

VU Research Portal

Judicial and extra-judicial protection regarding public contracts in the Netherlands

Huisman, P.J.; Jansen, C.E.C.; van Ommeren, F.J.

published in

Contrôles et contentieux des contrats publics = Oversight and Challenges of Public Contracts
2018

document version

Version created as part of publication process; publisher's layout; not normally made publicly available

document license

Article 25fa Dutch Copyright Act

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Huisman, P. J., Jansen, C. E. C., & van Ommeren, F. J. (2018). Judicial and extra-judicial protection regarding public contracts in the Netherlands. In L. Folliot-Lalliot, & S. Torricelli (Eds.), *Contrôles et contentieux des contrats publics = Oversight and Challenges of Public Contracts* (pp. 173-197). (Droit Administratif / Administrative Law; Vol. 26). Bruylant.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

Pays-Bas / Netherlands
**Judicial and extra-judicial protection regarding public
contracts in the Netherlands**

BY

FRANK VAN OMMEREN

RESP. FULL PROFESSOR OF CONSTITUTIONAL AND ADMINISTRATIVE LAW,
V.U. AMSTERDAM

PIM HUISMAN

ASSISTANT PROFESSOR OF ADMINISTRATIVE LAW AT V.U. AMSTERDAM

AND

CHRIS JANSEN

FULL PROFESSOR OF PRIVATE LAW AT V.U. AMSTERDAM, PROFESSOR OF CONSTRUCTION
LAW AT TILBURG UNIVERSITY, AND VICE-CHAIRMAN OF THE DUTCH PUBLIC
PROCUREMENT OMBUDSMAN

1. Introduction

The purpose of this contribution is to provide a basic overview of the most important characteristics of the system of judicial and extra-judicial protection in Dutch public contract law. We will first sketch out briefly the normal Court system in order to explain which kind of court a claimant should approach for judicial protection against government acts in general (2). Subsequently, we will explain the types of public contracts that are basically distinguished in Dutch legal doctrine (3). This distinction is considered relevant, given that the type of contract at hand largely determines which court has jurisdiction. We will thereupon deal with the question of how judicial protection is organised as regards the two most important types of public contracts: *public power contracts* (4) and *public contracts of a private nature* (5). As regards the latter type of contracts, we will also show how judicial protection (ordinary courts) as well extra-judicial protection (Public Procurement Ombudsman) is currently organised in the framework of public procurement (6). We will conclude this contribution with a brief summary (7).

BRUYLANT

2. The system of judicial protection against government acts in a nutshell

2.1. Introduction

In the Dutch legal system the answers to questions of judicial protection are conditional upon the *type of Court* the claimant has access to. For this reason it is necessary to determine firstly which kind of court should be approached.

Our judicial system knows mainly two types of courts: the civil Court and the administrative Court. We will leave the criminal Court aside, since it is not very relevant for the judicial protection against public contracts.⁽¹⁾ Each type of court has its own distinctive kind of rules of access, procedural rules and powers to pronounce judgments. In this section we will outline the most important features of these courts and pay attention to their distinct competences and powers as far as is relevant for understanding public contract law.

2.2. Civil Court and administrative Court

In the civil law column it is usually possible to deal with a case in three instances. After the District Court (*Rechtbank*), there is a Court of Appeal (*Gerechtshof*) and finally the Supreme Court (*Hoge Raad*). These civil courts are considered to be the so-called ordinary courts of the judiciary system.

In the administrative law column there is generally, but certainly not always, the possibility to deal with a case in two instances. The Administrative Law Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) is the most important Court of second instance. It has a rather general jurisdiction in administrative law cases. Administrative law cases are usually preceded by a mandatory objection-procedure (*bezwaarschriftprocedure*) at the administrative authority that took the contested decision.⁽²⁾ The purpose of this objection-procedure is to provide the administrative authority with the opportunity to review its own decision completely, before the case goes to the administrative Court.

Although *tax law* is considered to be a certain type of administrative law, the jurisdiction of tax law cases is situated in the civil law column. Consequently, tax assessments on appeal are dealt with by the Court of Appeal (*Gerechtshof*)

(1) See, on the specific public power contracts that are relevant in criminal law, J.H. CRIJNS, *De strafrechtelijke overeenkomst: de rechtsbetrekking met het Openbaar Ministerie op het grensvlak van publiek- en privaatrecht* (dissertation Leiden), Alphen aan den Rijn, Kluwer, 2010.

(2) Public bodies often consist of more than one administrative authority (*bestuursorgaan*). In administrative law it is the *administrative authority* that performs the unilateral public law act (see Art. 1:3 [1] GALA). However, in Dutch public contract law it is the *public body* as a whole that is considered to be the legal person that enters into the contract and executes it.

and by the Supreme Court (*Hoge Raad*). In tax law cases these courts function as a specific type of administrative court, which means they apply the administrative judicial procedures. We mention tax law separately since tax law plays an important role in public contract law (*see* also section 4).

Although the jurisdiction of the administrative Court is certainly significant for a certain type of public contracts, it only accepts cases against unilateral decisions of an administrative authority and not against public contracts. The General Administrative Law Act (*Algemene wet bestuursrecht*; hereafter: GALA) requires a decision in the sense of Article 1:3 (1) of the GALA(3). Familiar examples of these unilateral decisions are a licence, a permit or a grant of an administrative authority. To approach an administrative court these kinds of unilateral decisions are required. In case an administrative authority, after an application, fails to take a decision in due time, the administrative Court is authorized to order the administrative authority to take this decision. A complication is that certain unilateral decisions of an administrative authority are excluded by statutory law from the jurisdiction of the administrative courts.(4) Private law acts are also excluded from the jurisdiction of the administrative courts.

The powers of an administrative court are rather limited. It is not up to the administrative Court to assess the advantages or disadvantages of the decision of the administrative authority. The administrative Court judgments are restricted to a point of law and do not assess the merits or efficiency of the decision. This means that the Dutch procedure at the administrative courts should be conceived as a kind of judicial review procedure.(5) This judicial review procedure is considered to be exclusive: when the administrative Court has the competence to take the case, it is not possible to lodge an appeal at the civil Court.

An important difference between the judicial procedure at an administrative court and civil courts is that the administrative Court is easier to access. The Court registry fee of the administrative courts is lower and representation by an attorney is not obligatory.(6)

(3) An English version of the General Administrative Law Act can be found on the Web site of the Dutch Government (www.rijksoverheid.nl) at www.rijksoverheid.nl/binaries/rijksoverheid/documenten/besluiten/2009/10/01/general-administrative-law-act-text-per-1-october-2009/gala18-11-09.pdf. However, there are several translations on the Internet, which differ slightly. We prefer to translate the term *besluit* of Art. 1:3 (1) as decision.

(4) This exception is relevant for the judicial protection against specific performance acts that are based on public power contracts (*see* Sect. 4).

(5) Cf. G. JURGENS and F. VAN OMMEREN, "The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide", (2012) 71(1) *Cambridge L.J.*, p. 182.

(6) The registration fee for administrative courts can vary, depending on the nature of the case submitted, between € 46 (natural persons) and € 334 (legal persons). The registration fee for civil courts varies, depending on the nature of the claim, between € 288 (natural persons) and € 3,903 (legal persons).

