

# European Open Source & Free Software Law Event 2010 Torino

## **TENDERING LEGISLATION ASPECTS OF OSS**

by

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# Introduction

- Reinout Rinzema (1959)
- Lawyer since 1983 and ICT law as of 1987;
- Partner Stibbe ( - september 2010)
- Lawyer for the Dutch government in numerous ICT projects;
- Arbitor SGOA: 'Foundation for the Settlement of Automation Disputes' and NAI: Dutch Arbitration Institute'
- Reporting justice Court of Appeal Arnhem

# Why is this a question (I)?

- DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;
- Main rule: ‘government must organise a European tender when awarding a public contract’;
- 2. (a) *‘Public contracts’ are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.*

# “The Netherlands in Open Connection”

- An action plan for the use of Open Standards and Open Source Software in the public and semi-public sector;
- The Dutch Lower Chamber considers the use of open standards and open source software by the government and the public and semipublic sectors to be important.
- In its view interoperability is crucial for achieving certain social Goals ( i.e. better accessibility and exchangeability of information.)
- For this reason the Lower Chamber has asked the Cabinet to prepare a plan for this.
- The Balkenende Cabinet is fulfilling the wishes of the Lower Chamber with this action plan.

# “The Netherlands in Open Connection”

the Cabinet encourages the application of open standards in the implementation and renewal of ICT systems for government applications, to increase freedom of choice in the use of software, particularly by considering open source software as a valid alternative during sourcing

➤ Cabinet Rutte 2010: ??

# “The Netherlands in Open Connection”

- Action plan applicable to the national government, subsidiary government bodies and the public and semi-public sector
- Objectives:
  - 1. increase in interoperability between and with the different building blocks and forms of service provision of eGovernment by accelerating the use of open standards;
  - 2. reduction in dependence on suppliers in the use of ICT through faster introduction of open standards and open source software;
  - 3. promotion of a level playing field in the software market and promotion of innovation and the economy by forceful stimulation of the use of open source software and by giving preference in contracts to open source software if equally suitable.

# “The Netherlands in Open Connection”

- The key focus with regard to open standards is:

*use open standards, or come up with a very good reason why this is not possible, and indicate when open standards will indeed be implemented.*

- Principle of “comply or explain, and commit”.

# “The Netherlands in Open Connection”

- By using more open source software itself, the Dutch government can stimulate activity in the field of open source software.
- To make this possible, steps must be taken to replace the current dependence on closed solutions with freedom of choice.
- The development of a strategy is a sound basis for encouraging the inclusion of open source software as a serious, permanent alternative to other forms of software.

# “The Netherlands in Open Connection”

- Instigating planning two years before current licences expire.
- Developing architectures based on NORA and migration paths: if desired and relevant distinguishing between migration processes for the desktop, back office, databases, operating systems, etc.
- Selecting open standards to minimise dependence on specific suppliers.
- Choosing open source software in the case of equal suitability.
- Requesting expertise from programme office.
- Implementing the strategy, firstly in renewal processes, secondly in other processes.

# Dutch Court of Audit

- investigation re possibilities to make savings by reducing closed standards and introduction of open source within the Dutch government;
- Report expected in the spring of 2011;

# Why is this a question (II)?

- Can contracting authorities simply download open source software?
- Can they favour open source software in tender proceedings?
- Can contracting authorities set different conditions for providers of open source software?
- Can they simply buy ancillary services, such as implementing services or maintenance services?

# **DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004**

- on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
- The award of contracts concluded [...] by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency

# Basic notions

- Article 1.2.a: Public contracts': contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.
- (consideration 29) Technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions.
- Article 2: Principles of awarding contracts. Contracting authorities shall treat economic operators equally and non-discriminatory and shall act in a transparent way.

# Question: can contracting authorities choose for Open Source Software without conducting Public Tenders?

- Article 2: Principles of awarding contracts. Contracting authorities shall treat economic operators equally and non-discriminatory and shall act in a transparent way.
- BUT: does this influence the scope of public tender, i.e. does this mean that a contracting authority is limited in its possibilities to define the scope of a tender?

# Main question

- What is in fact the extent of the procedures for the award of contracts?
  - Is their main goal to protect the aims of the European Treaty (i.e. non-discrimination) and to provide for administrative procedures or
  - Do they also have *material* impact (i.e. the obligation to draw up the technical specifications in terms of functional performance and requirements)?

