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Sommaire

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The Execution of Public Contracts and Third-Party Interests in the Netherlands

Summary

To what extent should the courts consider third-party interests when adjudicating disputes relating to the execution of public contracts awarded following a competitive tendering procedure? In the Netherlands this question is a hot topic.

This contribution starts with a general overview of Dutch public contract law, in which we examine to what extent the Dutch courts, when settling disputes in the context of different types of public contracts, should consider any third-party interests tied up with these contracts. After this overview we analyse how Dutch courts currently deal with third-party interests in the specific context of disputes concerning the execution of public contracts awarded following a competitive tendering procedure. The case law available shows that the disputes in this context mainly relate to the interpretation of contracts, the implication of terms, unfair terms, change of circumstances, and the exercise of remedies in cases of non-performance of contracts. What courts apparently wish to avoid in this context when settling disputes is applying rules of contract law in such a way that the content of the contract becomes substantially different from that during the tendering procedure. Whether this approach is correct is open to debate, as public procurement law does not in principle make it impossible for a court to intervene in a contract.

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Introduction

For the past few years, we have greatly enjoyed collaborating with Etienne Poltier on various projects in the Public Contracts in Legal Globalization network. One of those projects led to the book *Oversight and Challenges of Public Contracts*,[1] to which Poltier contributed an excellent article on legal protection in the context of public contracts under Swiss law.[2] One of the topics he discusses there is the settlement of disputes arising during the execution stage of a public contract. Under Swiss law – just as under Dutch law – such disputes are settled by the civil courts based on civil procedure and contract law.

In his article POLTIER notes that Swiss courts do this without reference to the fact that the issue is the execution of a public contract and that the contract has been awarded following a competitive tendering procedure, hence third-party interests could therefore also be involved in the dispute settlement. Consider, in particular, the interests of the company that was the second best tenderer on the award of the contract. From the point of view of the dispute relating to the execution of the contract that has arisen between the public body and the winning tenderer, the second tenderer is regarded as a third party, i.e. not a party to the contract. If that third party considers that its interests in the competitive

1 L. FOLLIOT-LALLIOT / S. TORRICELLI (eds.), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts*, Brussels: Bruylant 2018.

2 Etienne POLTIER, 'Le règlement des litiges liés aux contrats publics', in: Folliot-Lalliot/Torricelli (eds.), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts*, Brussels: Bruylant 2018, pp. 357-380.

tendering of the public contract are being harmed as a result of the dispute between the public body and the winning tenderer relating to the execution of the contract, it cannot turn to the civil courts.[3] Our understanding of Swiss law is that in such cases the third party must turn to an administrative court to protect its interests, as it is the administrative courts that deal with breaches of the public-law obligations of public bodies in the context of public procurement.

This is no different in principle under Dutch law, with the proviso that the third party will have to turn to a civil rather than an administrative court to address any breach of public procurement law by a public body, as it is the civil courts in the Netherlands that adjudicate disputes relating to the *award* of public contracts as well as their *execution*.[4] Nevertheless – and here Swiss and Dutch law converge again – a second best tenderer that considers that its interests in the award of the public contract are in some way tied up with the dispute between the public body and the winning tenderer as regards the execution stage cannot raise those interests in the civil procedure that has arisen between the public body and the winning tenderer. Instead, it will need to launch separate proceedings – i.e. in a civil court – to protect its interests. In practice, we see this happening mainly in cases where the second tenderer has become aware that there are problems with the execution of the public contract. Depending on how the public body and the winning tenderer attempt to resolve those execution problems between themselves, the second tenderer could take the view that with the resolution adopted the public body is improperly modifying the public contract and in that respect breaching one of the provisions of Article 72 of Directive 2014/24/EU.[5]

It cannot be taken for granted that a third party would take this route, as it would need to have sufficient knowledge of the actual execution of the public contract and how the parties involved in the contract are dealing with the disputes between them. In many cases, the third party will not have that knowledge. If a dispute of this kind is then brought before a court, the question is whether the court should concern itself with the interests of the third party and regard them as important when settling the dispute. We are

