The impact of competitive tendering on the execution of public contracts and concession contracts

The Netherlands

0. Preliminary remarks: the law applicable to (disputes regarding) the execution of contracts within the scope of the EU Directives 2014/24/EU and 2014/23/EU

In the Netherlands, a "public contract" (*overheidsovereenkomst*) is defined as a contract in which at least one of the parties is a public body. It is common in Dutch legal doctrine to distinguish between the following types of public contracts:[1]

- public contracts of a private nature (or: private government contracts);
- public power contracts;
- implementation contracts;
- mixed contracts.

The distinguishing factor is the object of the contract that the public body is entering into, *i.e.* private law matters or the use of public powers. The analysis of cases studies in this paper focuses on contracts that meet the definition of either "public contracts" or "concession contracts" in the EU Directives 2014/24/EU and 2014/23/EU.[2] In Dutch law, such contracts fit within the first type of contracts mentioned above: *public contracts of a private nature*.[3] Hence whenever the expression *public contracts of a private nature* or – abbreviated – *public contracts* is used in this paper, it is meant to include both public contracts as well as concession contracts within the scope of the aforesaid EU Directives.

The Dutch Civil Code is applicable to both the conclusion and the execution of public contracts of a private nature. The parties to such contract – a public body and a private entity – have the same contractual obligations and can seek the same remedies as the two private parties to an ordinary contract of a private nature. Furthermore, it is the civil court that will judge any dispute concerning both the conclusion as wel as the execution of a public contract of a private nature.[4] When doing so, the court will not resolve these disputes any differently – again: in principle –

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1 See Frank van Ommeren, Pim Huisman & Chris Jansen, 'Judicial and extra-judicial protection regarding public contracts in the Netherlands', in: Laurence Folliot & Simone Torricelli (eds.), *Contrôles et contentieux des contrats publics/Oversights and litigation in public contracts*, Vol. 26 Collection Droit Administratif/Administrative Law, Paris: Bruylant 2018, pp. 173-197 at pp. 177-180; see also Pim Huisman, Chris Jansen & Frank van Ommeren, 'The Execution of Public Contracts and Third-Party Interests in the Netherlands', in: Véronique Boillet, Anne-Christine Favre & Vincent Martenet (eds.), *Le droit public en mouvement – Mélanges en l'honneur du Professeur Etienne Poltier*, Vol. 70 Recherches juridiques lausannoises, Genève/Zürich: Schulthess 2020, pp. 661-674 at. pp. 664-666.

2 Directive 2014/24/EU of 26 February 2014 on public procurement and Directive 2014/23/EU of 26 February 2014 on the award of concession contracts.

3 In Dutch: *privaatrechtelijke overheidsovereenkomst*. In the Netherlands, in principle, a public body can enter into any contract that can be concluded by private parties, hence the expression "public contract *of a private nature*". Obvious examples of such contracts are: the sale of goods (both procurement and sale by a public body) or the supply of services. Contracts that meet the definition of "concession contracts" in Directive 2014/23/EU are also regarded as public contracts of a private nature, see P.J. Huisman & F.J. van Ommeren, *Hoofdstukken van privaatrechtelijk overheidshandelen. Publiekrechtelijke en privaatrechtelijke rechtspersonen op de grens van publiek- en privaatrecht* (*Handboeken staats- en bestuursrecht*), Deventer: Wolters Kluwer 2019, pp. 396-405.

4 Van Ommeren, Huisman & Jansen 2018, pp. 187-189; Huisman, Jansen & Van Ommeren 2020, pp. 666-667 and 669.

from those relating to ordinary contracts of a private nature that are concluded between two private parties.

Nevertheless, Article 3:14 CC imposes a duty upon public bodies, when using the instrument of a public contract of a private nature, not to contravene rules of a public law nature.[5] Moreover, both the fact that one of the contracting parties is a public body, as well as the fact that the subject matter of the contract relates to public interests, may influence the nature, content and extent of the (pre-)contractual obligations of the parties to the contract. For the open standards under private law, such as reasonableness and fairness,[6] enable the civil courts to take into account the particular capacities of the parties as well as their interest affected by the contract into consideration, when settling disputes on the basis of the relevant provisions of the Civil Code.

The general reflections above are relevant, firstly, when it comes to the award of public contracts of a private nature within the scope of the EU Directives 2014/24/EU and 2014/23/EU. These Directive have been implemented in the Public Procurement Act (*Aanbestedingswet*) of 2012, which has been revised in 2016. This Act is a typical example of 'written rules of public law' as referred to in Article 3:14 CC, which must be taken into account by a public body when it seeks the *conclusion* of a public contract falling within the ambit of the Act by means of a competitive tendering procedure. In many cases where disputes arise in the course of such procedure, the civil court will be able to resolve these disputes merely by applying the rules of the Public Procurement Act with no regard to the provisions of the Civil Code. It is reiterated here, however, that the rules of the Act are not the *only* rules applicable to the (pre-contractual) relationship between a public body, on the one hand, and the tenderers involved in the tendering procedure on the other. It occasionally occurs that disputes arising in the course of the tendering procedure must be resolved by the civil court by applying rules to be derived from the Civil Code, whether or not in connection with rules to be found in the Public Procurement Act.[7]

Secondly, the general reflections above are relevant insofar as the *execution* of public contracts of a private law nature within the scope of the aforesaid EU Directives is concerned. Apart from a provision on the modification of contracts,[8] the Public Procurement Act does not provide for any substantial rules to be taken into account by the parties to a public contract of a private nature resulting from a competitive tendering procedure. This means that any obligations of the parties in the course of the execution of such contract are to be derived from general contract law rules embedded in the Civil Code. Again, however, when resolving a dispute concerning the execution of a public contract of private nature, the provisions of the Civil Code will enable the court to take the particular interests affected by the public contract into consideration –

5 Article 3:14 CC: 'A right or power that someone has by virtue of civil law may not be exercised in defiance of written or unwritten rules of public law.' See also Van Ommeren, Huisman & Jansen 2018, pp. 176-177. It follows from its wording of Article 3:14 CC that it applies to *any* party to *any* contract falling within the scope of the Civil Code. Nevertheless, the Explanatory Memorandum explains that the Dutch legislator particularly has in mind private law acts of public bodies, see MvA II, Parl. Gesch. BW Inv. 3, 5 and 6 Book 3, p. 1055. See also Huisman & Van Ommeren 2019, pp. 466-467.

6 Article 3:12 CC: 'At determining what the principle of reasonableness and fairness demands in a specific situation, one has to take into account the general accepted legal principles, the fundamental conceptions of law in the Netherlands and the relevant social and personal interests which are involved in the given situation.'

