

# Best Value Approach in Public Procurement: Improving ‘Best’ through Enhanced Preparation Phase

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The Best Value Approach (BVA) offers an innovative method to get the most out of Supplier-Customer Relationships (SCRs). This paper argues that the preparation phase should be enhanced when applying BVA in the context of public procurement. Literature on SCRs learns how successful relationships are governed bilaterally during execution. This literature also describes which processes are taking place prior to contracting. Here, the concepts of this literature are applied to analyse the specific public procurement context. The impact of this context is, that the tender process is governed unilaterally. Further, BVA - as applied in public procurement - is viewed through the lenses of the SCR literature. Although BVA partly leads to bilateral governance, the impact of the public procurement context remains. For practitioners wanting to improve BVA's effect in public procurement, the paper offers an enhancement of the approach. For theory building, the analysis leads to a further differentiation of the concept of governance. For regulators, it offers something to consider: focus on principles or rules?

**Keywords:** Best Value Approach, Buyer-Seller Relationship, Relationship Governance, Public Procurement.

## Introduction

As a practitioner, the author has experienced that Supplier-Customer Relationships (SCRs) in public procurement not always bring both parties the intended result. This is even more disappointing, as parties went through a meticulous tender process as set by the leading principles of public procurement. The SCR literature discusses the ways parties work together, improve performance and achieve goals for their relationship. The central concept is that of governance, in this paper defined as: the actions parties take to control, influence, or regulate the policy and affairs of a SCR (based on Oxford's dictionary). Literature has reached a consensus, that best performing SCRs attain their results by combining contractual and relational governance (Cao & Lumineau, 2015). Contractual governance is defined as: “the extent to which roles, obligations, responsibilities, contingency adaptation, and legal penalty are specified or well-detailed in formal agreements” (Cao and Lumineau, 2015), and relational governance as: “the extent to which the relationship is governed by trust, flexibility, solidarity, information exchange, fairness, and informal rules and procedures” (Cao and Lumineau, 2015).

Such governance is preceded by pre-contractual mechanisms as described in Social Exchange Theory (SET), Relational Exchange Theory (RET), and Transaction Cost Economics (TCE). Prior to contract signing, parties use the following mechanisms to lay the foundations for relational and contractual governance. Repetitive negotiations consisting of formal bargaining and informal social-psychological processes of sense-making lead to joint expectations of risk and trust (Ring & Van de Ven, 1994); parties gradually develop relational norms (I. R. Macneil, 1980), and trust and commitment (Morgan & Hunt, 1994), together leading to relational

governance (Dwyer, Schurr, & Oh, 1987; Dyer & Singh, 1998; Heide & John, 1992). Contractual governance is developed through “offering safeguards by aligning incentives ...or expanding a trading relation from unilateral to bilateral exchange through the concerted effort of reciprocity, thereby to effect an equilibration of trading hazards” (Williamson, 1985).

From Information Measurement Theory (Kashiwagi & Slater, 2003), the Best Value Approach (BVA) is developed to attain intended SCR results through specific interactions, starting in the pre-contractual phase (Kashiwagi, 2015). The Best Value Approach aims to enhance SCR’s value by splitting responsibilities regarding substance (the goods, services, or works transacted in the SCR) between customer and supplier. Even before contracting, the supplier focuses on developing and delivering the solution for a outcome that the customer has set as its SCR goal. Therefore, parties need to interact to truly understand each other’s goals, processes, needs, organization (Bergema, 2016). This approach has been adapted for application in public procurement in the Netherlands (Rijt, Witteveen, Santema, 2016). BVA has shown its positive effects in ample cases, industries, and geographies (Rijt, Santema, 2012; Rijt, Santema, 2013); both in private as in public procurement.

However, literature does not tell us whether these pre-contractual SCR processes emerge in public procurement as well. Nor do we understand BVA’s success in terms of SET, RET, or TCE. From this scholarly perspective, the author suggests a major oversight in the practice of public procurement. Pre-contractually, the interaction between customer and each of the aspirant suppliers is disabled, invoked by the customer’s dominance in executing a fair, equitable, transparent, and non-discriminatory contract awarding, and by the risk of a supplier using its power to object to customer’s decisions, potentially stopping the tender (hindrance power). This could be a cause for the often-disappointing results during contract execution. Recently, Tulling (2018) analyzed the conflicts during execution of Best Value projects. Partly these can be traced to insufficient understanding between parties, starting in earlier phases. Further, to understand whether BVA can resolve this cause, BVA is analyzed in terms of SET, RET, and TCE. On the substance level BVA does result in pre-contractual interaction. However, on the process level, the cause is not yet remedied by the current version of BVA: it does not change the way parties behave in public procurement. Finally based on this analysis, the author develops an enhancement to the practice of public procurement, which together with applying BVA could resolve the cause. By introducing dialogue even earlier and extending it to the process level, pre-contractual mechanisms are pre-empted. Such dialogue can be compliant to the leading principles of public procurement. And such dialogue enables parties to experience each other as expert in their field. This will improve adherence to Best Value principles in all SCR phases.