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3 POLTIER 2018, p. 367: 'Dans tous ces cas, le traitement des litiges relève de la compétence du juge civil ordinaire; celui-ci applique sans réserve les règles de la procédure civile ordinaire. Autrement dit, le fait qu'un contrat doive être considéré comme un marché public ne déploie aucune conséquence sur le droit matériel ou procédural applicable. En particulier, le tiers, non partie au contrat, notamment le soumissionnaire évincé, n'a pas légitimité à saisir le juge civil; peu importe que le contrat conclu diverge, dès l'origine ou par la suite, des prestations ayant fait l'objet de l'adjudication.'

4 For more detail on this topic see our contribution to the aforementioned project of the Public Contracts in Legal Globalization network: Frank VAN OMMEREN / Pim HUISMAN / Chris JANSEN, 'Judicial and extra-judicial protection regarding public contracts in the Netherlands', in: Folliot-Lalliot/Torricelli (eds.), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts*, Brussels: Bruylant 2018, pp. 173-197.

5 Implemented in Article 2.163a ff. of the Public Procurement Act *(Aanbestedingswet)* 2012.

seeing this question taking on increasing relevance in Dutch practice in the execution of public contracts. Our aim in this article is to show how Dutch courts deal with this question when adjudicating contractual disputes arising in the context of the execution of public contracts that have been awarded following a competitive tendering procedure. We analyse the case law in § II. The analysis is preceded in § I by a general discussion of Dutch public contract law, in which we examine to what extent the Dutch courts, when settling disputes in the context of public contracts in general, should consider any third-party interests tied up with the particular contract. We conclude the article with some conclusions (§ Conclusion).

I. Public contracts in general, settlement of disputes and third-party interests

A. Types of public contracts

In order to give a satisfactory answer to the question of the extent to which courts should take third-party interests into consideration when settling a contractual dispute, we first need to distinguish between the various types of public contracts found in the Netherlands.[6]

We define 'public contract' as a contract in which at least one of the parties is a public body. Within public contracts we identify four types:[7]

- Public contracts of a private nature (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.

In principle, a public body can enter into any contract that can be concluded by private parties. We refer to such cases as a *public contract of a private nature* or a *private gov-*

6 Most of this section has been taken from VAN OMMEREN/HUISMAN/JANSEN 2018, pp. 177-179 and p. 186.

7 For further reading on public contracts in the Netherlands see P.J. HUISMAN / F.J. VAN OMMEREN, *Hoofdstukken van privaatrechtelijk overheidshandelen. Publiekrechtelijke en privaatrechtelijke rechtspersonen op de grens van publiek- en privaatrecht*, Deventer: Wolters Kluwer 2019, pp. 577 ff.

ernment contract: for example, the sale of goods (both procurement and sale by a public body), rentals, supply of services. Entering into public contracts of a private nature is regarded as one of the tools that public bodies have to enable them to function.

A *public power contract* is a contract under which a public body agrees how it will use one of its public powers in the future. There is scope for the public body to enter into a contract under that public power only if it allows the public body some discretion. Characteristic of this type of public contract is that it is concluded *before* the public power is actually exercised. Execution consists in the public body performing a unilateral public-law act. This will often be a decision within the meaning of Article 1:3 (1) of the General Administrative Law Act (*Algemene wet bestuursrecht*, hereafter referred to as 'GALA'). Public power contracts can be entered into, for example, relating to the granting of a subsidy or permit, the passing of a local plan or the imposition of a tax.

