

LEGAL UPDATE

New focus on Section 2.82 of Procurement Act

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Recently, there has been a strong focus on Section 2.82 of the Procurement Act, including questions by members of the Dutch House of Representatives which were answered on 26 September. In short, this provision means that a contracting authority may stipulate that tenders can only be submitted by companies where least 30% of the employees are disabled or disadvantaged. Companies that do not comply with this requirement may not submit a tender.

A dissertation study at Utrecht University conducted in collaboration with the consulting firm RadarAdvies shows that municipalities still make too little use of this Section, which means that opportunities for social enterprises are insufficiently utilised. Furthermore, the fact that opportunities have decreased because access to sheltered employment has been closed off (due to the introduction of the Participation Act in 2015, see the report published by the Social and Cultural Planning Board last September) also gives rise to concerns about sheltered workshops. In addition, there was a round table discussion on social enterprises in the House of Representatives on 25 April.

In order to clarify Section 2.82 of the Procurement Act, questions were asked by the House member Bruins (of the CU), which were [answered](#) by the State Secretary for Economic Affairs and Climate Policy, Mona Keijzer, on 26 September 2018. These questions mainly concerned the purpose of Section 2.82 of the Procurement Act and how the 30% criterion may be applied.

In the answer to these questions from the House, it was confirmed that the purpose of Section 2.82 of the Procurement Act is to increase the employment rate of people who are at a distance from the labour market, and that it must be attractive for government authorities to opt for reserved contracts. It was also noted that, "needless to say", Section 2.82 of the Procurement Act does not mean that a contract can be awarded directly to an organisation falling within the scope of this Section. The contract must still be awarded by means of a tendering procedure organised between the organisations admitted to the procedure.

It was also (implicitly) confirmed that tendering with a reserved contract becomes more attractive to government authorities when more companies meet the criteria of Section 2.82 of the Procurement Act, as the contracting authorities then have more companies to choose from and more companies can bid for reserved contracts. The fact that a large share of the created guaranteed jobs are filled by means of so-called 'secondment relationships' (temporary employment relationships and secondments under the Sheltered Employment Act) was also discussed. If they concern long-term employment relationships (not temporary employment relationships), it is permitted to count these secondment relationships towards the 30% criterion.

In fact, these answers to the House questions did not provide any information that could not already be found in the Explanatory Memorandum to this Section. However, evidently there was nonetheless a need for clarification. Perhaps the lack of clarity experienced in practice has to do with the amendment of Section 2.82 of the Procurement Act in 2016. The old version of the Section permitted the contracting authority to reserve the participation in the tendering procedure to sheltered workshops, provided that at least 50% of the employees concerned had a disability which prevented them from working in a job under normal conditions.

In the amended Procurement Act, the reservation for sheltered workshops has been expanded to include programmes for protected employment and companies whose main objective is the social or professional integration of disabled or disadvantaged people. The target group has been expanded from the disabled to those who are 'disadvantaged'. Disabled and disadvantaged people include people who fall under the Jobs Agreement and Occupationally Disabled Persons Quota Act (Wet banenafpraak en quotum arbeidsbeperkten). Lastly, the percentage has been reduced from 50% to 30%.

Section 2.82 of the Procurement Act is therefore an instrument to facilitate scaling up social entrepreneurship, and to enable involving more commercial enterprises in this. The idea is not to make it even easier for contracting authorities to skip the tendering procedure through this Section and to award a contract directly to a social enterprise (which they are familiar with). Although this is the interpretation that is sometimes given to this Section in practice, the minister repeated in response to the House questions that awarding contracts directly is not permitted, as this would eliminate competition.

Regardless of what caused the lack of clarity about the Section, having a discussion about tendering to sheltered workshops in any case reflects the growing focus on social entrepreneurship. The fact that seconded employees may count towards the 30% criterion fits in well with the objective of Prime Minister Rutte to create 125,000 jobs for people who are at a distance from the labour market. Job Cohen, Chairman of Cedris (Association for Social Employment and Occupational Rehabilitation), said that secondments are crucial to achieving this number of jobs and that they also a successful way of helping people with occupational disabilities to get a job in ordinary companies.

It is said that "advertising works through repetition". Bearing in mind the objective of Prime Minister Rutte and the disappointing impact of the Participation Act, as well the increasing popularity of social entrepreneurship, it is a welcome development that the possibilities of Section 2.82 of the Procurement Act are once again highlighted in order to encourage its utilisation.

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