Apart from the judicial review procedure at an administrative court there are, in theory, two other forms of judicial protection available against governmental decisions: the appeal at a higher administrative authority, board or tribunal within the government and the road to a civil court. Although this was very different in the past, the internal appeal procedure at a higher administrative authority, board or tribunal (so-called: *administratief beroep*) – in which this authority, board or tribunal is asked to review the contested decision not only on a point of law but also on the merits or efficiency – is considered to be obsolete. This type of procedure virtually doesn't occur anymore and is certainly not relevant for public contract law.

Although frequently approached, the civil courts function as “residual” courts (*restrechter*). In all cases where the administrative Court is not competent, the civil Court has the competence to receive the case. In those cases a claim can be brought before the civil Court, even when the subject matter concerns public law rights or obligations. Thus is prevented that lacunas arise in the judicial protection: there is always a certain type of court available.

The powers to pronounce judgments differ seriously between administrative and civil courts. The administrative Court is mainly authorized to *annul* the decisions of the administrative authority. In other words: it can only impose a quashing order. When a decision is annulled, the administrative authority is obliged to take a new decision, whilst taking the judgement of the Court into account. Under special and rather strict circumstances the administrative Court may put its own decision in place of the annulled decision or rule for compensations. The action for a claim for compensations at the administrative courts is still in an embryonal stage of development. The administrative Court is neither empowered to impose a mandatory or prohibiting order nor a declaratory judgment. These are very important features, whereas the civil Court can provide all kinds of remedies, which are of course very significant for judicial judgments regarding public contract law.

2.3. Jurisdiction does not determine substance

An essential characteristic of the Dutch judicial system is that – unlike many other legal systems⁽⁷⁾ – each type of Court does *not* apply its own set of public or private standards. Briefly stated: jurisdiction does not determine substance. In *civil* courts not only civil law but also public law will be applied. According to Dutch law private law acts of the government are not only governed by legal standards of a *private* law origin (e.g. the Civil Code (*Burgerlijk Wetboek*), the

(7) T. KOOPMANS, *Courts and Political Institutions – A Comparative View*, Cambridge, CUP, 2003, p. 134.

principle of good faith etc.), but also by standards of a *public* law origin. This means that on private law acts of the government both written and unwritten public law standards are applicable, like human rights and principles of proper administration. This mix is prescribed in both the Civil Code (Art. 3:14) and the GALA (Art. 3:1[2]). Although this does not happen very often, it is equally significant to note that even *administrative* courts can apply standards from the Civil Code – whether analogously or not.⁽⁸⁾ This feature of the legal system is referred to as a *mixed law system*.

3. Types of public contracts

3.1. Introduction

Under a public contract we understand a contract to which at least one of the parties is a public body. Nevertheless, this simple definition gives rise to a few conceptual problems, which are highly relevant to understand the law of the judicial protection regarding public contracts in the Netherlands. In this section we will try to get a better grasp of these.

Right from the outset, it is important to realize that Dutch law on public contracts is historically rooted in private law. However, during the last decades the insight in legal doctrine has grown that certain kinds of public contracts have such strong public law features that it makes sense to distinguish them conceptually as a different type of public contract – even when they do not have a specific statutory basis. This insight is also relevant for questions of judicial protection against public contracts.

3.2. Three types of public contracts

To determine whether a dispute about a public contract should be tried in a civil or administrative court, the preliminary question is what type of public contract the dispute is about. The type of public contract determines largely what kind of court has jurisdiction. In Dutch literature on public law three basic types of public contracts are distinguished:⁽⁹⁾

(8) G. JURGENS and F. VAN OMMEREN, “The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide”, *op. cit.*, p. 192. See recently ABRvS, 19 November 2014, ECLI:NL:RVS:2014:4129, AB, 2015, p. 93. ABRvS is the abbreviation for *Afdeling bestuursrechtspraak van de Raad van State* (Administrative Law Division of the Council of State). AB means *Administratiefrechtelijke beslissingen* (Dutch Administrative Law Reports).

(9) R.J.N. SCHLÖSSELS and S.E. ZIJLSTRA, *Bestuursrecht in de sociale rechtsstaat*, 6th ed., Alphen aan den Rijn, Kluwer, 2010, pp. 864 and ff.; H.D. VAN WIJK, W. KONJNENBELT and R. VAN MALE, *Hoofdstukken van bestuursrecht*, 16th ed., Alphen aan den Rijn, Kluwer, 2014, pp. 241-242; M.W. SCHELTMA and M. SCHELTMA, *Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht*, 3rd ed., Alphen aan den Rijn, Kluwer 2013, pp. 205 and ff.

- Public power contracts (public contracts in a narrow sense);
- Public contracts of a private nature (private government contracts);
- Mixed contracts.

In theory a public contract could be concluded about almost every conceivable topic. In law in action in the Netherlands public contracts are concluded about both public law and private law matters.

The *public power contract* is a contract about the (announced) use of a public power that is conferred to a public body. This type of public contracts is also known as a public contract in the narrow sense. It is a contract that necessarily implies the exercise of a public power. The public power needs to have at least some discretionary aspects. If not, there is no room for the public body to conclude a contract about this power. Characteristic for this kind of public contract is that it should be concluded *before* the actual exercise of the public power. The execution of the contract implies a (unilateral) public law act of a public body. This unilateral act is often regarded to be a decision in the sense of Article 1:3 (1) GALA (as mentioned in Sect. 2). For instance, we can think of the granting or prolongation of a certain kind of licence (e.g. an environmental permit), the determination of a zoning scheme or the levy of a tax assessment. According to the rule of law the public power itself should in principle have a specific statutory basis, but public powers without a statutory basis do sometimes occur. For the public power contract, it is very important to note that the possibility for the public body to use this statutory public power to conclude a contract about the use of this power in the near future, is not explicitly stated in the statute. In this sense public power contracts do not dispose of a statutory basis. *See* further about this type of contract in Section 4.

In principle the government can conclude every contract that validly could be concluded between private parties. We speak in those cases of a *public contract of a private nature* or a private government contract. Examples are the sale of goods (public body either buying or selling), lease, supply of services etc. The entering into a contract of a private nature is considered to be one of the various instruments the government has to exercise a public function. *See* further about this type of contract in Section 5.

Finally, we distinguish the so-called *mixed contracts*. A mixed contract is a public contract that includes both clauses with a public power contract nature and clauses of a public contract of a private nature. A clear example is the public contract in which the government both exchanges land, which is its property, with privately owned land and *also* includes a clause in which it states how it will use its public power to change a traced out road. In legal *practice* most public contracts are actually *mixed*. But legal literature and case law usually refer

to ‘public power contracts’ or ‘public contracts with a private nature’; this is because most of the time the dispute is only about one of these types of clauses. We will not pay any further attention to this mixed contract, since what we will assert here on public power contracts and public contracts of a private nature also applies to mixed contracts.

For a real understanding it is important to focus on the criterion that is used to qualify these types of public contracts. It is essential to note that the only determining aspect is the *subject matter* of the public contract. So neither the nature of the legal entity (public body or not), nor the nature of the substantive applicable law, nor the type of competent court that is empowered to examine the contract, is decisive for the qualification of these types of public contracts. In ancient legal doctrine and a few times explicitly in civil case law, however, a contract was considered to be of a public law nature merely because one or more of the contracting parties is a public body.⁽¹⁰⁾ However this qualification is as such not very meaningful for the judicial protection, because these contracts are still tried in a civil court. For the access to the courts on public contracts consequently the most decisive criterion to determine which type of court is competent, is the subject matter of the contract.