It is not uncommon in the Dutch legal literature for the concept of 'public power contract' to be interpreted broadly, in which case *implementation contracts* are also deemed to be public power contracts.[8] Although a public power contract and an implementation contract are both related in some way to a decision within the meaning of Article 1:3 GALA, we regard them as two different types of contract, as the way in which they are related to the decision differs.[9] A public power contract relates to the exercise of a public power in the future: as far as the public body is concerned its execution consists in taking a decision – for example, to renew a permit or grant a subsidy – in accordance with the agreement between the parties. The contract is concluded *before* this decision is taken. In the case of an implementation contract the relationship between the contract and the decision is different: *after* a decision – for example, to grant a permit or subsidy – has been taken, a contract can be concluded relating to the execution of that decision. Unlike a public power contract, this contract does not relate to the exercise of a public power in the future: for example, it could require the non-government party to act in accordance with conditions attached to the permit or the decision to grant the subsidy. A contract concluded to implement the decision to grant a subsidy is an example of an implementation contract.[10] The contract could require the recipient of the subsidy to carry out the activities for which the subsidy has been granted.[11]

A quick glance at legal systems outside the Netherlands in fact shows that the public power contract is not a familiar concept there. The existence of the public power contract as a legal concept is simply not recognized, or there is substantial doubt that entering into

8 M.W. SCHELTEMA / M. SCHELTEMA, *Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht,* 3rd edn., Deventer: Kluwer 2013, p. 209.

9 Cf. HUISMAN/VAN OMMEREN 2019, pp. 583-584.

10 See Article 4:36 (1) GALA.

11 See Article 4:36 (2) GALA.

a contract relating to the exercise of a public power in the future is possible in law (other than in the specific cases in which the law expressly permits this).[12] A concept more familiar in other countries, however, is a process that begins under public law and ends with a contract, i.e. with an implementation contract. This is presumably because the conclusion stage of many implementation contracts falls under the regime of public procurement law, which is generally a more familiar system.

The last type is *mixed contracts*. A mixed contract is a public contract that lays down stipulations of the kind found both in a public contract of a private nature and in a public power contract. An example is a contract under which a municipal authority agrees to exchange land and at the same time to support a change in the use of that land. The subject of the contract is partly the ownership of the land (it is a public contract of a private nature) and partly the public power to revise the local plan (it is a public power contract). We shall not return to the subject of mixed contracts explicitly; it goes without saying that the ensuing discussion also applies to stipulations in mixed contracts as found in either a public contract of a private nature or a public power contract.

B. The conclusion of public contracts and third parties: public procurement law

Dutch private law lays down standards for the conclusion of public contracts of a private nature and implementation contracts such that there is also a requirement to involve third parties in the conclusion of a contract in certain cases. Public contracts awarded following a competitive tendering procedure are governed by public procurement law, in particular, the Public Procurement Act *(Aanbestedingswet)* 2012. The principle in the Netherlands, unlike in other countries, is that disputes relating to the award of a public contract are brought before the civil courts. If the public body is under a statutory duty to apply a competitive tendering procedure when awarding a public contract, third-party interests enjoy special protection at the conclusion stage of the contract on that basis. It goes without saying that these are a particular type of third-party stakeholders, namely third parties who are in principle competitors. A hot topic in the Netherlands is whether the civil courts should take the interests of these third parties into consideration in the context of a dispute relating to the execution of the contract. This question is discussed separately in more detail in §3.

12 See the national reports in: R. NOGUELLOU / U. STELKENS (eds.), *Droit comparé des Contrats Publics/Comparative Law on Public Contracts,* Brussels: Bruylant 2010.

C. The execution of public contracts and third parties

1. Public contracts of a private nature

Disputes relating to the execution of public contracts of a private nature are brought before the civil courts. The open standards under private law, such as reasonableness and fairness, enable the civil courts to take the interests of third parties affected by the contract into consideration when settling disputes. The civil courts also check whether public contracts of a private nature are compatible with general principles of proper administration (see Article 3:14 of the Civil Code *["Burgerlijk Wetboek"]*), and they can thus consider third-party interests.