7 See on this topic extensively: C.E.C. Jansen, *De aanbestedingsovereenkomst. Aanbesteden in verbintenisrechtelijk perspectief, Preadvies voor de Nederlandse Vereniging voor Aanbestedingsrecht* 2009, Den Haag: SDU 2009; S. Prent, *De redelijk handelende aanbesteder: over de wisselwerking tussen het Europees aanbestedingsrecht en het Nederlands verbintenissenrecht bij een aanbestedingsprocedure*, diss. VU, Den Haag: Boom juridische uitgevers 2021 (to be published on 7 September 2021).

8 See Article 2.163a ff and Article 2a.53 Public Procurement Act, implementing Article 72 of EU Directive 2014/24/EU and Article 43 of EU Directive 2014/23/EU.

including third party interests[9] – when settling disputes on the basis of the relevant provisions of the Civil Code. It is argued in Dutch legal doctrine that these interests include the so-called competition interest underlying the Public Procurement Act.[10] Obviously, this is where the following case studies below become relevant.

9 See Huisman, Jansen & Van Ommeren 2020, pp. 667 ff.

10 See on this topic: M.A.B. Chao-Duivis, 'Aanbestedingsrechtelijke consequenties van contractuele wijzigingen', in: M.A.M.C. van den Berg, M.A.B. Chao-Duivis & H. Langendoen (red.), *Aangenomen werk. Opstellen aangeboden aan A.J. van Wijngaarden in herinnering aan prof.mr. M.A. van Wijngaarden*, Tjeenk Willink 2003, pp. 35 ff; R.G.T. Bleeker, 'Contractsdwang en rechtsbescherming', *BR* 2003, pp.773-777; C.E. Drion, 'Ongewenste ontwikkelingen in het aanbestedingsrecht', *NJB* 2006, 251, p. 303; C.E.C. Jansen & E.R. Manunza, '(On)gewenste ontwikkelingen in het aanbestedingsrecht?', *NJB* 2006, 19, pp. 1038-1043; R. Leether, 'Zin en onzin van het aanbestedingsrecht', *NJB* 2006, pp. 2127-2128; C.E.C. Jansen & E.R. Manunza, naschrift bij: '(On)gewenste ontwikkelingen in het aanbestedingsrecht?', *NJB* 2006, 37, pp. 2129-2130; S. Mutluer & C.E.C. Jansen, 'Mogelijke contractenrechtelijke remedies ter correctie van machtsoverwicht van aanbesteders', *NTBR* 2007, pp. 186-193; C.E.C. Jansen, 'Wisselwerking tussen aanbestedingsrecht en verbintenissenrecht', *TA* 2008, pp. 526-540; J.M. Hebly & M.B. Klijn, 'Wezenlijke wijziging van een overheidsopdracht', *TvB* 2008/157, pp. 822-830; S. Mutluer, 'Onevenwichtige contractvoorwaarden bij overheidsaanbestedingen en het beroep op art. 6:248 lid 2 BW', *Contracteren* 2010, pp. 90-99; M.A.B. Chao-Duivis, 'Contractenrecht en aanbestedingsrecht. Gedachten over beginselen van het contractenrecht en de rol van deze in het aanbestedingsrecht', in: M.A.B. Chao-Duivis, C.E.C. Jansen en J.B.M. Vranken (red.), *Alleen Samen. Opstellen aangeboden aan prof.mr. M.A.M.C. van den Berg*, IBR, Den Haag 2010, pp. 173-195; C.E.C. Jansen, 'Uitleg van overeenkomsten die na een aanbestedingsprocedure tot stand zijn gekomen', *TBR* 2011/41, pp. 200-211; C.E.C. Jansen, 'Wijzigen van overheidscontracten die door middel van een gereguleerde aanbestedingsprocedure tot stand komen', *Contracteren* 2012, pp. 49-63; C.E.C. Jansen, S. Mutluer, A.T.M. van den Borne, S. Prent & U. Ellian, 'Towards (further) EU Harmonization of Public Contract Law', in: *Proceedings of the 5th International Public Procurement Conference*, Seattle 17-19 August 2012, www.ippa.org/IPPC5/Proceedings/Part3/PAPER3-7.pdf, pp. 759-809; C.E.C. Jansen & S. Prent, 'Totstandkoming van overeenkomsten en afbreken van onderhandelingen in de context van een gereguleerde aanbestedingsprocedure', *Maandblad voor Vermogensrecht* no. 7/8 2013, pp. 219-224; C.E.C. Jansen & S. Prent, Case note Rechtbank Overijssel 8 December 2015, *JAAN* 2016/30, pp. 149-151; Huisman, Jansen & Van Ommeren 2020, pp. 669-674.

4. Case study 4: parties hold differing meanings as to the interpretation of an ambiguous term in the contract

4.1. Description of the case study

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.

A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.

4.2. General contract law: overview of the law on interpretation of contracts

When interpreting an ambiguous term in a contract, Dutch law requires a court to do so by applying rules of interpretation. The rules that are to be applied in a particular case will depend on the characteristics of the case at hand. Generally speaking, two types of cases are being distinguished in legal doctrine:[11]

(1) cases where the prime objective of the contract is to invoke legal effects for the *contracting parties* themselves;
(2) cases where the prime objective of the contract is to invoke legal effects for *third parties*.

The rules of interpretation to be applied in the type (1) cases have been set out by the Dutch Supreme Court (*Hoge Raad*) in the *Haviltex*-case.[12] Generally speaking, these rules instruct the court to consider not only the linguistic meaning of the ambiguous term in the contract, but also the meaning that both contracting parties might reasonably assign to it under the particular circumstances of the case and what they could reasonably expect from each other in that respect, having regard to the parties' capacities. In ordinary cases – *i.e.* outside the scope of competitive tendering – where the parties have freely negotiated the contract or were otherwise able to influence its content, application of the *Haviltex* yardstick will amount to an objective-subjective interpretation of the contract. Objective, in the sense that the linguistic meaning of the ambiguous term will become relevant for its interpretation. Subjective, in the sense that relevance will be attached to the parties' subjective intentions that can be derived from their conduct and statements before and after entering into the contract.