3.3. Substantive law

With regard to substantive law, on almost all contracts – public contracts included – the rules of the Civil Code are applicable. The Civil Code contains a separate set of rules for contracts (*see* partic. Art. 6:213 and ff CC). Traditionally, even public contracts are conceived to be of private law nature, but some of them have *also* public law characteristics, especially the public power contracts. That is why nowadays the public power contract is also referred to as a public *law* contract⁽¹¹⁾. However, this does not impede the application of the ordinary civil law rules of the Civil Code on these kinds of public contracts. Although the General Administrative Law Act does not accommodate separate general rules on public contracts, there are many standards of a public law origin that are applicable, like the general principles of proper administration and human rights. These general standards of a public origin are applicable on *both* public

(10) HR, 5 February 1993, ECLI:NL:HR:1993:ZC0848, AB, 1993, p. 239; NJ, 1995, p. 716 (*Welzijnsconvenant*). (HR is the abbreviation for *Hoge Raad* [Supreme Court]. NJ means *Nederlandse Jurisprudentie* [Dutch Law Reports]).

(11) R.J.N. SCHLÖSSELS and S.E. ZIJLSTRA, *Bestuursrecht in de sociale rechtsstaat*, *op. cit.*, p. 865; H.D. VAN WIJK, W. KONIJNENBELT and R. VAN MALE, *Hoofdstukken van bestuursrecht*, *op. cit.*, p. 242; and M.W. SCHELTEMA and M. SCHELTMA, *Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht*, *op. cit.*, p. 206.

power contracts and public contracts of a private nature.⁽¹²⁾ This means that on a conceptual level – to distinguish between public power contracts and public contracts with a private nature – it is irrelevant to what extent the public contract is governed by private law or public law.

All in all, under Dutch law the public contract is rooted in private law, but the insight rises increasingly that *certain* public contracts can be concluded about (*statutory*) *public powers*, which means that this fact is rather dominant to determine its legal character.

4. Public power contracts: civil and administrative Court

4.1. Introduction

In this section, we focus on public power contracts. Public power contracts are, as explained in Section 3, contracts between a public body and a private person or another public body, on the use of its specific public powers, for example the power to license, to subsidize or to regulate. The contract often contains obligations for the other party as well, such as the obligation to pay a certain amount of money in a governmental fund.

The execution of a public power contract implies a unilateral public law act of an administrative authority in accordance with the agreement. After all, the implementation of the contract requires unilateral acts of both parties, including a unilateral act of the government based on the public power in question. Performance on behalf of the government might require for example granting a license, making regulation etc. This does not automatically mean that all disputes regarding a public power contract can and will be decided in an administrative court.⁽¹³⁾ Only if an act of an administrative authority qualifies as a decision (*besluit*) in the sense of Article 1:3 GALA is the administrative Court competent (Art. 8:1 GALA): *see* Section 2.

There are different phases and therefore different points of departure in the life cycle of a public power contract for judicial protection. In this section we focus on the decision to enter into the contract (Sect. 4.2), the contract as such (Sect. 4.3) and the execution of the contract (Sect. 4.4). In every phase the main question is if the relevant governmental act qualifies as an act amenable to a judicial review procedure at an administrative court. Jurisdiction is, as we shall see, scattered between the administrative and civil Court on the

(12) *See* more elaborative, G. JURGENS and F. VAN OMMEREN, “The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide”, *op. cit.*, pp. 190 and ff.

(13) For further reading, *see* P.J. HUISMAN, “De rechterlijke competentieverdeling van geschillen over bevoegdhedenovereenkomsten”, in *De burgerlijke rechter in het publiekrecht* (R.J.N. SCHLÖSSELS e.a. eds), Alphen aan den Rijn, Wolters Kluwer 2015, pp. 233-249.

level of an individual public power contract, but there are exceptions to this rule (Sect. 4.5). At the end of this section we discuss contracts implementing a decision (so-called implementation contracts; Sect. 4.6) and the calls in Dutch literature to broaden the competence of the administrative Court to end the scattered jurisdiction in matters concerning a public power contract (Sect. 4.7).

4.2. Decision to enter into the contract: *acte détachable*

Public power contracts are, under Dutch law, private law acts. One should differentiate between the contract as such on the one hand, and the decision of an administrative authority to enter into contract on the other hand. The decision to enter into the contract (a so-called *acte détachable*) and the contract are two separate law acts. In this section we focus on the decision to enter into the contract, in the next section we focus on the contract.

The decision to enter into the contract is – according to the GALA and for example Article 160 (1)(e) Municipality Act – a decision under Article 1:3 GALA. This decision is not amenable to a judicial review procedure at an administrative court. Article 8:3 (2) GALA excludes this specific decision from the competence of the administrative Court(14). Because of the residual competence of the civil Court it is possible to address the civil Court in these matters. Unlike in many other legal systems the *acte détachable* in the Dutch judicial system is thus not amenable to a judicial review procedure at an administrative court.

4.3. Public power contract (as such)

According to case law of the civil(15) and administrative(16) courts public power contracts are *acts of private law*. Therefore the contract does not qualify as a decision under Article 1:3 GALA, simply because of the fact that it is not a (unilateral) *public law act*. Disputes about the validity of a public power contract are therefore to be resolved before a civil court.

(14) There is an exception in the rather uncommon situation in Dutch law that a decision to conclude a civil law act needs approval of another administrative authority. The written decision containing a refusal to approve a decision to prepare a legal act under private law is amenable to a judicial review procedure at an administrative court (Art. 8:2 [2][b]jo. Art. 8:1 GALA).

(15) HR, 3 April 1998, ECLI:NL:HR:1998:AN5655, AB, 1998, p. 241 (*Alkemade v. Hornkamp*); HR, 2 May 2003, ECLI:NL:HR:2003:AF2848, AB, 2003, p. 354 (*Nunspeet v. Mulder*); and HR, 14 June 2013, ECLI:NL:HR:2013:BZ0520, AB, 2013, p. 273 (*Ruimte voor Ruimte*). In the *Etam v. Zoetermeer* case (HR, 8 July 2011, ECLI:NL:HR:2011:BP3057, AB, 2011, p. 298) the Supr. Ct ruled that a public power contract is a *mixed* contract; this is not about the qualification of the contract as a public or private law act (or a combination of both), but is about the fact that depending on the exact claim the civil or administrative court has to be addressed.

(16) ABRvS, 8 September 2004, ECLI:NL:RVS:2004:AQ9924, AB, 2004, p. 458 (*Wijziging Tracébesluit*); and ABRvS, 24 November 2010, ECLI:NL:RVS:2010:BO4824, AB, 2011, p. 143.

The contract is governed by a mixture of private and public law. The civil courts apply the normal private law rules concerning the validity of private law acts and contracts (*see e.g.* Art. 3:40, 3:44, 6:228 CC), and public law standards such as the principles of proper administration (Art. 3:14 CC and 3:1 [2] GALA). A private law act that violates a principle of proper administration is null and void (Art. 3:40 [1] CC). In the *Alkemade v. Hornkamp* case, for example, the Supreme Court ruled that a public power contract was null and void because it violated the principle that prohibits abuse of public power (*verbod van détournement de pouvoir*; Art. 3:3 GALA).⁽¹⁷⁾ When a public body enters into a contract on the use of a public power, the obligations for the other party have to relate with the objective of the public power that is subject of the contract. It is possible for the other party to successfully claim annulment of the contract when this correlation is absent. This illustrates that the civil Court (also!) reviews the scope of public powers.

