



# **Public Contract through Procurement – Can there still be State Aid**

**By Michael Steinicke**

**The Pros and Cons of Competition in/by the Public Sector  
Stockholm, November 13, 2009**

**Comments by  
Joseph Wilson, Commissioner  
Competition Commission of Pakistan**



# The Article

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- Factual in essence
- Builds on an interesting inter-relation between State aid and procurement rules - that has been taken by others as well.
  - *The Inter relationship between the European State Aid and Public Procurement Rules: When does a government contractor gain an “economic advantage”?* by Dylan M Hughes (June 2009)
- Presents a defensible conclusion



# Procurement Rules and Price

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- Several exercises conducted to isolate the impact of the application of public procurement directives suggest that the application of these rules by authorities effectively reduced the price they paid.
- In one study, it was found that the price paid when the directives were not applied was around 40% higher than when they were applied.



# Main Question

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- Will a price found through a procurement procedure always reflect the market price?
- The paper discussed different procurement procedures and their elements which may effect the price procured



# Public Procurement: Types

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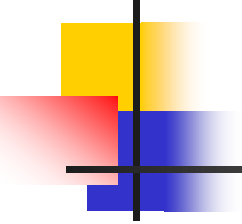
- **Open Procurement:**

Procurement price could be closest to market price

- **Selective/Restricted Procurement:**

Procurement price would probably be more than market price

- **Negotiations**

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- Market Price effected by business to business relations.
  - Market Operator Principle
    - Pre-contractural phases are different



# Price is a function of variables

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- **The explicit 'price' of any good or service is a function not only of the nominal price, but also of the credit terms, applicable discounts, rebates, terms of delivery, and the like.**



# Price is not the only Criterion

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- It is worth noting also that a public authority do not necessarily pursue the “lowest cost”.
- Like private undertaking public authorities consider “qualitative elements” in order to secure the most economically advantageous outcome.





# Buyer/Seller: Different Priorities acknowledged in the paper

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- For a Buyer:
  - **Dependability**
  - **Reliability**
  - **Quality**
  - **Price**
  - **Service level**
- For a Seller:
  - **Price**



# Market Operator Principle: Pure Procurement vs. Market Intervention by State

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*“When the State procures stationery for its public administration it behaves like a normal consumer and does not favour any production: but when it alters the allocation of resources in the market by acting as a public authority, it may favour certain sectors or productions.”*

*Altmark Decision*



# Pre-contractural Phases

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- Minds-set of the parties change when dealing with public authorities
  - At least in some countries – supplier ask of higher price from government
  - Owing to prevalent corruption on the part of public officials



# Higher Price = State Aid

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- If the contract price seems higher than the market price, then it is assumed that there is an advantage in favour of the private contracting party – an advantage equivalent to state aid.
- Not True in some cases



# Unacknowledged Assumptions

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- The procurement process can involve:
  - **Collusive Bidding (form of Cartelization)**
  - **Corruption**
- In such cases, any difference between the market price and price paid by public authority shall not be considered as a State Aid.
- Money swindled from public authority
- Transfer of title
- Antitrust injury – compensatory damages



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**THANK YOU FOR YOUR  
ATTENTION**