Occasionally, application of the *Haviltex* yardstick will amount to a more objective interpretation of the contract. This is for instance the case when the contract is lacking relevant precontractual context, or other information that could shed light on the parties' subjective intentions. In such a case, a court may lean heavily – although never exclusively – on the linguistic

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11 Rules on contract interpretation have been developed by case law. They are not being dealt with in the Civil Code. Nevertheless, the rules underlying the *Haviltex* yardstick – discussed below – are also to be applied when it is necessary to determine whether a contract has been formed between the parties at all. For that case, the rules follow from Articles 3:33 and 3:35 CC. Article 3:33 CC: 'A juridical act requires the will (intention) of the acting person to establish a specific legal effect, which will (intention) has to be expressed through a statement of the acting person'. Article 3:35 CC: 'Towards him who has interpreted another person's statement or behaviour, in accordance with the meaning that he reasonably could give to it in the circumstances, as a statement with a certain content of this other person addressed to him, cannot be appealed to the absence of a with that statement corresponding will (intention).'

12 HR 13 March 1981, ECLI:NL:HR:1981:AG4158, *NJ* 1981/635 (*Haviltex*), with note C.J.H. Brunner.

meaning of the ambiguous term.[13] Interpreting the contract in a more objective manner, when applying the *Haviltex* yardstick, will also be required in the event that the contract, having regard to its nature, may have an impact on the interests of third parties, despite the fact that its prime objective is to invoke legal effects for the contracting parties themselves.[14]

The rules of interpretation to be applied in the type (2) cases referred to at the beginning of this section – *i.e.* cases where it follows from the nature of the contract that its prime objective is to invoke legal effects for third parties – have been set out by the Supreme Court in the *Gerritse/HAS*-case.[15] These rules of interpretation are particularly relevant when, for instance, representatives of individual employers enter into a collective agreement with employees' representatives from trade unions. The prime objective of such an agreement is clearly to invoke legal effects for third parties: the individual employers and their employees. However, although they are bound to such collective agreement, these individuals were neither involved in negotiations nor in formulating the terms of the agreement. Moreover, it will not always be possible for them to trace the subjective intentions of their representatives involved in the actual negotiations of the collective agreement. This is why the courts are instructed by the *Gerritse/HAS*-case, when interpreting a contract falling within the ambit of this second type of cases, to assign important – although not decisive – weight to the linguistic meaning of the ambiguous term and to do so in light of the entire wording of the agreement. Obviously, application of the *Gerritse/HAS* yardstick will amount to an objective interpretation of the contract.

Finally, when it becomes clear from the characteristics of the case that the court is allowed to opt for a more objective interpretation of the contract, either on the basis of the *Haviltex* yardstick or on the basis of the *Gerritse/Has* yardstick, this does not imply that the court may limit itself to the linguistic meaning of the ambiguous term. The Supreme Court has ruled in the *DSM/Fox*-case that, in the end, *all* circumstances of the case, assessed in light of the standards of reasonableness and fairness, are considered to be decisive for the interpretation of the contract.[16] This rule is nowadays regarded as the common basis of both the *Haviltex* yardstick and the *Gerritse/HAS* yardstick.

4.3 Application of general contract law to the case study[17]

In the last decade, case law has shown that Dutch civil courts regularly have had to interpret an ambiguous term in a public contract of a private nature that was concluded following a competitive tendering procedure, and falling within the ambit of the Public Procurement Act or one of its predecessors.[18] The following conclusions can be drawn from the analysis of this case

13 See HR 19 January 2007, ECLI:NL:HR:2007:AZ3178, *NJ* 2007/575 (*PontMeyer*); HR 29 June 2007, ECLI:NL:HR:2007:BA4909, *NJ* 2007/576 (*Derksen/Homburg*), with note M.H. Wissink; HR 19 October 2007, ECLI:NL:HR:2007:BA7024, *NJ* 2007/565 (*Vodafone/ETC*); HR 9 april 2010, ECLI:NL:HR:2010:BK1610, *RvdW* 2010/511 (*UPC/Land*); HR 5 April 2013, ECLI:NL:HR:2013:BY8101, *NJ* 2013/214 (*Lundiform/Mexx*). See on this also P.S. Bakker, *Redelijkheid en billijkheid als gedragsnorm*, diss. VU 2012, Deventer: Kluwer 2012, pp. 64-74.

14 HR 22 October 2010, ECLI:NL:HR:2010:BM8933, *NJ* 2011/111 (*Kamsteeg/Lisser)*, with note F.M.J. Verstijlen. See also the case note of C.E. du Perron regarding HR 20 February 2004, ECLI:NL:HR:2004:AO1427, *NJ* 2005/493 (*DSM/Fox*). One could think of contracts involving the transfer of property.

15 HR 17 September 1993, ECLI:NL:HR:1993:ZC1059, *NJ* 1994/173 (*Gerritse/HAS*), with note P.A. Stein.

16 HR 20 February 2004, ECLI:NL:HR:2004:AO1427, *NJ* 2005/493 (*DSM/Fox*), with note C.E. du Perron.

17 See for previous analysis: Jansen 2008, pp. 536-539; Jansen 2011, pp. 200-211; Jansen, Mutluer, Van den Borne, Prent & Ellian 2012, pp. 782-784; Huisman, Jansen & Van Ommeren 2020, p. 670.

18 An assessment of case law published between 2011 and 2021 resulted in approximately 35 cases that meet the description of the case study.

law. The dominant approach of the courts is to interpret contracts that fit the description of the case study by using an objective interpretation method. It is also clear why the courts use this method and how this relates to the development of EU public procurement law. However, the courts are still in doubt, so it seems, how to fit in the application of such objective interpretation method into the general system of rules of contract interpretation, as explained in the previous section. Both the *Haviltex* yardstick and the *Gerritse/HAS* yardstick are used to achieve the desired outcome, the latter becoming more and more favourite over the years. Although this development can be questioned in theory, it has led to an outcome that seems to be satisfying from a practical point of view. These conclusions will be explained in the following.

Over the years there have been, as always, case law decisions that are less instructive for the explanation of the development of the law. Occasionally, for instance, courts have interpreted contracts that fit the description of the case study, but neglected to mention the nature of the yardstick they applied and did not elaborate at all on the possible relevance of the factual and legal context of the competitive tendering procedure that preceded the conclusion of the contract.[19] Decisions remain even unclear if the court simply states that 'an objective interpretation method is to be applied'.[20] By the same token, courts have sometimes applied the subjective-objective *Haviltex* yardstick to interpret the contract as if it were an ordinary contract, with no regard to its particular factual and legal competitive tendering context.[21]

Cases law decisions have become more interesting since courts started to bring up the aforesaid context. In one case, for instance, the court refers to the fact that the contract was concluded following a competitive tendering procedure without the possibility to negotiate the contract. The court does not explain, however, the relevance of that fact for the interpretation of the contract. The court eventually interprets the contract to the detriment of the winning tenderer, for reason that he neglected to raise questions during the tendering procedure.[22] In another case, the court not only mentions the fact that the contract was concluded following a competitive tendering procedure, but also refers to the interests of all tenderers involved in that procedure, and to the principles and rules of public procurement law applicable to such procedure for the purpose of protecting these interests. However, although the court eventually rules to the detriment of the contracting authority, the decision does not clarify the relevance of the aforesaid context for the choice of the particular yardstick and the rules that should be applied to interpret the contract.[23] In both of the aforementioned cases, the courts apply the *Haviltex* yardstick. It does not appear from these decisions, however, that they aim at an objective interpretation of the contract in doing so.