Disputes about the validity of the contract as such are, as a general rule, to be settled in a civil court of law. But what if a contractual clause with an obligation for a private party – e.g. the obligation to pay a certain amount of money in a governmental fund – is ‘transformed’ in the phase of the execution of the contract by an administrative authority into a requirement laid down in a decision in the sense of Article 1:3 GALA? Case law does not yet provide any clarity concerning the answer to this specific question, but it seems that – because of the ‘transformation’ in a part of a decision – the administrative Court is competent.⁽¹⁸⁾

Other disputes concerning the contract as such, e.g. disputes about cancellation or modification of the contract, are to be settled in a civil court.

4.4. Execution of the contract

In the phase of the execution of a public power contract it is possible to distinguish between claiming specific performance for breach of contract and claiming damages. Hereafter both claims are analysed further.

Specific performance

Implementation of a public power contract on behalf of a public body requires a decision in accordance with the agreement. Often these decisions are amenable to a judicial review procedure at an administrative court. An administrative law case is usually preceded by a mandatory objection-procedure (*see* Sect. 2). It is not the contract that is subject to judicial review by the administrative Court, but (only) the execution in the form of a decision.

⁽¹⁷⁾ HR, 3 April 1998, ECLI:NL:HR:1998:AN5655, *AB*, 1998, p. 241 (*Alkemade v. Hornkamp*).

⁽¹⁸⁾ HR, 14 June 2013, ECLI:NL:HR:2013:BZ0520, *AB*, 2013, p. 273 (*Ruimte voor Ruimte*).

The administrative Court is mainly authorized to annul the decision (*i.e.* the execution of the contract in the form of a decision) for example because of the violation of applicable laws and principles of proper administration. The administrative Court does not have the authority to order the performance of the contractual obligation by the government.

On the decision-making-level there is an obligation, based on the principle of due care (*zorgvuldigheidsbeginsel*, Art. 3:2 GALA), for an administrative authority to gather the necessary information concerning the relevant facts and the interests to be weighed. From this principle emanates the obligation to involve a public power contract when the administrative authority takes a decision.⁽¹⁹⁾ Furthermore the administrative authority is obliged – based on the principle that reasons must be given (*motiveringsbeginsel*, Art. 3:46 and 3:47 GALA) – to motivate which part the contract played in taking the decision.⁽²⁰⁾ Non-compliance with aforementioned (more) procedural principles could lead to an annulment of the decision by the administrative Court.

More important than the procedural safeguards provided by administrative law, is to what extent an administrative authority is obliged to comply with the contract in the decision-making-process. The contract has (only slight) significance in the decision-making process, because of the general principle of protection of legitimate expectations (*vertrouwensbeginsel*), which requires an administrative authority to act as promised at the decision-making-level.⁽²¹⁾ Compliance with the contract cannot always be guaranteed, because administrative law requires the administrative authority to weigh all relevant interests in decision-making. It is for example possible that third party interests (or the general interest) weigh more heavily in the final decision than could have been predicted at the time of concluding the contract. If the administrative authority has a wide margin of discretion when taking a decision, the administrative Court carries out a limited judicial review of the weighing of the relevant interests by the administrative authority. This gives the administrative authority a margin to comply with the contract or not. It is therefore rare that an administrative court annuls a decision implementing a contract due to conflict with the principle of protection of legitimate expectations.

The implementation of a public power contract can also result in a public law act that is not amenable to a judicial review procedure at an administrative

(19) ABRvS, 27 June 2012, ECLI:NL:RVS:2012:BW9520, *AB*, 2013, p. 346; and ABRvS, 29 April 2015, ECLI:NL:RVS:2015:1372, *AB*, 2015, p. 384.

(20) ABRvS, 6 February 2013, ECLI:NL:RVS:2013:BZ0796, *AB*, 2013, p. 210; and ABRvS, 19 March 2014, ECLI:NL:RVS:2014:986.

(21) ABRvS, 8 September 2004, ECLI:NL:RVS:2004:AQ9924, *AB*, 2004, p. 458 (*Wijziging Tracébestuit*); and ABRvS, 27 June 2012, ECLI:NL:RVS:2012:BW9520, *AB*, 2013, p. 346.

court. An important exception to the rule that a unilateral public law act is amenable to a judicial review procedure at an administrative court is made for primary and secondary legislation, *i.e.* legislation created by the legislative or the executive arm of government (*see* Art. 8:1 *jo.* 1:3 [1] *jo.* 1:1 [2][a] and Art. 8:3 [1][a] GALA). It is possible for the other party to address the civil Court claiming specific performance because of breach of contract when a public power contract regards the use of a legislative power. The possibilities for the civil Court to order the public body to carry out the performance that is requested are rather limited. The civil Court cannot order a public body to make primary or secondary legislation (this emanates from Art. 3:296 CC)(22). It is only possible for the civil Court to declare specific legislation inapplicable if it is not conform the contract; it should be noted here that this rarely happens(23).

The implementation of a public power contract by a private person – for example paying the government a certain amount of money – does not qualify as a public law act, and therefore does not qualify as a decision amenable to a judicial review procedure at an administrative court. If the government wants to claim breach of contract (e.g. the other party refuses to pay) it will have to bring its action to a civil court.

Damages

If the government does not perform (fully) in accordance with a public power contract, *i.e.* it takes another decision than promised, damages can be claimed by the other party on two separate and distinctive legal grounds. A public body can be liable due to the fact that the public law act implementing the contract is an unlawful act (Art. 6:162 CC), and/or can be liable for non-performance (Art. 6:74 CC).

Since 2013 the GALA contains rules concerning the competence of the administrative and civil Court when an interested party claims damages in the situation a decision is annulled by the administrative Court and therefore qualifies as an unlawful act (Art. 8:88 [1][a] *jo.* 8:89 GALA). In social security cases and tax law cases the administrative Court has exclusive competence when an interested party claims damages on this legal ground (Art. 8:89 [1] GALA). In other cases, the civil Court has exclusive authority if the claim is more than € 25,000; if the claim is equal to or lower than € 25,000, the interested party has the choice between the civil or the administrative Court (Art. 8:89 [2] GALA). When damage is caused by a public law act not amenable to a judicial review

(22) HR, 21 March 2003, ECLI:NL:HR:2003:AE8462, *AB*, 2004, p. 39 (*Waterpakt c.s. v. Staat*); HR, 1 October 2004, ECLI:NL:HR:2004:AO8913, *NJ*, 2004, p. 679 (*Faunabescherming v. Friesland*); and HR, 7 March 2014, ECLI:NL:HR:2014:523, *AB*, 2014, p. 230.

(23) HR, 16 May 1986, ECLI:NL:HR:1986:AC9354, *AB*, 1986, p. 574 (*Landbouwvliegers*).

procedure at an administrative court, damages can only be claimed at the civil Court (Art. 8:88 [2] GALA).

In more recent case law a distinction has been made between claiming damages because of an unlawful public law act and claiming damages because of non-performance by a public body. In the *Etam v. Zoetermeer* case, the Supreme Court ruled that there is a difference between judicial review of the decision implementing the contract and the question whether or not damages have to be paid due to non-performance under Article 6:74 CC(24). Subject of the review of the administrative Court is a decision and this Court has to decide whether or not this decision is in accordance with the law and the principles of proper administration. The administrative Court does not review the contract and compliance with its obligations as such; this Court does not answer the question whether there is non-performance on the part of the public body (Art. 6:74 CC). Only the civil Court can be approached with this claim. Therefore, even if the administrative Court did find the decision to divert from the contractual obligation lawful, it is possible for damages to be claimed at the civil Court.