An example is the case of *'De negende van OMA'*.[13] At issue here was whether the Municipality of Vlaardingen was required to execute a contract under which it would install an artwork or whether it was permitted not to do so in the interests of local residents. Considering third-party interests could be regarded as incompatible with the nature of contract law, as the interests of third parties (who are not party to the contract) does not in principle play a role in the execution of a contract. This differs from the public-law principle that a public body must take relevant interests of third parties into consideration and always consider those interests in its decisions – which is not to say, however, that third-party interests are always decisive (the substantive principle of due care: see Article 3:4 GALA). The grounds for the judgment in this case do not explicitly refer to general principles of proper administration in general or the substantive principle of due care in particular, but the interests of the third parties were considered to be substantial enough for the municipality not to be required to execute the contract. The Supreme Court based its considerations entirely on requirements of reasonableness and fairness, taking the third-party interests into account.

2. Implementation contracts

An implementation contract follows on from the exercise of a public power. Although action can be taken in an administrative court against the exercise of a public power in the form of a decision within the meaning of Article 1:3 GALA, anyone wishing to have a dispute relating to the execution of the implementation contract settled must turn to the civil courts. The position of third-party stakeholders is affected by the fact that an implementation contract is (by definition) preceded by the exercise of a public power. This

13 HR 20 May 1994, ECLI:NL:HR:1994:ZC1366 ('De negende van OMA'). (HR is the abbreviation for *Hoge Raad* (Supreme Court).) There was recently a similar case at the Court of Appeal *(Gerechtshof)* in Amsterdam: Gerechtshof Amsterdam 30 January 2018, ECLI:NL:GHAMS:2018:238 (the 'Westland Wells' artwork).

can be seen, for example, in the case of a subsidy contract, where it cannot be ruled out that a third party will contest the decision to grant the subsidy in an administrative court, and if the action is successful it may not be possible to execute the implementation contract.

3. Public power contracts

Unlike in the case of the public contracts of a private nature and implementation contracts discussed above, the execution of public power contracts usually consists in taking a decision within the meaning of Article 1:3 (1) GALA, for example, passing the promised local plan or granting the promised permit. In these cases, the decision to execute the contract is one that can be appealed in an administrative court. The fact that the execution of the contract consists in taking a public-law decision, to which public-law standards apply, is reflected in the role played by third-party interests in the way administrative courts deal with disputes relating to execution. The interests of third parties (non-contracting parties) can be a key factor in these decisions. Third-party stakeholders (interested parties within the meaning of Article 1:2 GALA) in a decision are entitled to object to the decision, their interests must be taken into consideration and they can appeal the decision in an administrative court. Not taking account of these interests in a decision, or disregarding them, can result in the decision to execute the contract being quashed by the administrative court. *Legally*, the position of a third party is no different in relation to a decision to execute a public power contract than in relation to a decision where no public power contract has been concluded: if the third party is in a strong position in relation to a decision, that will remain the case. On the other hand, the third party's *actual* position may be substantially weakened, as the contracting parties, to the exclusion of the third party, have an agreement (a commitment!) that may make it more difficult for the third party to turn the situation around through its statutorily guaranteed position at the decision-making stage. There is in principle no statutory requirement to involve particular third parties at the conclusion stage of the contract and to inform them once the contract has been concluded.

The administrative courts do not decide whether the contract is valid; proceedings on this subject can be instituted in a civil court. Although – on paper – the position of third parties in decision-making may be weakened, under the current law it does not seem to be the case that third-party objections can result in a public power contract being declared void or quashed in a civil court.

II. Settlement of disputes regarding the execution of public contracts concluded following competitive tendering procedures and third-party interests

A. Introductory remarks[14]

How do Dutch courts deal with third-party interests when adjudicating contractual disputes relating to the execution of public contracts awarded following a competitive tendering procedure?