A decision of the Court of Appeal of Arnhem-Leeuwarden of 2010 is regarded as an important step in the development of the law.[24] This was the first decision where a court applied the

19 Rechtbank Rotterdam 25 February 2015, ECLI:NL:RBROT:2015:1283, *JAAN* 2015/81; Rechtbank Overijssel 2 February 2018, ECLI:NL:RBOVE:2018:337, *JAAN* 2018/76; Rechtbank Den Haag 11 July 2018, ECLI:NL:RBDHA:2018:8300.

20 Rechtbank Zeeland-West-Brabant 31 January 2018, ECLI:NL:RBZWB:2018:1797, *JAAN* 2018/156; Rechtbank Overijssel 13 February 2019, ECLI:NL:RBOVE:2019:508, *JAAN* 2019/54; Rechtbank Amsterdam 15 April 2020, ECLI:NL:RBAMS:2020:2323, *JAAN* 2020/96.

21 Rechtbank Den Haag 13 January 2012, ECLI:NL:RBSGR:2012:BV0860; Rechtbank Utrecht 13 June 2012, ECLI:NL:RBUTR:2012:BX0481; Rechtbank Arnhem 29 August 2012, ECLI:NL:RBARN:2012:BX7467; Rechtbank Rotterdam 19 September 2012, ECLI:NL:RBROT:2012:BX8536; Rechtbank Noord-Nederland 12 December 2017, ECLI:NL:RBNNE:2017:4766, *JAAN* 2018/25; Gerechtshof Arnhem-Leeuwarden 24 July 2018, ECLI:NL:GHARL:2018:6973; Rechtbank Gelderland 11 February 2020, ECLI:NL:RBGEL:2020:884.

22 Rechtbank Arnhem 11 July 2012, ECLI:NL:RBARN:2012:BX6272.

23 Rechtbank Limburg 17 May 2013, ECLI:NL:RBLIM:2013:CA0842, *JAAN* 2013/129.

24 Gerechtshof Arnhem-Leeuwarden 15 June 2010, ECLI:NL:GHARN:2010:BM8411, *JAAN* 2010/68; *TBR* 2011/51.

Haviltex yardstick in a case fitting the description of the present case study and ruled that far-reaching importance is to be assigned to the customary linguistic meaning of the wording of the term of the contract in normal language. The court's decision is entirely based on the *factual* context of the case: the contract was concluded following a competitive tendering procedure, and had been drafted entirely by the contracting authority, without any involvement whatsoever of its counterparty. With its decision, the court clearly indicates the need for an objective interpretation of the contract, instead of the ordinary subjective-objective interpretation. Moreover, the rule of interpretation that follows from the court's decision amounts to the most objective interpretation possible in Dutch law.[25]

The decision of the Court of Appeal of Arnhem-Leeuwarden has subsequently been analysed by legal doctrine, particularly focussing on the following interrelated questions.[26] Firstly, why should a court interpret a contract in the most objective way possible using the *Haviltex* yardstick, instead of applying the *Gerritse/HAS* yardstick which would inherently lead to the same result? Secondly, it was questioned whether and how a court should take into account the *legal* context of the competitive tendering procedure preceding the conclusion of the contract, when applying the aforesaid yardstick. As said, the Court of Appeal of Arnhem-Leeuwarden only considered the *factual* context of competitive tendering. And finally, it was questioned whether the court applied the correct rule of interpretation by assigning overpowering weight to the customary linguistic meaning of the wording of the term in normal language, given that this would make it impossible for a court to take into account the parties' mutual information duties regarding the ambiguity in the contract, having regard to their particular capacities.

Regarding the first question, it has been argued that the prime objective of a contract concluded following a competitive tendering procedure is to invoke legal effects for the contracting authority and its contractual counterparty: the winning tenderer. Hence the Court of Appeal of Arnhem-Leeuwarden rightly opted for an objective interpretation using the *Haviltex* yardstick. Admittedly, the execution of the contract may *also* have an impact on the interests of the other tenderers that participated in the preceding tendering procedure. That fact, however, is considered to provide insufficient justification for the application of the *Gerritse/HAS* yardstick. As explained above, the latter yardstick is only to be used when it follows from the nature of the contract that its prime objective is to invoke legal effects for third parties.[27] As regards the second question, it has been argued – bringing the *legal* context of competitive tendering to the debate – that a court is not allowed to interpret the term of the contract substantially different from how it would be interpreted during the tendering procedure by all reasonably informed tenderers exercising ordinary care.[28] This argument is substantiated with reference to the contracting authority's transparency duty under EU public procurement law to draw up all the conditions and detailed rules of the award procedure in a clear, precise and unequivocal manner in the contract documents so that all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way.[29] The argument has

25 Dutch law distinguishes various rules of objective interpretation. Interpreting the contract on the basis of the rule that far-reaching importance is to be assigned to the customary linguistic meaning of the wording of the term in normal language, is considered to result in the most objective interpretation possible. See on this topic also R.P.J.L. Tjittes, 'Uitleg van schriftelijke contracten', *RM Themis* 2005, p. 2-29 and Jansen 2011, p. 205.

26 Jansen 2011, p. 204-210.

27 Jansen 2011, p. 204-205, with reference to HR 22 September 2002, ECLI:NL:HR:2002:AE3381, *NJ* 2002/610 (*ING Bank/Muller q.q.*), with note C.E, du Perron; see also Tjittes 2005, p. 12.

