases, 16 were interim proceedings (Dutch: 'kort geding'), 1 concerned an appeal for an earlier ruling (Dutch: 'hoger beroep').
- There were 3 tenders with 2 rulings each, making for 14 unique tender procedures.
- The tenders were run by municipalities (6), provinces (3), a ministry (1), a district water control board (1), a hospital (1), a school (1) and a health transport organisation (1).
- In 6 out of 17 (35%) rulings, the case concerned 'general' (non-BVP) procurement issues, pertaining to e.g. the Alcatel period, tenderers not fulfilling binding requirements, the right to redo a tender (and others).
- In the remaining 11 out of 17 (65%) rulings, the case concerned BVP-specific tender issues, pertaining to e.g. transparency with respect to scoring of quality documents, motivation of rejection, the right to reject in the Clarification phase (and others).
- Out of the 11 cases with BVP-specific tender issues, the provided information in the rulings led the author to the cautious conclusion that in 5 (45%) cases the plaintiff showed lack of understanding of the BVP-method, and in 6 (55%) cases the buyer either poorly executed the BVP-tender, and or showed lack of understanding of the BVP-method/principles.
- 8 out of 14 (57%) unique tender procedures which ran as BVP-tenders included some form of decision making by the buyer.
- BVP-tenders which included some form of decision making by the buyer accounted for 11 out of 17 (65%) of the legal cases.
- In 4 out of 17 (24%) cases the plaintiff was successful.
- Out of these 4 successful cases, 3 cases involved decision making by the buyer. Plaintiffs were successful on the following grounds: procedure as run by buyer in breach with guiding principles of public procurement, buyer failed to sufficiently clarify on what grounds the winner was pre-awarded, buyer unlawfully disqualified tenderer in clarification phase and unlawfully decided to redo the tender (this time not using BVP)
- In the 1 successful case where there was no indication the buyer made decisions, the plaintiff was successful because the buyer pre-awarded to a tenderer whose solution did not meet a binding requirement.

## What makes a BVP-tender a BVP-tender?

The Best Value Approach is an approach which minimises risk by utilising expertise. The best known application of this approach is the method of Best Value Procurement. BVP sets out to provide the conditions to replace decision making, MDC and thinking (all by the buyer) with the utilisation of the vendor's expertise (generally in alignment with the buyer's own expertise). Historically the BVP-method has evolved from a past performance information based system into what it is today. The BVP process has become more simple and transparent, and its steps are well documented.

With the increased public awareness of the results that have been achieved using BVP, a larger group of buyers have started to use it. With this wider proliferation of BVP there has also been an increase in buyers using only 'elements of BVP' in their own particular procurement process.

A 'BVP-tender' is not a tender which exactly follows a certain pre-ordained template, but a tender which abides the underlying principles of BVP. These principles follow from IMT, and when upheld it shall be transparent:

- To the vendors what it is the buyer wants to have achieved (prior to start of tender)
- To the buyer which of the vendors is best able to achieve its aim (identification of vendor)
- To the buyer how the identified vendor will actually achieve its aim (clarification prior to awarding the contract)

When procuring goods and or services, BVP is to create an environment that optimises the performance of vendors by replacing the buyer's decision making, MDC and thinking by the utilisation of the expertise. In [\(Verweij, 2016a\)](#), it is argued that:

- 'MDC' can be viewed as the buyer making decisions for the expert-vendor
- The use of requirements, protocols and guidelines can be viewed as 'decisions made in the past' (by the buyer)
- Thinking (by the buyer) can be viewed as 'a precursor to decision making': a process that ultimately results in a decision (if it would have been transparent to the buyer, the buyer would not have to think).

From this follows that the essence of BVA (and thus also BVP) is the avoidance of 'all types of decision making'.

BVP asks from the buyer to avoid decision making in identifying the expert-vendor. BVP then asks from the identified expert-vendor to provide the transparency required to avoid any decision making by the buyer in awarding the contract.

The principles to be observed to avoid decision making - following from IMT and as described in [\(Verweij, 2016a\)](#) - are: Transparency, Objectivity, No details, No requirements, No relationships. These are collectively labelled 'TONNNO'.