As we saw above, this relates to public contracts of a private nature and implementation contracts.[15] Disputes relating to the *execution* of such contracts – like disputes relating to competitive tendering – are brought before the civil courts in the Netherlands.[16] When judging disputes concerning the execution of these contracts the civil courts will not treat these disputes any differently from those relating to contracts of a private nature that are concluded between private parties in general. The parties to the public contract have the same contractual obligations and can seek 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 resolve these disputes. 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 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 its contractual obligations towards 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.

The peculiarities of a public contract concluded following a competitive tendering procedure are obvious, as third-party interests are expressly involved in the conclusion of the contract, namely those of the competitors of the tenderer to which the contract is ultimately awarded. During the tendering procedure, moreover, those interests enjoy extensive protection under public procurement law, namely the Dutch Public Procurement Act 2012, which implements the European Directives on public procurement.[17]

In the ensuing discussion, we shall show how Dutch courts currently deal with these peculiarities when applying the provisions of the Civil Code in the adjudication of con-

14 Part of this section is taken from VAN OMMEREN/HUISMAN/JANSEN 2018, p. 188.
15 See § I/B.
16 See § Introduction.
17 See in particular Directive 2014/24/EU.

tractual disputes relating to the execution of public contracts of this kind. The limited case law available to date shows that these disputes relate mainly to the interpretation of contracts, the implication of terms, unfair terms, change of circumstances, and the exercise of remedies in cases of non-performance of contracts.

B. How Dutch courts deal with disputes at the contract execution stage

1. Interpretation of contracts

A typical dispute that falls under this heading involves the case where a public body awards a public contract to the winning tenderer following a competitive tendering procedure. During the execution stage of the contract, a dispute may arise between the parties regarding the interpretation of an ambiguous term in the contract. In that case, the court will need to interpret that term.

In a normal situation, when interpreting an ambiguous term in a contract a court will need to consider not only the linguistic meaning of the term but also the meaning that both contracting parties might reasonably assign to it under the circumstances and what they could reasonably expect from each other in that respect.[18] The result of applying this yardstick, however, is that the interpretation also takes the subjective intentions of the contracting parties into consideration. This can in turn, lead to a result different from that of basing the interpretation of the term on the objective meaning that all reasonably well informed and reasonably diligent tenderers would have assigned to it during the tendering procedure.[19] At stake, then, are third-party interests that are protected by public procurement law. The Dutch courts are now aware of this and therefore, when interpreting public contracts concluded following a competitive tendering procedure, apply a more objective yardstick, disregarding the subjective intentions of the parties.[20]

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18 This rule of interpretation stems from the Dutch landmark case HR 13 March 1981, ECLI:NL:HR:1981:AG4158 *(Haviltex)*.

19 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.

20 See e.g. Gerechtshof Arnhem 15 June 2010, ECLI:NL:GHARN:2010:BM8411; Gerechtshof Amsterdam 19 March 2013, ECLI:NL:GHAMS:2013:BZ6956; Gerechtshof Arnhem-Leeuwarden 31 July 2018, ECLI:NL:GHARL:2018:7154. See on this topic also C.E.C. JANSEN, 'Uitleg van overeenkomsten die na een aanbestedingsprocedure tot stand zijn gekomen', *TBR* 2011/41, pp. 200-211.

2. Implication of terms

Another type of dispute that has been dealt with by the courts involves the case where the parties have differing views on whether a particular duty is incumbent on one of them. The problem is that the contract does not explicitly provide for a term imposing such a duty on the relevant party. The dispute then focuses on the question of whether such a term is implied in the contract.

In such cases, the dispute can be brought before a court to ascertain whether the court envisages some way of adding to the contract based on law, usage (common practice) or standards of reasonableness and fairness.[21] A number of judgments show that Dutch courts are reluctant to fill gaps in public contracts that have been concluded following a competitive tendering procedure. This reluctance would seem to be motivated by the fact that these courts consider that any such addition would substantially modify the contract, which would adversely affect the interests of the other tenderers.[22]

3. Unfair terms

A common feature of public contracts concluded following a competitive tendering procedure is that the terms of the contract are specified by the public body. During the execution stage, the winning tenderer may be confronted with a term that – in the opinion of the tenderer – is unfair. The dispute will then focus on the question of whether the public body is allowed to invoke such a term.