28 Jansen 2011, p. 208-209.

29 ECJ 18 October 2001, Case C-19/00 (*SIAC Construction*), *ECR* 2001, I-7725, paragraph 42; ECJ 4 December 2003, Case C-448/01 (*Wienstrom*), *ECR* 2003, I-14527, paragraph 57; ECJ 29 April 2004, Case C-496/99P (*Succhi di Frutta*), *ECR* 2004, I-3801, paragraph 111 and also 115: '(…) contracting authority, strictly to comply with the criteria it has itself laid down on that basis not only in the tendering procedure *per se* (…) but also, more generally, up to the end of the stage during which the relevant contract is performed.'

subsequently been used to answer the aforesaid third question in the following manner. When applying the *Haviltex* yardstick, a court is not allowed to take into account how the contracting authority and the winning tenderer ought to have understood the term *subjectively*, having regard to their *particular* capacities. Instead, the court must establish how all reasonably informed tenderers exercising ordinary care ought to have understood the term. Indeed, this will require a court to zoom in on the customary linguistic meaning of the wording of the term in normal language. But it will also require a court to do so by taking into account the capacities reasonably to be expected from a tenderer taking part in the tendering procedure that preceded the conclusion of the contract.[30]

From 2012 on, Dutch courts started to take into account the *legal* context of the competitive procedure when interpreting an ambiguous term in the contract.[31] What the decisions of the courts have in common, is that they all acknowledge – having regard to the particularities of the legal context – the need for an objective interpretation of the contract. In doing so, however, the courts have stopped applying the *Haviltex* yardstick.[32] Instead, most courts started to apply – either expressly or impliedly – the *Gerritse/HAS* yardstick.[33] Moreover, the decisions of the courts show that they follow slightly differing reasonings in order to explain the legal context relevant for the interpretation of the contract.

In some decisions, courts start their reasoning by explicitly referring to the aforesaid duty of transparency of contracting authorities, as developed by the ECJ in its case law, as well as the interests protected by such duty, in order to explain why the contract is to be interpreted objectively using the *Gerritse/HAS* yardstick. In these decisions, the courts also mention the interpretation rule that is to be applied: a court must assign important weight to the linguistic meaning of the ambiguous term and do so in light of the entire wording of the contract.[34] In other

30 Jansen 2011, p. 209-210.

31 In addition to this, some courts keep also refer to the particular *factual* context of the case, similar to the decision of the Court of Appeal of Arnhem-Leeuwarden in 2010: Rechtbank Amsterdam 24 May 2012, ECLI:NL:RBAMS:2012:BX3388, *JAAN* 2012/121, confirmed in appeal by Gerechtshof Amsterdam 1 October 2012, ECLI:NL:GHAMS:2012:4044; Rechtbank 's-Hertogenbosch 29 March 2013, ECLI:NL:RBOBR:2013:BZ6000; Rechtbank Oost-Brabant 24 February 2014, ECLI:NL:RBOBR:2014:869, *JAAN* 2014/100; Rechtbank Noord-Nederland 2 April 2014, ECLI:NL:RBNNE:2014:1712; Rechtbank Limburg 19 februari 2015, ECLI:NL:RBLIM:2015:1392; Rechtbank Den Haag 30 May 2018, ECLI:NL:RBDHA:2018:6510, *JAAN* 2018/160 with note B.J.H. Blaisse-Verkooyen; Rechtbank Noord-Nederland 20 March 2019, ECLI:NL:RBNNE:2019:1107, *JAAN* 2019/90.

32 An exception is Gerechtshof Amsterdam 19 March 2013, ECLI:NL:GHAMS:2013:BZ6956, *JAAN* 2013/90, with note J.W.H. Raadgever. In this decision, the Court of Appeal of Amsterdam takes into account the same factual context as the Court of Appeal of Arnhem-Leeuwarden did in 2010. In addition, however, the court mentions that the preceding competitive tendering procedure was subject to the rules and principles of public procurement law. The court concludes that the contract is to be interpreted objectively using the Haviltex yardstick, but does not mention the rule that far-reaching importance is to be assigned to the customary linguistic meaning of the wording of the term in normal language. The decision by Rechtbank Overijssel 21 November 2014, ECLI:NL:RBOVE:2014:6162, constitutes a similar exception. This court introduces the legal context of the tendering procedure under the application of the *Haviltex* yardstick by referring to the contracting authority's transparency duty as defined in the case law of the European Court of Justice.

33 This has happened – either explicitly or impliedly – in all following decisions, unless indicated otherwise.

34 Rechtbank Rotterdam 13 April 2016, ECLI:NL:RBROT:2016:2961; Rechtbank Gelderland 12 July 2017, ECLI:NL:RBGEL:2017:4007, *JAAN* 2017/183; Rechtbank Gelderland 19 July 2017, ECLI:NL:RBGEL:2017:4476, *JAAN* 2017/250; Rechtbank Den Haag 20 November 2018, ECLI:NL:RBDHA:2018:15505, *JAAN* 2019/41; Rechtbank Den Haag 13 February 2019, ECLI:NL:RBDHA:2019:1239; Gerechtshof 's-Hertogenbosch 17 September 2019, ECLI:NL:GHSHE:2019:3434.

decisions, courts start their reasoning from the *principle* of transparency under EU public procurement law, requiring the application of the *Gerritse/HAS* yardstick as well as the aforesaid interpretation rule.[35] Sometimes however, a court follows a reversed reasoning, starting from the *Gerritse/HAS* yardstick and its interpretation rule, with subsequent reference to the contracting authority's transparency duty.[36]

There are also decisions to be found where the courts neither refer to the contracting authority's duty nor to the principle of transparency. Occasionally, in such decisions, the court rules that the term of the contract is to be interpreted by establishing how a reasonably informed tenderer exercising ordinary care ought to have understood the term, requiring a focus on the customary linguistic meaning of the wording of the term in normal language.[37] In other decisions, this reasoning is reversed: the court's ruling takes the *Gerritse/HAS* yardstick and the aforesaid interpretation rule as a starting-point and subsequently argues that application of the rule would amount to the interpretation given by a reasonably informed tenderer exercising ordinary care.[38]

In the decisions discussed above, the courts take into account the public procurement law context properly when interpreting contracts concluded following competitive tendering procedures. Nevertheless, it can be questioned, at least in theory, whether the courts are correct in framing their reasoning in the *Gerritse/HAS* yardstick. As said, this yardstick is only to be used when it follows from the nature of the contract that its prime objective is to invoke legal effects for third parties. That is clearly not the case in the event of contracts concluded upon a competitive tendering procedure.[39] The fact that the contracting authority's transparency duty, as developed by the ECJ in its case law, is owed to *all* tenderers, explains and justifies the objective interpretation of the ambiguous term once the contract is concluded. And given that this requires the court to establish how all reasonably informed tenderers exercising ordinary care ought to have understood the term, it also explains why the court will have to focus on the customary linguistic meaning of the wording of the term in normal language. But such interpretation rules could also be construed, and applied, in the framework of the *Haviltex* yardstick.