If the other party does not comply with his contractual obligations, the public body can only claim damages at a civil court.

4.5. Exceptions to the rule: judicial review at only one type of court

It depends on the exact claim whether a dispute can and will be settled in an administrative or civil court. On the level of an individual public power contract jurisdiction is usually scattered between the administrative and the civil Court. Sometimes jurisdiction is not scattered between two types of courts.

In some fields of administrative law, for instance tax law, the competence of the administrative Court is very broad. As a consequence, less is covered by the residual competence of the civil Court. In nearly all conflicts concerning tax rulings (*i.e.* public power contracts on the levy of a tax assessment) the administrative Court has competence. Disputes concerning the legitimacy of the contract and the execution of the contract are all reviewed by this Court; as a result the civil Court has no role(25).

It is, on the other hand, also possible that all conflicts concerning a certain type of public power contract can only be resolved by the civil Court. This is the case when the implementation of the contract results in a public law act that is not amenable to a judicial review procedure at an administrative court. A poignant example of this type of public contract is the contract on the use of

(24) HR, 8 July 2011, ECLI:NL:HR:2011:BP3057, AB, 2011, p. 298 (*Etam v. Zoetermeer*).

(25) P.J. HUISMAN, "De rechterlijke competentieverdeling van geschillen over bevoegdhedenovereenkomsten", *op. cit.*

a legislative power. The civil Court can be approached for all possible claims concerning the decision to enter into contract, the contract as such and the execution of the contract(26). However, when the other party claims specific performance for breach of contract there is little to no prospect of success.

4.6. Public power contract versus implementation contract

It is not uncommon in Dutch literature to give the concept of public power contracts a broad definition. In this broad definition so called implementation contracts are considered to be public power contracts as well(27). Although a public power contract and an implementation contract both have a certain correlation with a decision under Article 1:3 GALA, we regard them as two separate and distinctive types of contracts: they each correlate to a decision in a different way(28). A public power contract is about the use of a public power in the future; performance of the contract on behalf of the government consists of taking a decision – e.g. granting a licence or a subsidy – in accordance with the contract. The contract is concluded *before* taking this decision. The correlation contract-decision is completely different when it concerns an implementation contract. *After* a decision – e.g. to grant a licence or a subsidy – is taken it is possible to conclude a contract on the implementation of this decision; this contract is, contrary to a public power contract, not about the use of a public power in the future. It contains for instance the obligation for the other party to act in accordance with the conditions and terms of the licence or subsidy. An example of an implementation contract is the contract that is concluded in order to implement the decision to grant a subsidy (Art. 4:36 [1] GALA). The agreement may provide for an obligation for the subsidy recipient to perform the activities for which the subsidy has been granted (Art. 4:36 [2] GALA).

The distinction between public power contracts and implementation contracts is important; there are, for instance, some differences regarding judicial protection. Performance of an implementation contract does not consist of taking a decision by an administrative authority, and it is therefore not possible to claim specific performance for breach of contract or claim damages at an administrative court. The administrative Court is only competent in cases concerning the decision (e.g. the decision to grant a licence or a subsidy) of which the contract is the implementation. It is the other way around with public power contracts. Performance of the contract on behalf of the public body consists

(26) *Ibid.*

(27) M.W. SCHELTEMA and M. SCHELTMA, *Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht*, op. cit., p. 209.

(28) Cf. F.J. VAN OMMEREN and P.J. HUISMAN, “Van besluit naar rechtsbetrekking: een groeimodel”, in *Het besluit voorbij* (F.J. VAN OMMEREN e.a. eds), Den Haag, Boom Juridische uitgevers, 2013, pp. 34-36.

of taking a decision. Mostly these decisions are amenable to a judicial review procedure at an administrative court.

4.7. Closing remarks: broadening the competence of the administrative Court?

Depending on the exact claim, the administrative or civil Court is competent in matters concerning a public power contract. Most of the time jurisdiction is scattered between those *two* types of courts on the level of *one* public power contract. It is for example possible that the administrative Court is competent to review the performance of the contract on behalf of the government (a decision), whilst after this procedure the other party has to claim damages at the civil Court to ascertain full coverage of his damage. This situation is not desirable for all concerned (the public body, the other party and the administrative and civil courts) from the point of view of efficiency, legal uniformity and legal certainty. In recent Dutch literature there are calls to end (or at least reduce) the scattered jurisdiction by broadening the competence of the administrative Court(29).

5. Public contracts of a private nature: civil Court

5.1. Introduction

In the previous section we discussed the so-called public power contracts. As was explained in Section 3, these contracts are to be distinguished from public contracts of a private nature (or: private government contracts). Public contracts of a private nature are concluded between a public body and a private party (either a natural person or a legal person of a private law nature). Whenever a public body enters into a contract of a private nature, he is using a private law instrument in order to exercise a public function.

Generally speaking, this type of contract involves any contract that could validly be concluded between private parties. Such contracts are first of all dealt with by the provisions of general contract law of Book 3 and Book 6 CC.(30) In addition to this, specific provisions to be found in Book 7 (Specific Contracts) CC will apply to the most important examples of contracts that can be concluded

(29) See e.g. F.J. VAN OMMEREN and P.J. HUISMAN, "Van besluit naar rechtsbetrekking: een groeimodel", pp. 50, 93.

(30) An important example of such an innominate contract in the framework of public contracts is the concession. Concessions are generally qualified as public contracts of a private nature, with the exception of concessions based on specific statutory duties, e.g. public transport concessions based on the *Wet personenvervoer 2000* (Public Transport Act). These are qualified as a unilateral decision in the sense of Art. 1.3 GALA (see also Sect. 2, 3 and 4).

between private parties, including public entities acting as a private party: contracts for the sale of goods,(31) lease contracts,(32) service contracts,(33) and construction contracts.(34)(35)

A public contract of a private nature may obviously give rise to conflicts between the contracting parties: the public body and the private party. As was already explained in Section 3 above, either party may then bring an action before the civil Court.(36) As a matter of principle, the civil Court will not treat these conflicts differently from those regarding contracts of a private nature that are concluded between private parties. The parties to the public contract have the same contractual obligations and can seek for the same remedies as the private parties to an ordinary contract of a private nature, and the Court will have to apply the same provisions of the Civil Code to solve these conflicts. Nevertheless, Article 3:14 CC imposes a duty upon public bodies, when using the instrument of a contract of a private law nature, not to contravene the general principles of proper administration. Moreover, the fact that a public body uses a contract of a private nature in order to exercise a public function will influence the nature, content and extent of his contractual obligations owed to the private party. It is for the civil Court to take these peculiarities into account, when trying a case involving a public contract of a private law nature on the basis of the relevant provisions of contract law to be found in the Civil Code.

5.2. Remedies available

As was stated above, a party to a public contract of a private nature may seek the same remedies as any private party to an ordinary contract of a private nature on the basis of the normal provisions of the Civil Code. This means that a party may contest the validity of the public contract on the basis of the general provisions of Article 3:40 CC on immoral and illegal contracts, Article 3:44 CC on fraud, threats and abuse of circumstances, Article 3:33 *jo.* 3:35 CC on mistake, and Article 6:228 CC on misrepresentation.(37) Conflicts on the interpretation and supplementation of public contracts of a private nature are to be dealt with on the basis of the general provision of Article 6:248(1) CC, whereas unfair

(31) Book 7, Tit. 1, CC.