In disputes such as these, the winning tenderer could ask the court to stop the public body from invoking the term of the contract, insofar as the application of that term would be unacceptable under standards of reasonableness and fairness, given the circumstances of the case.[23] Again, however, Dutch courts are reluctant to provide relief to the winning tenderer for the same reason that they are reluctant to fill a gap in the contract.[24] Judicial intervention in the contract, they believe, could amount to an unacceptable substantial modification of the contract,[25] which, given the interests of the other tenderers, would require a new competitive tendering procedure.

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21 See Article 6:248(1) CC.

22 See for example District Court *(Rechtbank)* Gelderland 17 December 2014, ECLI:NL:RBGEL:2014:8171 at 4.8; Rechtbank Overijssel 8 December 2015, ECLI:NL:RBOVE:2015:5364 at 4.8; Gerechtshof Arnhem-Leeuwarden 10 July 2017, ECLI:NL:GHARL:2017:5925 at 4.28.

23 See Article 6:248(2) CC.

24 See § 3.2.2.

25 See for example Gerechtshof Arnhem 28 September 2010, ECLI:NL:GHARN:2010:BN8784, at 9; Rechtbank Gelderland 17 December 2014, ECLI:NL:RBGEL:2014:8171 at 4.45; Rechtbank Rotter-

4. Change of circumstances

It occasionally happens that an exceptional change of circumstances occurs at the execution stage of a public contract. In such cases, the winning tenderer may argue that the performance of one or more duties incumbent on it has become onerous. This could then result in a dispute in the event that the public body holds the tenderer to its duty.

In a case of this kind the court, on application by the winning tenderer, could change the legal effects of the contract or dissolve the contract in whole or in part if there are unforeseen circumstances of such a nature that the public body, according to standards of reasonableness and fairness, cannot expect the contract to continue unchanged.[26] In this case too, however, courts have ruled that the principles and rules of public procurement law prevent the use of this statutory remedy, as it would result in an unacceptable substantial modification of the contract.[27] Here again, we see how third-party interests are taken into consideration when settling a dispute between the public body and the winning tenderer.

5. Remedies in the case of non-performance of contracts

The winning tenderer is obviously bound to perform its contractual duties in accordance with the terms of the public contract. There may be cases, however, where the public body is of the opinion that the tenderer is acting in breach of the contract. A dispute may then arise if the public body tries to invoke a remedy.

The civil courts have ruled that the power of the public body to exercise the remedy is limited by the provisions that it has itself laid down in the contract. If the contract stipulates, for example, that the winning tenderer is required to pay a penalty in the event of late performance, the public body will have to claim that penalty if this actually occurs; if it does not do so, it is alleviating the risk to the winning tenderer, and another tenderer could take the view that the public body is thus substantially modifying the contract, which will, therefore, need to be put out to competitive tender again.[28]

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dam 7 February 2018, ECLI:NL:RBROT:2018:833 at 4.15-4.19; Gerechtshof Arnhem-Leeuwarden 10 July 2018, ECLI:NL:GHARL:2018:6335 at 5.13. See also the advice of Advocate-General Keus at 2.12 for HR 6 April 2012, ECLI:NL:HR:2012:BV6696. See on this topic also S. MUTLUER, 'Onevenwichtige contractvoorwaarden bij overheidsaanbestedingen en het beroep op artikel 6:248 lid 2 BW', *Contracteren* 2010, pp. 89-98.

26 See Article 6:258(1) CC.

27 See for example Gerechtshof Arnhem-Leeuwarden 11 July 2017, ECLI:NL:GHARL:2017:5925 at 4.31; Rechtbank Rotterdam 7 February 2018, ECLI:NL:RBROT:2018:833 at 4.23-4.26.