Finally, it is noted that some decisions show that courts sometimes try to circumvent the choice for either the *Haviltex* or the *Gerritse/HAS* yardstick. In these decisions, the courts base the need for an objective interpretation of the contract entirely on the transparency duty of

35 Rechtbank Den Haag 16 June 2015, ECLI:NL:RBDHA:2015:7043, *JAAN* 2015/184; Rechtbank Rotterdam 8 september 2016, ECLI:NL:RBROT:2016:10202, *JAAN* 2017/49; Rechtbank Rotterdam 23 February 2017, ECLI:NL:RBROT:2017:10878, *JAAN* 2018/122 with note A.B.B. Gelderman. Occasionally, neither the duty nor the principle of transparency is taken as a starting-point. Instead, the court refers in rather general terms to the public procurement law context of the contract in order to explain the subsequent application of the *Gerritse/HAS* yardstick and its interpretation rule. See for instance: Rechtbank Limburg 19 februari 2015, ECLI:NL:RBLIM:2015:1392.

36 Rechtbank Zeeland-West-Brabant 9 November 2018, ECLI:NL:RBZWB:2018:7334. In this decision, the court eventually seeks to establish how a reasonably informed tenderer exercising ordinary care ought to have understood the term. Sometimes, the court only refers in general terms to the public procurement law context of the contract, see for instance Rechtbank 's-Hertogenbosch 29 March 2013, ECLI:NL:RBOBR:2013:BZ6000; Rechtbank Oost-Brabant 24 February 2014, ECLI:NL:RBOBR:2014:869, *JAAN* 2014/100.

37 Rechtbank Amsterdam 24 May 2012, ECLI:NL:RBAMS:2012:BX3388, *JAAN* 2012/121, confirmed in appeal by Gerechtshof Amsterdam 1 October 2012, ECLI:NL:GHAMS:2012:4044.

38 Rechtbank Zeeland-West-Brabant 16 April 2014, ECLI:NL:RBZWB:2014:2593, *JAAN* 2014/93; Rechtbank Rotterdam 7 February 2018, ECLI:NL:RBROT:2018:833; Rechtbank Gelderland 21 October 2020, ECLI:NL:RBGEL:2020:5918. In one case, the court merely mentions the *Gerritse/HAS* yardstick and the interpretation rule, omitting any reference to the public procurement law context whatsoever. See for instance Rechtbank Amsterdam 20 February 2018, ECLI:NL:RBAMS:2018:1206, *JAAN* 2018/190.

39 And contrary to what has been ruled by Rechtbank Rotterdam 13 April 2016, ECLI:NL:RBROT:2016:2961.

contracting authorities as developed in the case law of the ECJ, as well as the inherent interests of the other tenderers.[40] Neither the *Haviltex* yardstick nor the *Gerritse/HAS* yardstick are applied by the courts: neither explicitly nor impliedly. One of these decisions involved a case ruled by the Court of Appeal of The Hague[41] which was subsequently brought before the Supreme Court[42]. Unfortunately, the Supreme Court was not asked to decide on the issue of the yardstick to be applied. This is probably the reason why the Advocate-General did not conclude on the issue, although he did touch upon it, and eventually approved the reasoning of the Court of Appeal.[43] What the Conclusion of Advocate-General makes clear is that the issue of the yardstick to be applied does not have practical relevance. In the end, it is the proper outcome, achieved by the Court of Appeal of The Hague, and by many other courts, that matters: the transparency duty of the contracting authority, as developed by the ECJ in its case law, and the inherent interests of the other tenderers, requires a court to establish how all reasonably informed tenderers exercising ordinary care ought to have understood the term, when interpreting a contract concluded following a competitive tendering procedure.

40 Gerechtshof Den Haag 31 January 2012, ECLI:NL:GHSGR:2012:83, *TBR* 2016/177, with note W.J.M. Herber; Gerechtshof Den Haag 15 December 2015, ECLI:NL:GHDHA:2015:3399; Gerechtshof Arnhem-Leeuwarden 31 July 2018, ECLI:NL:GHARL:2018:7154. See also Rechtbank Den Haag 30 May 2018, ECLI:NL:RBDHA:2018:6510, *JAAN* 2018/160 with note B.J.H. Blaisse-Verkooyen, where the court adds to its reasoning that it must establish how all reasonably informed tenderers exercising ordinary care ought to have understood the term, requiring a focus on the customary linguistic meaning of the wording of the term in normal language.

41 Gerechtshof Den Haag 15 December 2015, ECLI:NL:GHDHA:2015:3399.

42 HR 7 juli 2017, ECLI:NL:HR:2017:1265.

43 ECLI:NL:PHR:2017:467, see particularly footnote 14 of the Conclusion.

5. Case study 5: contract does not provide for a particular matter and may need supplementation with an additional term

5.1 Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that the explicit terms of the contract do not provide for a particular matter.

A dispute arises between A and B on the question what should be the content of the additional term to be implied in the contract in order to deal with the matter not provided for in the contract.

5.2 General contract law: overview of the law on implication of terms[44]

In Dutch contract law this case study becomes relevant whenever the parties to the contract have differing views on whether a particular duty is incumbent on one of them, given that the contract is lacking an express term dealing with such duty. In order to solve the dispute between the parties, the court will have to apply Article 6:248 (1) CC which states: 'An agreement not only has the legal effects which parties have agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness.'

Article 6:248 (1) CC provides the court with an instrument to imply a term into the contract either by (i) statutory law, (ii) usage or (iii) the standards of reasonableness and fairness. In practice, implication of terms by statutory law is of particular importance. It usually requires the court to seek resort to the relevant provisions of Book 7 of the Dutch Civil Code on Specific Contracts. On the other hand usage, as well as the standards of reasonableness and fairness, have resulted in a variety of duties to be implied in contracts in the last decades.

Article 6:248 (1) CC requires the court to take into account the nature of the contract when implying a term into the contract. This means that the court must give relevance to the legal qualification of the contract (*e.g.* agency, sales, lease, services), its particular subject matter (*e.g.* movables, immovables), and the particular capacity of the parties (*e.g.* business, consumer, government).