When applying the TONNNO-principles consistently throughout the procurement process (from market consultation to the clarification phase), the risk the buyer will not have its aims achieved is minimised. What this looks like in practice has been described in "Introducing the Best Value Quality Checklist in Procurement" [\(Verweij/Kashiwagi, 2016b\)](#).

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In short, a BVP-tender is a BVP-tender when all types of decision making are avoided. This is achieved by observing the principles known as TONNNO.

### **Are the BVP-tenders which ended up in court BVP-tenders?**

Whether a BVP-procedure is 'truly' a BVP-procedure is not always black and white. This assessment is still harder to make 'from the outside'. Sometimes requirements merely reflect the expertise of the buyer itself, or they follow from policies the buyer cannot change. Sometimes transparency appears to be lacking, but may have been sufficiently clarified in the information notice.

At other times, however, it is clear that the way the tender procedure is organised does not reflect what BVP sets out to achieve (indirectly - but ultimately - doing the Best Value community a disservice). Labelling a tender a BVP-tender automatically generates expectations. Not living up to these expectations increases the likelihood of rejected tenderers feeling hard done by. Sometimes to the point they will go to court.

For this article only the rulings have been analysed, not the tender guidelines. The information found in the ruling is limited: first to the information that was provided to the court by the involved parties, and second to what was then deemed relevant and included in the ruling. Still, for almost all of the rulings it was clear that the tender procedure contained several recognisable BVP elements. This could be the use of a price ceiling and (some type of) performance information, a risk and a value add dossier, and or interviews.

The available information in the rulings was then read for instances where either the TONNNO-principles were not observed by the buyer, or where the tender-procedure followed was at odds with what BVP sets out to achieve.

The following was found:

- The buyer including its own or external experts in the assessment team (and or bringing them in during the clarification phase), and then end up rejecting a tenderer based on these experts simply not being convinced the tenderer is able to achieve the buyer's aim (either in the selection phase or at the start of the clarification phase). The problem here is not the presence of the buyer's experts in itself, but the 'conflict' between stating the aim in broad and general terms, and then rejecting a tenderer on (technical) details.
- The buyer scoring a tenderer's quality documents *relative* to those of other tenderers. In BVP documents are to scored on their own, for reasons of objectivity and transparency. Scoring documents relatively furthermore complicates motivating the scores, and also invites decision making by the assessment team.
- The buyer including a description of the solution as an awarding criterion. In BVP's selection phase the expert-in-achieving-the-aim is to be identified, not the solution. The description has a high risk of including details and not being transparent to the assessment team.
- The buyer requesting a written Curriculum vitae (CV) of key personnel to be scored relatively. Legally this is unproblematic, as long as it is made transparent how the CV is going to be scored (which it wasn't). Replacing an actual interview with key personnel with the assessment of his/her CV is missing an important point about the reason BVP includes interviews.

- Limiting the number of claims in a dossier to just two. This requirement is a decision by the buyer which may make it harder to identify the expert-tenderer.
- The buyer disagreeing with a tenderer that something is not transparent (this was a documented answer in the procedure's information notice). The buyer must ensure both its aim, the awarding criteria, and how they are assessed are totally transparent to the tenderers. If not, it risks to not being able to identify the expert-vendor.
- The buyer forcing the tenderers to price a list of items, explicitly forbidding them to find optimisations. Optimisations where either to be shared with all tenderers, or to be described in the Value Add dossier.
- The buyer running a BVP-tender, but in an organisation that was not ready to let go of details and requirements: after the selection phase the organisation decided to terminate the tender and run it again, for the same aim, but not as a BVP-tender.

**Conclusion 1:** When a tender is called a BVP-tender, and it looks like a BVP-tender, it is not automatically a BVP-tender.