28 See Rechtbank Den Haag 16 June 2015, ECLI:NL:RBDHA:2015:7043 at 4.6, where the court in fact concluded that the contract did not place the risk of late performance on the winning tenderer in all circumstances.

The latter will also be the case if the winning tenderer delivers performance that is inferior to the contractually agreed performance and the public body – instead of availing itself of the remedies provided under the contract – agrees to the underperformance.[29]

If the public body avails itself of the statutory option of rescission of the contract, the other party can normally enter the defence that the breach of contract does not warrant rescission.[30] A question as yet unanswered in the case law is to what extent there is still scope for that defence in a case where the contract was concluded following a competitive tendering procedure.[31]

Conclusions

Disputes relating to the execution of public contracts are usually the province of the civil courts in the Netherlands. When settling a dispute on the execution of a *public contract of a private nature* third-party interests may play a role in the considerations of a civil court not only in view of the open standards that abound in private law (reasonableness and fairness) but also in view of general principles of proper administration (the substantive principle of due care).

Two types of public contracts in the Netherlands are closely related to taking decisions within the meaning of Article 1:3 GALA. Disputes relating to the execution of an *implementation contract* are in principle the realm of the civil courts. The position of third-party stakeholders is determined by the fact that an implementation contract is preceded by the exercise of a public power. If an administrative court quashes the decision preceding the contract at the instigation of a third party, it may be impossible to execute the contract as a result. Third parties are protected in the execution of a *public power contract* by the administrative courts, which assess, based on public-law standards, whether

29 See a number of successive cases relating to the same public contract in which the winning tenderer was unable to supply road salt that met the agreed quality standard: Rechtbank Den Haag 21 December 2017, ECLI:NL:RBDHA:2017:15465; Rechtbank Den Haag 25 April 2018, ECLI:NL:RBDHA:2018:4940; Rechtbank Den Haag 4 January 2019, ECLI:NL:RBDHA:2019:54.

30 Article 6:265(1) CC: 'Every failure of a party in the performance of one of its obligations gives the other party the right to set the contract aside in whole or in part, unless the failure does not justify this setting aside and the consequences thereof, given its special nature or minor importance.'

31 Unclear in this context is Rechtbank Den Haag 12 September 2018, ECLI:NL:RBDHA:2018:10933 at 4.6: 'De aanbestedingsrechtelijke context van de opdracht – en het daardoor toepasselijke gelijkheidsbeginsel – maakt immers dat op een rigide wijze moet worden bezien of is voldaan aan de gestelde eisen.' (The public procurement-law context of the contract – and the principle of equality that therefore applies – means that a strict examination must be carried out to see whether the requirements have been met.)

third-party interests have been taken into consideration sufficiently when taking the decision to execute the contract.

This contribution has paid particular attention to the extent to which Dutch courts should consider third-party interests when adjudicating disputes relating to the execution of public contracts awarded following a competitive tendering procedure. Both public contracts of a private nature and implementation contracts can be concluded in this way.

Dutch courts take third-party interests into consideration when adjudicating contractual disputes relating to the execution of public contracts awarded following a competitive tendering procedure. What courts apparently wish to avoid in this context when settling disputes is applying rules of contract law in such a way that the content of the contract becomes substantially different from that during the tendering procedure. Whether this approach is correct is open to debate, as public procurement law does not in principle make it impossible for a *court* to intervene in a contract. Aside from the fact that Article 72 of Directive 2014/24/EU is addressed to the *public body* 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 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.[32]

In this article we have provided an outline of an area that is still developing, based on the limited case law available. The current situation already raises follow-up questions, as the foregoing makes clear. The last word has certainly not been said about the position of third parties in contractual disputes relating to the execution of public contracts awarded following a competitive tendering procedure, and further research is urgently needed.

32 Cf. C.E.C. JANSEN / S. PRENT, 'Aanvulling van overeenkomsten die na een Europese aanbestedingsprocedure tot stand zijn gekomen', *JAAN* 2016/30, p. 151.