### **Research Question & Method**

This conceptual paper is confined to the research question: How can the Best Value Approach further improve the value of SCRs in public procurement? The answer to this question is sought through three steps. First, understanding how SCRs are formed in public procurement, and identifying differences in the processes and initial conditions compared to literature. Second, understanding BVA in the public procurement context in governance terms. Third, designing processes to resolve deficiencies found.

Research on the emergence and development of SCRs within public procurement - which have been established using BVA - has not been identified. Therefore this paper is based on exploratory research, solely based on literature research and analysis. The study takes an organizational and dyadic perspective, with the relationship as unit of analysis, and is limited to new SCRs (no joint past experiences between parties) in the public procurement context. This context is further called the Regulated Tender Environment (RTE). The analysis of the RTE is based on the Dutch regulations (as derived from European directives), combined with the author's experiences as practitioner. For the analysis of the pre-contractual processes and initial conditions, the theoretical lenses of SET, RET and TCE are applied as most SCR studies are based on a combination of these fields (Cao & Lumineau, 2015). BVA in RTE is analyzed using the same theoretical lenses. Based on the insights derived, additional and RTE-compliant process steps are identified, to enable the initial conditions and pre-contractual processes as described in literature for non-RTE context. Each of the research steps is dealt with in a separate section, together leading to a conclusion and discussion.

### **Pre-Contractual SCR Processes Within RTE**

In this section the phases and pre-contractual activities in a SCR within RTE are described. Further, literature on SCR is used to analyse the processes and initial conditions within RTE. Thus, causes are identified, which prevent SCRs in RTE to develop as described in literature. Finally, the analysis leads to a differentiation of the concept of governance not yet found in literature.

#### *RTE Essentials*

The public procurement market is relevant for potential suppliers because of its size: “worth an estimated US\$ 1.7 trillion annually” (World Trade Organization, 2016), for customers to maximize their satisfaction and performance with their SCRs, for public policy makers to pursue their policies, and for scholars to study the RTE effect. The EU directives state in their considerations the leading principles: equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. These are to be upheld by the ‘contracting entity’ (customer organization) towards each and between all suppliers. Further, several requirements and procedural options are given. In total, the regulations c.a. encompasses approx. 500 pages. The Regulated Tender Environment (RTE) and non-RTE differ. Whereas there is just a pre-contractual and an execution phase in non-regulated environments, in RTE the pre-contractual period is strictly split into pre-tender, tender, and contracting phases. During the tender phase, both the RTE principles and the detailed regulations apply. During all other phases of the SCR within RTE, the principles (continue to) apply. See Figure 1.

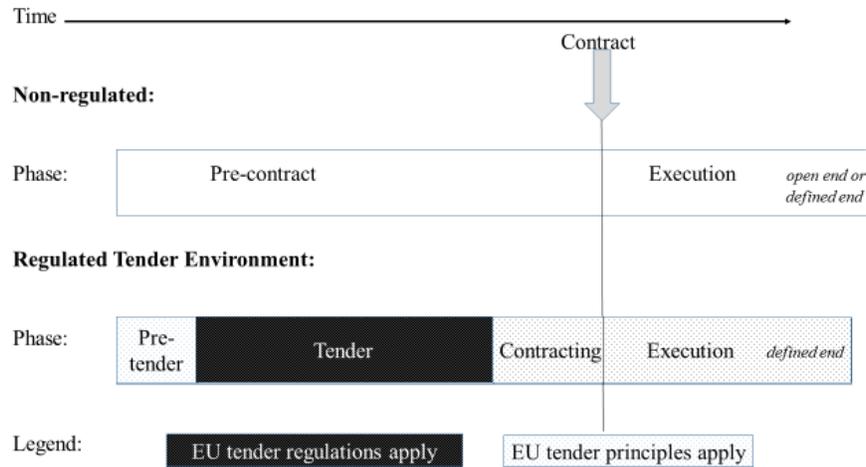


Figure 1: SCR phases in non-regulated and in Regulated Tender Environment (RTE).

Further differences are the either open or defined end (in non-RTE) versus the always defined end of the SCR in RTE, and the activity-split: whereas in non-RTE there is pre-dominantly joint activity (Figure 2), within RTE there is no joint activity.