### Is there an element of BVP which is at odds with the European public procurement directives?

Although it was never the BVP-method itself which stood trial, the rulings provide sufficient guidance to answer this question with a resounding 'no'. The European public procurement directives, as interpreted in the case-law, express three guiding principles: transparency, equal treatment, and proportionality. A BVP-tender properly executed, abiding by the TONNNO-principles, automatically also abides the European public procurement directives. This argument is made in ([Verweij, 2017](#)). The interested reader is also referred to (Apostel, 2011; van Leeuwen, 2011; Verberne, 2013/2016) for more information on this topic.

The conclusion that a well executed BVP-tender is NOT at odds with the guiding principles, also follows from statements made by judges in several of the analysed rulings. In the particular ruling discussed in ([Verweij, 2017](#)), the issue of BVP's 'subjectivity' - which is introduced by having an assessment team score quality documents - was explicitly addressed. In more than one of the analysed rulings it was stated what is to be provided to the tenderer (be it in a BVP-tender or otherwise):

- i. It must be absolutely clear to the (prospective) tenderer what is expected of him
- ii. The tender documents must be assessed using a scoring system that is 'as objective as possible'
- iii. The contracting authority is to motivate its assessment in a manner which allows the rejected tenderer:
  - a. to assess the way the assessment took place
  - b. to verify the assessment validates the (pre-)award decision

**Conclusion 2:** A well executed BVP-tender operates fully within the existing legal framework for European public procurement.

Having arrived at this conclusion doesn't mean, however, that there isn't a BVP-specific 'legal challenge'. Because there is.



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## The legal Achilles' heel of a BVP-tender

Assessing quality documents and interviewing key personnel - instead of ticking off a list of requirements and or scoring an array of performances - is to ensure the 'expert tenderer' is identified (the tenderer who is able to achieve the buyer's aims against minimal risk). When the BVP-tender is run correctly, it is generally straight forward to explain to a rejected tenderer how the buyer arrived at the tenderer's score. The challenge, however, is to explain to a rejected tenderer why a competing tenderer obtained the scores that resulted in the pre-award (in the case it doesn't simply come down to price).

Generally - as can be found in the rulings, as well as in the BVP text books - buyers tend to describe the difference between scoring e.g. a 'neutral' versus 'good' or 'excellent' in non-specific, general terms. But simply stating that the pre-awarded tenderer had more 'SMART' formulations and or that its information was more 'dominant' does not, in fact, allow the rejected tenderer to 'verify the assessment validates the pre-award decision' (point iii.b in the previous section).

In one of the rulings the court rejected the defence of the buyer that no more insight could be provided 'because it is a BVP-tender'. The buyer stated that the expert-claims could not be shared, because of the pre-awarded tenderer's right to confidentiality to protect its competitive interests. The court recognised both a buyer's margin of discretion when assessing quality documents, as well as the need for the buyer to treat the obtained information with the required confidentiality. But this does not, however, exempt the buyer from providing insight in the characteristics and relative advantages that resulted in the pre-award.

The need to provide transparent and objective descriptions of the scoring terms (what are the distinguishing features between scoring e.g. 'good' or 'excellent') was already identified in ([Verweij/Kashiwagi, 2016](#)). In this context it was also suggested to consider clearly prioritising the various elements of an aim, and use this prioritisation in the substantiation for the various scores. To be 'on the safe side' other routes can, and perhaps should, be explored as well.

An Achilles' heel is a weakness in spite of overall strength, which can lead to downfall. In the end the pre-award ranking is the combination of price and the result of how well the tenderers demonstrate expertise by providing claims and substantiations in support of achieving the aim. Providing rejected tenderers with the insight into what resulted in the pre-award starts with the buyer defining unambiguous aims and transparent awarding and scoring criteria. The buyer's organisation is well-advised to consider very carefully - prior to the start of the tender - how and what information to provide rejected tenderers.

**Conclusion 3:** Because of the nature of the BVP-tender (assessing quality documents and interviews) the buyer is to consider with great care how - using what information - to communicate the grounds for its pre-award decision to rejected tenderers.

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Trees with Character, founded by Jorn Verweij, provides consultancy [services](#) in Best Value Procurement. These include the design of a BVP-tender, and a check on potential weaknesses of an existing 'BVP' procedure (both for vendors and buyers).

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