(32) Book 7, Tit. 4, and 5 CC.

(33) Book 7, Tit. 7, CC.

(34) Book 7, Tit. 12, CC.

(35) Other examples are: contracts for barter (Book 7, Tit. 1.12, CC); financial security contracts (Book 7, Tit. 2, CC); donation contracts (Book 7, Tit. 3, CC); storage contracts (Book 7, Tit. 9, CC); employment contracts (Book 7, Tit. 10, CC); bailment contracts (Book 7, Tit. 14, CC), and insurance contracts (Book 7, Tit. 17, CC).

(36) The parties may also agree upon an alternative form of dispute resolution, such as arbitration.

(37) *See* also Sect. 4.3 above.

clauses can be challenged on the basis of Article 6:2 and Article 6:248(2) CC. In the event of non-performance of an obligation under the contract, the creditor of the duty may claim specific performance of the contract pursuant to Article 3:296 CC, withhold performance of some or all of his obligations following Article 6:52 and Article 6:262 CC, terminate the contract on the basis of Article 6:265 CC, and claim damages under Article 6:74 CC(38). Following Article 6:258 CC, a party may also be released from his obligations by supervening events which make the public contract much more onerous.

Although the courts will have to apply the above – and other – provisions of the Civil Code in order to resolve the case at hand, it is reiterated here that in doing so they will have to take into account that the case involves the use of a contract of a private nature by a public body in order to exercise a public function(39). The corollary of this is that the Court may sometimes apply the provisions of the Civil Code in a strict manner – and to the detriment of the public body – compared to what it would do in a case of an ordinary contract concluded between private parties(40). By the same token, a court may sometimes be more lenient with a public body under a public contract of a private nature in comparison to how it would treat an ordinary private party in the same circumstances(41).

6. Public contracts of a private nature in the framework of public procurement: civil Court and Public Procurement Ombudsman

6.1. Introduction

The notion of ‘public procurement’ or ‘government procurement’ can be explained as the procurement of works, goods or services on behalf of a public body from an external source.(42) National or supranational regulation may impose a duty upon public entities – provided that certain conditions are met – to procure their works, goods and services by issuing public tenders and to do

(38) See also Sect. 4.4 above.

(39) See Sect. 5.1 above.

(40) As is illustrated by the *Landmark* cases, HR, 27 March 1987, ECLI:NL:HR:1987:AG5565, *NJ*, 1987, p. 727 (*Amsterdam v. IKON*); and HR, 26 April 1996, ECLI:NL:HR:1996:ZC2051, *NJ*, 1996, p. 728 (*Rasta Rostelli*).

(41) See for instance HR, 10 April 1987, ECLI:NL:HR:1987:AG5573, *NJ*, 1988, p. 148 (*GCN v. Nieuwegein*); and HR, 10 September 1993, ECLI:NL:HR:1993:ZC1055, *AB*, 1993, p. 586 (*Den Dulk v. Curaçao*).

(42) See also Art. 1(2) Dir. 2014/24/EU: “[...] the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities [...]”. See also S. ARROWSMITH, *The law of public and utilities procurement. Regulation in the EU and UK*, vol. 1, London, Sweet & Maxwell, 2014, p. 1.

so in accordance with procedural rules. In the Netherlands, these rules are to be found in the Public Procurement Act 2012 (*Aanbestedingswet*), implementing the European public procurement Directives.⁽⁴³⁾

A contract between a public body and a supplier of works, goods or services that is concluded subsequent to a successful public procurement procedure qualifies as a public contract of a private nature.⁽⁴⁴⁾ This type of contract has been discussed in section 5 above. It follows from this that whenever such a contract – once concluded – gives rise to a conflict between the procuring public body and the private supplier, either party may bring an action before the civil Court. It also means that the civil Court will not treat these conflicts differently from those regarding other public contracts of a private nature discussed in Section 5: it will have to try the case on the basis of the relevant provisions of contract law of the CC. In doing so, the Court will have to take into account the implications of Article 3:14 CC. It is argued that this will also require the Court to consider and decide whether and how the characteristics of the preceding tendering procedure, the interests involved in it, as well as the objectives underlying its regulation, will influence the application of the contract law provisions of the CC.⁽⁴⁵⁾

Although the *performance* of a public contract concluded following a successful public procurement procedure does not show any significant peculiarities from a judicial protection perspective, in comparison to other public contracts of a private nature, the *formation* of the contract does show such peculiarities. As stated previously, the formation of a contract between a public body and a supplier of works, goods or services in the framework of a regulated public procurement procedure may require the public body to issue public tenders and to do so in accordance with procedural rules. Suppliers may contest the performance by the public body of one or more of his duties incumbent on him according to the Public Procurement Act 2012. They can either do so by bringing their case before the civil Court (Sect. 6.2) or by filing a complaint at the Dutch Public Procurement Ombudsman (Sect. 6.3).

(43) Sources of EU public procurement law are: the principles of the TFEU, and in partic. the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, and the relevant Dir., in partic. 2014/23/EU, 2014/24/EU, 2014/25/EU, and 2009/81/EC.

(44) From a European public procurement law as well as a Dutch contract law perspective, such contract can further be qualified either as a traditional supply contract – *i.e.* a contract for the sale of goods, a service contract, or a construction contract – or as concession contract.

(45) See C.E.C. JANSSEN, S. MUTLUER, A.T.M. VAN DEN BORNE, S. PRENT and U. ELLIAN, “Towards (further) EU Harmonization of Public Contract Law”, in *Proceedings of the 5th International Public Procurement Conference* (A.V. ROMAN, K.V. THAI and C. McCUE (eds), Seattle, 17-19 August 2012, [www.ipppa.org/IPPC5/Proceedings/Part 3/PAPER3-7.pdf](http://www.ipppa.org/IPPC5/Proceedings/Part%203/PAPER3-7.pdf), pp. 759-809.

6.2. Judicial protection in matters of public procurement: civil Court

In the event that a supplier decides to bring a public procurement case before the civil Court, he can – at least in theory – start proceedings on the merits of the case and file a claim for damages or for annulment of the contract concluded in breach of the public procurement regulation. In practice, however, this will seldom occur. Usually, the disappointed supplier will apply for interim measures in a summary procedure.⁽⁴⁶⁾ When doing so, he will ask the Court to establish that the public body acted in breach of the public procurement regulation and to order suspension, revision and/or re-opening of the tendering procedure and/or a prohibition to conclude the contract.

When a supplier decides to apply for interim measures in a summary procedure, he can start proceedings at any time in the course of the tendering procedure until the conclusion by the public body of a binding contract. The public body's decision to conclude such a binding contract is to be preceded by a so-called award decision.⁽⁴⁷⁾ In matters of public procurement falling within the scope of the EU public procurement Directives, the public body is required to suspend the conclusion of a binding contract for a period of 20 days after this award decision.⁽⁴⁸⁾ If the supplier starts proceedings before the expiration of this 20-days period, this will bar the public body from concluding a binding contract⁽⁴⁹⁾. In the event that the 20-days period has expired, the supplier may still apply for interim measures in a summary procedure if the public body did not conclude a binding contract yet. However, the public body can exclude this possibility for the supplier by inserting a provision in the tender documents to that effect.

If the Court rules in favour of the public body, the latter may continue the tendering procedure and conclude a binding contract. The supplier may subsequently appeal against the ruling of the Court, but this will not suspend that ruling. The corollary of this is that whenever the supplier wants to prevent the public body from carrying out the contract that was concluded after the ruling of the Court of first instance, he will have to request the Court of appeal to order a suspension of that contract. Practice shows that the courts of appeal in the Netherlands are very reluctant in allowing such requests.