The court is only allowed to apply Article 6:248 (1) CC in the event that the contract is indeed lacking a term. The fact that the contract is not dealing with a particular duty in *express* terms indicates that the parties probably forgot to deal with the subject matter. However, the court will have to take into account all the facts and circumstances of the case in order to establish whether the matter is provided for in the contract, even in the event that an express term is lacking. Hence it is possible that the court will establish that the parties, when negotiating the contract, explicitly agreed *not* to impose a particular duty upon one of them. In such a case, the contract is *not* lacking a term dealing with the subject matter: it turns out that it has been agreed between the parties that the duty is *not* incumbent on the said party. This prevents the court from implying a term into the contract. It is noted here that cases where a court has to establish whether or not a contract is lacking a term, are in fact cases where the court has to interpret the contract. As explained above, such cases fall within the ambit of case study 4.

Finally, it is noted here that the facts and circumstances of a case falling within the ambit of case study 5 may run parallel with facts and circumstances falling under the current case study

44 See for previous exploratory analysis: Huisman, Jansen & Van Ommeren 2020, p. 671.

7. As will be explained below,[45] case study 7 departs from the assumption that circumstances existing at the time of the conclusion of the contract have changed considerably in the course of the performance of the contract. As a result of this change of circumstances, performance of one or more obligations incumbent on tenderer B becomes onerous. Nevertheless, contracting authority A decides to invoke B's obligation under the contract. In case study 7 it is not being disputed between the parties that they agreed upon the particular obligation being imposed upon B. Their dispute is about the question whether A can still invoke performance of that obligation, notwithstanding the fact that performance has become onerous for B as a result of the change of circumstances. As will be explained below, Dutch law requires a court to solve the dispute by, firstly, establishing whether the contract provides for an express or implied term dealing with the particular change of circumstances and,[46] secondly, if the contract does not provide for such term, by either changing the legal effects of the contract or by dissolving the contract in full or in part. In such a case, however, the court is *not* required to imply a term into the contract dealing with the consequences of the change of circumstances on the basis of Article 6:248 (1) CC, but to change the legal effects (or to dissolve the contract) on the basis of Article 6:258 CC to be discussed below.[47]

5.3 Application of general contract law to the case study[48]

In the last decade, case law has shown that Dutch courts have had to deal on a few occasions with disputes on the implication of terms into contracts that were concluded following a competitive tendering procedure and falling within the ambit of the Public Procurement Act or one of its predecessors.

Although case law is scarce and additional research is needed, is seems that the courts do not have a problem with the implication of a term in the contract by statute.[49] Dutch courts seem reluctant, however, to imply terms on the basis of standards of reasonableness and fairness,[50] particularly when this would amount to a duty of the contracting authority to pay an additional sum of money to the winning tenderer[51]. This reluctance is motivated by the fact that the courts consider that any such implication of such terms would substantially modify the contract, which would adversely affect the interests of the other tenderers.[52] This approach by the courts has

45 The analysis of case study 7 will take place in the near future in a revised draft of this paper.

46 Cases where a court hat to establish whether the contract provides for an express or implied term dealing with a particular change of circumstances are in fact cases where the court has to interpret the contract. As explained above, such cases fall within the ambit of case study 4.

47 See section 7.2.

48 See for previous exploratory analysis: Jansen, Mutluer, Van den Borne, Prent & Ellian 2012, pp. 784-786; Huisman, Jansen & Van Ommeren 2020, p. 671.

49 See for example Rechtbank Den Haag 18 March 2020, ECLI:NL:RBDHA:2020:2774.

50 An exception is Rechtbank Arnhem 29 August 2012, ECLI:NL:RBARN:2012:BX7467. In this case, the court is willing to consider the implication of a term on the basis of the said standards. Th court eventually rules, with no regard to the factual and legal competitive tendering context of the contract, that Art. 6:248 (1) CC cannot be applied in favour of the winning tenderer, having regard to the particular facts and circumstances of the case.

51 In Rechtbank Gelderland 11 April 2019, ECLI:NL:RBGEL:2019:2525, *JAAN* 2019/127 with note E.J.M. Brenders & M.W. Speksnijder, the court is willing to imply a duty of the contracting authority (on the basis of the standards of reasonable and fairness) to give reasons for the cancellation of the contract.

52 See for example Gerechtshof Amsterdam 19 March 2013, ECLI:NL:GHAMS:2013:BZ6956, *JAAN* 2013/90, with note J.W.H. Raadgever; Rechtbank Gelderland 17 December 2014, ECLI:NL:RBGEL:2014:8171; Rechtbank Overijssel 8 December 2015, ECLI:NL:RBOVE:2015:5364, *JAAN* 2016/30, with note C.E.C. Jansen & S. Prent; Gerechtshof Arnhem-Leeuwarden 10 July 2017, ECLI:NL:GHARL:2017:5925. In the case of Rechtbank Rotterdam 8 September 2016, ECLI:NL:RBROT:2016:10202, *JAAN* 2017/49, the court merely doubts whether implication of a term is allowed in the framework of a European public procurement procedure.

been questioned in legal doctrine.[53] The argument is that (European) public procurement law does not in principle make it impossible for a national court to intervene in a contract. Aside from the fact that Article 72 of Directive 2014/24/EU is addressed to the *contracting authority* that is considering substantially modifying the contract – *i.e.* not to the *court* – it is also the case that, by applying the rules of contract law discussed above, the court is not actually modifying the contract but merely establishing what the parties' obligations were, given the circumstances, based on objective law, at the time of the conclusion and execution of the contract.

53 C.E.C. Jansen & S. Prent, Case note Rechtbank Overijssel 8 December 2015, *JAAN* 2016/30, pp. 149-151; Huisman, Jansen & Van Ommeren 2020, p. 674.

6. Case study 6: contracting authority invokes an allegedly unfair contract clause

6.1 Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, A decides to invoke a particular contract clause. The consequences of this are, however, detrimental to B.

B argues that A cannot invoke the contract clause for reason that the clause is unfair. A dispute arises between A and B on the question whether A can invoke the contract clause.

6.2 General contract law: overview of the law on unfair terms

In the event of disputes involving allegedly unfair contract clauses, the counterpart of the party trying to invoke such clause will usually ask the court to apply Article 6:248 (2) CC. This Article states: 'A rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness.'[54]

Article 6:248 (2) CC requires the court to apply an unfairness test. In doing so, the court must evaluate all the facts and circumstances of the case taking the perspective of several normative points of view, such as: the nature and content of the contract, the social position of the parties and their mutual relation, the way in which the particular clause was agreed upon between the parties and the extent to which the counterpart of the party trying to invoke the clause was aware of the purpose of the clause.[55]

In the event that the court applies the unfairness test to the detriment of the party trying to invoke the clause, it will not strike out the clause from the contract. The legal effect of the court's ruling is that the clause is declared not to be applicable in the particular case at hand. The clause will, however, continue to be binding upon the parties for future purposes. This can be explained by the fact that the outcome of the unfairness test entirely depends on the facts and circumstances of the particular case, which may differ from case to case.