# Recap technical specifications

- technical specifications need to be open;
- obvious when tendering an ordinary agreement
- also obvious when purchasing under a framework agreement?
  - With one supplier?
  - With three or more suppliers?

# Can authorities favour open source software?

➤ **CoJ EG, 29 April 2004, C-496/99, Succhi di Frutta:**

110 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.

111 The principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

# Oracle vs Dutch State

- Three Ministries;
- ERP software tendered in 2002; SAP winner
- Extension in 2010
- EU tender: SAP consultants and additional SAP licences;
- Oracle: tender illicit! Illegal expansion SAP contract, wrong functional specifications;
- Summary proceedings 2 December 2010

# Europaiki Dynamiki/European Commission “Cordis”, Court of First Instance, 12 March 2008, T-345/03

- call for tenders development and provision of the new version of services in support of the Community Research and Development Information Service (CORDIS);
- As of 1998, all support services for CORDIS supplied by a single contractor;
- During tender, the Commission acquired a software product known as ‘Autonomy’;
- ‘the principle of equal treatment requires that the potential advantages that may be enjoyed by the existing contractor or the tenderer connected to that party by virtue of a subcontract must be neutralised **only to the extent that it is not necessary for such advantages to be maintained, that is to say, where it is easy to effect such neutralisation, where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer**’

# AKD Prinsen en van Wijmen

## advice 24 february 2009

- the objective of the Directive is not to establish or influence the content of a Public Tender;
- restriction is safeguarding the principles of the European Treaty;
- once framework agreements are tendered public authorities are free to choose products with certain trademarks (?!).
- Maybe this is not the case of framework agreements exist with multiple vendors.

# Favouritism - exceptions

recital 1: This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2

# Does Open Source need to be tendered?

(<http://www.osor.eu>)

IT: Ministry withdraws tender, omitted Open Source alternatives

- The Italian ministry of Work and Social Politics scrapped a 4,5 million euro tender aimed at only authorised large account Microsoft resellers. by admin — last modified May 28, 2008 09:35 AM

HU: Government withdraws tender requesting proprietary software

- The Hungarian Central Board for Services, the country's public procurement authority, this Tuesday withdrew a tender requesting Microsoft and Novell software,

HU: 'Price of open source to be negotiated after procurement decision'

- The Hungarian government says it will negotiate the price of the open source software it is acquiring with the open source IT service provider that wins a ...

# How to favour Open Source?

- exclude closed source software as a principle? No!
- award criteria? To some extent;
- Dutch Ministry of Foreign Affairs: ‘provide open and close source’
- Dont’s: IP criteria (transfer of IP), contract criteria (contrary to standard license criteria Open Source), selection criteria
- minimum criteria? Yes if criteria comply with principles Directive, i.e. objective, proportional, etc

Examples? Provide:

- Documentation?
- Maintenance;
- Source Code?

# Does open source need to be tendered?

➤ **CoJ EG, 18 januari 2007, C-220/05, Jean Auroux and others**  
(CoJ EU, 25 March 2010, C-451/08 Helmut Müller)

1. An agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of (..), regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.
2. **In order to determine the value of a contract (..) account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.**
3. A contracting authority is not exempt from using the procedures for the award of (..) on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

**CoJ EU 6 May 2010 Club Hotel Loutraki AE C 179/2**

**It follows from the case-law of the Court that, in the case of a mixed contract, the different aspects of which are, in accordance with the contract notice, inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract**

# Does Open Source need to be tendered?

- If contracting authorities download open source software and tender ancillary services: general opinion (in principle);
- (some contestors!)
- If open source software is not free (and value exceeds threshold): yes
- If contracting authorities place open tender (with functional requirements): yes

# HIPPO Dutch Ministry General Affairs

- Hippo 7 = contentmanagement system;
- 2009: project Ministry General Affairs;
- No EU Tender, project started off with downloading Hippo 7;
- Hippo Dutch company (relevant?)
- ICT~Office (Dutch Branch Organisation IT Industry) made complaints;
- Unfair competition
- No procedures, project in March 2010 live.

# Purchase terms

- Governmental purchase terms often hinder open source suppliers or bids;
- Purchasors often ‘cut and paste’ former tender documents;
- ‘Never been fired for bying IBM’;
- Dutch Governmental Purchase terms ‘Arbit’ hinder open source?
  - Some say: yes
  - No, depends on tender documents;
  - Addendum to be developed