(46) In 2012 interim measures were applied for in 123 reported cases. In 2014 – one year after the Public Procurement Act 2012 came into force – interim measures were applied for in 117 reported cases. See Ministerie van Economische Zaken, *Aanbestedingsrechtspraak in Nederland 2012 en 2014, Eindrapport, mei 2015*, p. 7.

(47) See Art. 2.130 Public Procurement Act 2012, implementing Art. 53 Dir. 2004/18/EC.

(48) See Art. 2.127 Public Procurement Act 2012, implementing Art. 2bis Dir. 2007/66/EC.

(49) See Art. 2.131 Public Procurement Act 2012.

6.3. Extra-judicial protection: the Public Procurement Ombudsman(50)

Article 4.27 of the Public Procurement Act 2012 provides for a statutory basis for extra-judicial public procurement complaints review by the Dutch Public Procurement Ombudsman, which was established on 1 April 2013. This statutory-based extra-judicial complaints review board does not substitute the system of judicial protection in public procurement cases by the civil courts. Neither does it prevent a supplier from bringing his complaint before the Court at any stage of the tendering procedure, whether or not the Ombudsman has been addressed beforehand. The main objective of offering extra-judicial complaints review is to lower the threshold for suppliers – particularly small and medium enterprises (SME's) – who encounter difficulties in bringing their complaints before the civil courts. This objective is mainly achieved by issuing – free of charge – non-binding opinions on complaints. In addition, rather than being an alternative to judicial protection by the civil courts, the complaints review by the Ombudsman is intended as a means of dealing with public procurement complaints in a satisfactory manner before legal proceedings, if any, are started in Court.

The primary objective of the Ombudsman is to contribute to the resolution of public procurement complaints, a 'complaint' being defined as: 'an expression of dissatisfaction by one party regarding the acts or omissions of another, to the extent that such acts or omissions fall within the scope of the Dutch Public Procurement Act 2012'.(51)

Complaints may be submitted by "(a) economic operators that wish to acquire public contracts; (b) industry organisations that act on behalf of one or more economic operators; and (c) contracting authorities".(52) The bulk of complaints received by the Ombudsman so far have been submitted by economic operators that wish to obtain public contracts: (potential) candidates and (potential) tenderers. Practice shows that a vast majority of suppliers are SME's. In a few cases, complaints were submitted by industry organisations

(50) See also C.E.C. JANSEN, J.G.J. JANSSEN and J.S. MUNTZ-BEEKHUIS, "Extra-Judicial Complaints Review: First Experiences of the Dutch Public Procurement Experts Committee", in *Proceedings 6th International Public Procurement Conference*, Dublin, 2014, pp. 1231-1240.

(51) Art. 1(c) Decr. of 4 March 2013, *Stert.*, 2013, p. 6182 (*Instellingsbesluit Commissie van Aanbestedingsexperts*); and Art. 1(c) of the Rules (*Reglement van de Commissie van Aanbestedingsexperts*) pursuant to Art. 6(1) of the Decr.

(52) See Art. 7(1) of the Rules. So far, the Ombudsman did not have to deal with complaints submitted by contracting authorities against suppliers yet. This is not very surprising given that the Public Procurement Act 2012 is focussed on acts and omissions of procuring entities and does not impose duties upon suppliers.

acting on behalf of one or more economic operators that wish to acquire public contracts.(53)

Submitting a claim to the Ombudsman is not only free of charge: it also requires hardly any formalities to be fulfilled. The supplier must submit his complaint electronically using the complaint form on the Ombudsman's website.(54) The complaint must contain the name and address of both the supplier and the public body, as well as a description of the complaint. The supplier must clearly state what the complaint regards. He must also substantiate the complaint and include all of the relevant information needed to adequately process the complaint.

The Ombudsman can decide not to process a complaint either for general policy reasons, or for specific reasons related to the non-observance of formal requirements in the case at hand.(55) Up till now, it has not refused to process a complaint on the basis of general policy grounds. The Ombudsman's practice shows that the most important ground for refusal is that the supplier did not notify the public body of the complaint and/or did not afford a reasonable term to respond to it.(56) The obvious reason for this rule is to be found in the purpose of Ombudsman: a quick, careful, and accessible resolution of public procurement complaints, in combination with an improvement of the level of professionalism of public procurement practices, can only be achieved by encouraging the parties involved to discuss and resolve the complaint as much as possible between themselves. Resolving a complaint either through the Ombudsman or in a civil court is considered to be *ultimum remedium*. The corollary of this is that the supplier must be stimulated to notify the public body of the complaint prior to submitting the claim to the Ombudsman.

If the Ombudsman decides to process a complaint for the purpose of issuing an opinion, the supplier and the contracting authority will be notified of that fact and provided with a brief description of how the complaints procedure is to be carried out. The Rules do not provide for detailed provisions as to how to carry out the procedure. Instead the Rules instruct the Ombudsman to apply well-known general principles. Firstly, it must observe the principle of hearing

(53) Detailed statistics on the nature and number of complaints submitted to the Ombudsman since 1 April 2013 can be found in the annual reports of the Ombudsman (only available in Dutch), see www.commissievanaanbestedingsexperts.nl. The total amount of complaints submitted per year is as follows: 70 (year 1: 2013/2014); 102 (year 2: 2014/2015); 117 (year 3: 2015/2016). The majority of these complaints deals with the formulation and application of qualitative selection criteria and award criteria.

(54) See Art. 8(1) of the Rules.

(55) See Art. 9(1) of the Rules. The total amount of complaints the Ombudsman has decided to process since 1 April 2013 is as follows: 47 (of 70 complaints submitted in year 1); 67 (of 102 complaints submitted in year 2); 88 (of 117 complaints submitted in year 3).

(56) See Art. 9(1)(a) and 9(1)(b) of the Rules.

both sides of an argument when processing a complaint.⁽⁵⁷⁾ Secondly, it must strive to strike an adequate balance between processing speed and the due care that must be exercised throughout the procedure.⁽⁵⁸⁾

The Ombudsman's standard application of the first principle is that the complaint form, as well as additional documents to which the supplier refers in that form, is sent to the public body together with a request to respond to the complaint. Upon receipt of that response, the Ombudsman will send it to the supplier together with any documents to which the public body has referred in his response.

At this stage of the procedure, and based on the information it has gathered, the Ombudsman will render an opinion in writing regarding whether or to what extent the complaint is justified.⁽⁵⁹⁾ It will do so in accordance with the second principle mentioned above: it will strike a balance between processing speed and due care. In practice, this means that the Ombudsman will give priority to complaints where time is of the essence. These complaints involve tendering procedures where time limits – either for the receipt of requests to participate or for the receipt of tenders – have not expired yet. The same goes for complaints involving tendering procedures where the period of 20 days under Article 2.127 Public Procurement Act 2012 has not expired yet.

Once the Ombudsman has rendered an opinion, it has to notify both the supplier and the public body of it. In the event that there are possibilities for doing so, the Ombudsman will provide the public body with recommendations for resolving the complaint in addition to the opinion rendered.

(57) See Art. 10(6) of the Rules.

(58) See Art. 10(7) of the Rules.