Finally, it is noted here that a court must show extreme reluctance in ruling that a clause is not applicable in a particular case, following the application of the unfairness test. This is said to follow from the wording – "unacceptable" – in Article 6:248 (2) CC

6.3 Application of general contract law to the case study[56]

It has been argued by Dutch legal doctrine that some of the generic facts and circumstances of the present case study could be of particular relevance for the application, in favour of B, of the aforesaid unfairness test.[57] These facts and circumstances firstly relate to the dominant position

54 This is the general rule under Dutch contract law. In the event of allegedly unfair standard terms in consumer contracts, a consumer may also seek resort to Article 6:233 (b) CC, which reads: 'A stipulation from the applicable standard terms and conditions is voidable: (a) if it is unreasonably burdensome for the counterparty, having regard to the nature and content of the contract, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case.'

55 This 'catalogue' of normative points of view has been developed in the Supreme Court's case law since 1967, starting with the landmark case HR 19 May 1967, *NJ* 1967/261 (*Saladin/HBU*).

56 See for previous exploratory analysis: Jansen, Mutluer, Van den Borne, Prent & Ellian 2012, pp. 786-787; Huisman, Jansen & Van Ommeren 2020, p. 671.

57 Mutluer & Jansen 2007, p. 186-193; Jansen 2008, p. 526-540 at p. 539-540; Mutluer 2010, p. 90-99; Jansen, Mutluer, Van den Borne, Prent & Ellian 2012, pp. 786-787.

of contracting authority A who is able to impose contract clauses on B and the other tenderers in the course of the tendering procedure. Secondly, they relate to the limited opportunity of bilateral pre-contractual communication – including contract negotiations – as a result of restrictions following from the EU public procurement directives as implemented in Dutch Public Procurement Act. These facts and circumstances are linked to the following normative points of view of the unfairness test: 'the social position of the parties and their mutual relation' and 'the way in which the particular clause was agreed upon between the parties'.

It has further been questioned whether and to what extent the application of the unfairness test is to be influenced by the fact that the allegedly unfair contract clause could already have been problematized by the (winning) tenderer prior to the conclusion of the contract, in the course of the tendering procedure, from the perspective of the proportionality principle.[58]

Finally, it has been questioned whether and to what extent a court is allowed to declare at all that a contract clause is not applicable, following the application of the unfairness test, for reason that such ruling would substantially modify the contract, which would adversely affect the interests of the other tenderers.[59]

An analysis of (scarce) Dutch case law shows that there has been an initial tendency of the courts to apply the unfairness test, but to do so in favour of contracting authority A. The central argument for such ruling was that tenderer B should either have offered a substantial higher bid, in order to cover the risk inherent in the contract clause at stake, or have refrained from taking part in the tendering procedure at all in the event that he disliked the said clause.[60]

Other case law shows, however, that the courts nowadays seem reluctant to provide relief to the winning tenderer B for the same reason they are reluctant to fill a gap in the contract.[61] With reference to the factual and legal context of the competitive tendering procedure that preceded the conclusion of the contract, the courts refuse to apply the unfairness test of Article 6:248 CC in favour of the winning tenderer.[62] Judicial intervention in the contract, the courts argue, could

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58 See Jansen 2008, p. 540; Jansen, Mutluer, Van den Borne, Prent & Ellian 2012, at p. 787. See also C.E.C. Jansen, 'Beperking van aansprakelijkheid in de UAV-GC 2005: tijd voor een herziening?', *TBR* 2016/50, p. 334-345 at p. 337-338. Article 1.10 (1) and (2)(h) Public Procurement Act state: '(1) When preparing and concluding a public contract (…) a contracting authority (…) shall only set (…) conditions (…) which are reasonably proportional to the subject matter of the contract. (2)(h) When applying the first paragraph the contracting authority (…) shall in any event take the following into account: the terms and conditions of the contract.' Article 1.10 (4) of the Act provides for a legal basis for the Proportionality Guide. Chapter 3.9 of the Guide provides for more detailed rules to be taken into account by contracting authorities in this respect. The Proportionality Guide is available in English at: https://www.pianoo.nl/sites/default/files/media/documents/2020-09/Proportionality-Guide-January2020.pdf

59 See Jansen, Mutluer, Van den Borne, Prent & Ellian 2012, at p. 787; see also C.E.C. Jansen & S. Prent, Case note Rechtbank Overijssel 8 December 2015, *JAAN* 2016/30, pp. 149-151. The argument of the latter authors is elaborated upon in in the analysis of case study 5 above.

60 See for example RvA 23 November 2007, *TBR* 2008/95, p. 482 discussed by Mutluer 2012. See for recent examples: Rechtbank Den Haag 30 May 2018, ECLI:NL:RBDHA:2018:6510, *JAAN* 2018/160 with note B.J.H. Blaisse-Verkooyen; Rechtbank Den Haag 11 July 2018, ECLI:NL:RBDHA:2018:8300.

61 See § 5.3.

62 See for example Rechtbank Rotterdam 23 February 2017, ECLI:NL:RBROT:2017:10878, *JAAN* 2018/122 with note A.B.B. Gelderman. In this case, relevance was also attached to the fact that the content and purport of the contract clause at stake was unequivocally clear, prior to the conclusion of the contract. This court does not rule out, however, that the unfairness test may be applied in favor of the winning tenderer, despite the aforesaid factual and legal context. The particular facts and circumstances of the case at stake might support such ruling. Such facts and circumstances, however, were not presented to the court.

amount to an unacceptable substantial modification of the contract,[63] which, given the interests of the other tenderers, would require a new competitive tendering procedure.

It is submitted here that additional development of Dutch case law dealing with the current case study 6 is required in order to establish how the questions that are raised at the beginning of the current section must be answered according to Dutch law.

Chris Jansen
27 June 2021

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63 See for example Gerechtshof Arnhem 28 September 2010, ECLI:NL:GHARN:2010:BN8784, *JAAN* 2010/100; Rechtbank Gelderland 17 December 2014, ECLI:NL:RBGEL:2014:8171; Rechtbank Rotterdam 7 February 2018, ECLI:NL:RBROT:2018:833; Gerechtshof Arnhem-Leeuwarden 10 July 2018, ECLI:NL:GHARL:2018:6335, *JAAN* 2018/153. See also the advice of Advocate-General Keus at 2.12 for HR 6 April 2012, ECLI:NL:HR:2012:BV6696, *JAAN* 2012/81