(59) In this respect, the annual reports of the Ombudsman show the following statistics. In year 1, opinions were rendered in 26 of 47 complaints. In 9 cases the opinion was rendered in favour of the complainant, in 4 cases the Ombudsman ruled in favour of the contracting authority. In 13 cases an opinion was rendered partly in favour of the complainant and partly in favour of the contracting authority. In year 2, opinions were rendered in 30 of 67 complaints. Additionally, 10 opinions were rendered regarding complaints submitted in year 1. In 11 cases the opinion was rendered in favour of the complainant, in 16 cases the Ombudsman ruled in favour of the contracting authority. In 13 cases an opinion was rendered partly in favour of the complainant and partly in favour of the contracting authority. In year 3, opinions were rendered in 48 of 88 complaints. Additionally, 13 opinions were rendered regarding complaints submitted in the previous years. In 21 cases the opinion was rendered in favour of the complainant, in 19 cases the Ombudsman ruled in favour of the contracting authority. In 21 cases an opinion was rendered partly in favour of the complainant and partly in favour of the contracting authority. A substantial amount of complaints does not result in an opinion, notwithstanding the fact that the Ombudsman decided to process these complaints. Such complaints are sometimes withdrawn for reason that the contracting authority has suspended or even terminated the procurement procedure as a result of the complaint. It is also possible that the complainant, after having filed the complaint, has requested a civil court for an interlocutory ruling in which case the Ombudsman will suspend processing the complaint (*see also below*).

The opinions and recommendations issued by the Ombudsman are not binding.⁽⁶⁰⁾ Hence it is for the public body to decide whether and to what extent he will observe the Ombudsman's findings. As will be explained below, however, a supplier can use the Ombudsman's opinion, rendered in his favour, as an argument for legal proceedings against the contracting authority before the civil Court.

One of the key decisions a supplier will need to make in the event of a public procurement conflict is whether to submit a complaint to the Ombudsman or to apply for interim measures in a summary procedure. Both options have their advantages and disadvantages. First of all, having a complaint processed by the Ombudsman is free of charge whereas a registration fee is owed in the event that a case is brought before an ordinary court.⁽⁶¹⁾ In addition, legal costs can be reduced given that the procedure does not require the involvement of qualified lawyers. Costs can further be reduced as the procedure hardly requires any formalities to be fulfilled. Finally, what a court in a summary procedure *cannot* do – contrary to the Ombudsman – is to call upon experts, and to provide the parties in the case at hand, as well as practice at large, with recommendations. The obvious disadvantage of submitting a complaint to the Ombudsman is that it cannot give a binding ruling, unlike a civil court. Another disadvantage – to be discussed further below – is that the submission of a complaint to the Ombudsman does not suspend the tendering procedure that is the object of the complaint.

A supplier cannot have the best of both worlds by starting parallel proceedings before the Ombudsman and a civil court at the same time. The Rules compel the Ombudsman to refuse to deal with a complaint regarding which judicial proceedings have been instituted or a court has rendered a judgment.⁽⁶²⁾ By the same token, if a supplier requests a civil court for an interlocutory ruling in a matter that is already the object of a complaint submitted to the Ombudsman, the parties must immediately notify the Ombudsman thereof.⁽⁶³⁾ The Ombudsman will then have to suspend the processing of the complaint until the Court has rendered judgment.⁽⁶⁴⁾ Contrary to this provision, the Ombudsman may decide to resume processing a complaint if a request to that effect is jointly submitted by both parties or the adjudicating Court, provided that the Court suspends its hearing of the matter.

(60) See Art. 11(2) of the Rules.

(61) See Sect. 2.2 (footnote 7) on registration fees for administrative and civil courts.

(62) See Art. 8(1)(g) and Art. 10(10)(e) of the Rules.

(63) See Art. 10(9) of the Rules.

(64) See Art. 10(12) of the Rules.

What a supplier *can* do, is to submit a complaint to the Ombudsman in order to obtain an opinion in his favour, whereupon he can request for interim measures in a summary procedure from a civil court and support that request by referring to the Ombudsman's opinion. (65)

The submission of a complaint to the Ombudsman does not suspend the tendering procedure that is the object of the complaint. (66) This puts a high pressure on the supplier's decision whether or not to submit the complaint to the Ombudsman. The obvious risk is that – in the event the Ombudsman turns out not to be able to process the complaint before the expiry of a relevant time limit, particularly the standstill period referred to above – the supplier will be barred from requesting an interlocutory ruling from the Court. On the other hand, in order to control this risk, the Ombudsman can request the contracting authority to postpone taking a decision in the tendering procedure until the Ombudsman has issued its opinion. Although public entities are not obliged to comply with this request, the Ombudsman's experience is that they are prepared to do so in half of the relevant complaints.

7. Conclusion: judicial and extra-judicial protection

The picture of the outlines of the judicial competence of the courts on public contracts in the Netherlands can be painted as follows. To elaborate the access to the courts a distinction should be made between an action or claim of the government (public body) and an action or claim of other parties (private parties). (1) The *government* as a claimant should always bring its actions to a civil court, irrespective of the type of public contract it wants to proceed about. (2) For a *private party* the choice depends on the type of public contract. (2.1) Regarding a public contract with a *private nature* the claimant always has to bring his action to a civil court. (2.2) Regarding a *public power* contract there are however two possibilities. The choice for a civil or an administrative court (judicial review procedure) depends on the kind of claim. For procedures on the *performance or execution* of the public power contract the claimant has to approach the administrative Court when the execution of the contract implies an amenable decision in the sense of Article 1:3 GALA. When a private party

(65) This has happened in seven cases so far. In five cases, the courts concurred with the opinion of the Ombudsman: Rb Gelderland, 24 January 2014, ECLI:NL:RBGEL:2014:454; Rb The Hague, 4 December 2014, ECLI:NL:RBDHA:2014:16374; Rb Zeeland-West-Brabant, 1 May 2015, ECLI:NL:RBZWB:2015:2951; Rb The Hague, 13 April 2016, ECLI:NL:RBDHA:2016:3999; Rb Midden-Nederland, 30 June 2016, ECLI:NL:RBMNE:2016:3518. In two cases, the courts did not concur with the opinion of the Ombudsman: Rb Rotterdam, 30 December 2015, ECLI:NL:RBROT:2015:9802; Rb The Hague, 16 December 2015, ECLI:NL:RBDHA:2015:14662. All cases can be found at www.rechtspraak.nl

(66) See Art. 8(4) of the Rules.

wants to claim damages on the ground that the decision is annulled by the administrative Court, it depends on the type of case whether the administrative Court or the civil Court has to be addressed with this claim. In all other cases regarding a public power contract the claimant has to bring his action to a civil court.⁽⁶⁷⁾

In conclusion, regarding the judicial protection, usually a civil court is authorized to judge claims about public contracts. There are however a few exceptions to this rule. The most important exception is a claim about the execution of a public power contract in case the execution consists of an amenable decision by an administrative authority: in that specific situation the administrative Court is entitled to handle the case in a judicial review procedure.

Regarding the extra-judicial protection the picture looks more simple at first glance, but it is at the same time rather diverse, since it is up to the parties to the contract whether they choose for arbitration or alternative dispute resolution as an alternative for the access to a court. In matters of public procurement, a party may decide to bring a case before the civil Court directly, but he may also decide to first approach the Public Procurement Ombudsman with a complaint. In the event that the Ombudsman gives a non-binding opinion in favour of the complaint, the complainant can decide to subsequently bring the matter before the civil Court.

(67) There are a few exceptions to this rule, for example in cases concerning tax rulings: *see* Sect. 4.5.