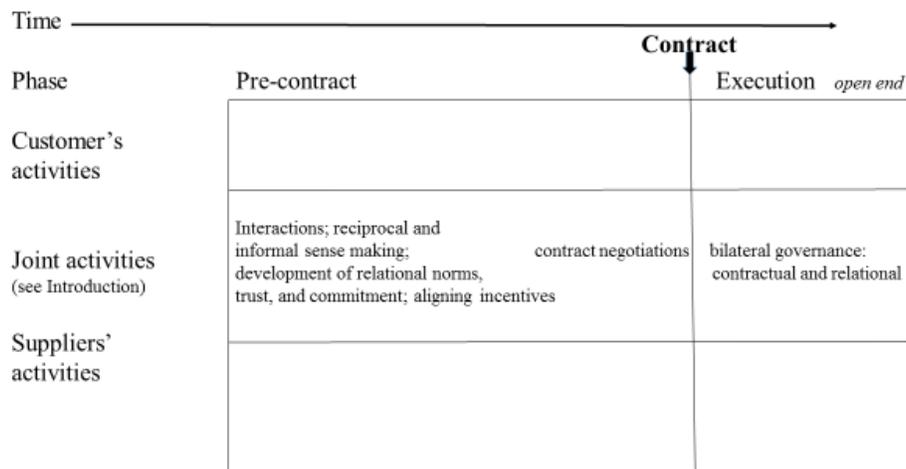


Figure 2: Customer's, suppliers', and joint activities in non-regulated SCRs.

In the RTE, tendering is regulated: communication is formal “all communication and information exchange under this Directive [...] are performed using electronic means of communication” (art.40.1, directive 2014/25/EU), interaction is limited if happening at all (Telgen, Harland, & Knight, 2006), and joint activity seems prohibited. Within these formal requirements and on top of the written communications between parties during the tender, additional contact moments with oral communication may be used, if these are in line with the leading principles of the EU directives. E.g. with each of the parties to the procedure, separately. Further, the tender phase is split in episodes for notification, supplier assessment, solution assessment and awarding (see Figure 3). In some procedures supplier and solution assessment are combined and form one episode.

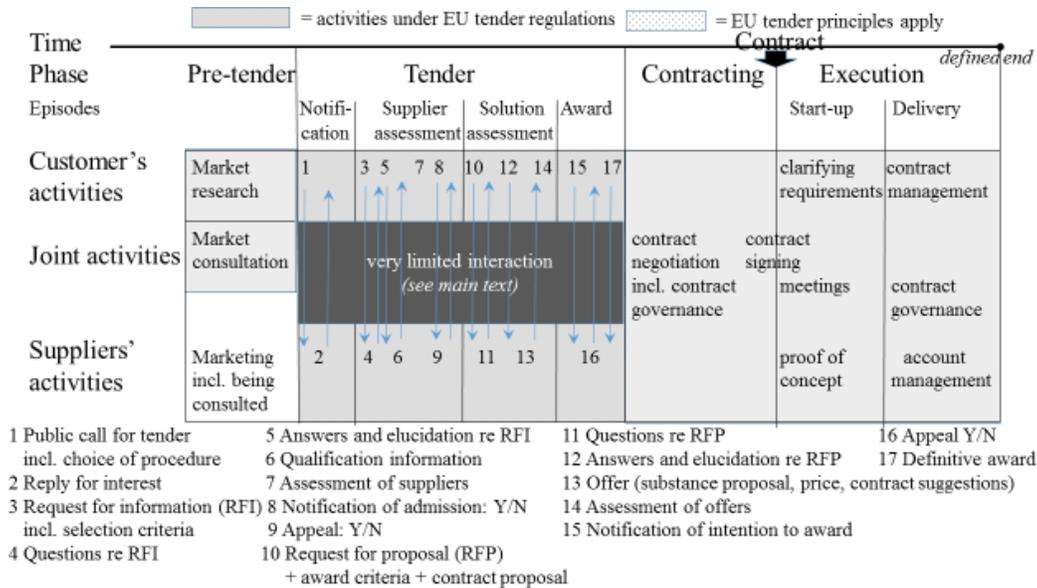


Figure 3: Customer's, suppliers', and joint activities in SCRs within RTE.

Activities 9 and 16 signify that each supplier can decide to appeal the customer's assessment and selection decision. Appeal constitutes a supplier's use of its hindrance power under RTE. Either the appeal is resolved between parties, if not the supplier can call upon the court to rule.

### SCR Governance Within RTE

#### Introduction

Despite the extensive coverage of inter-organizational governance (Cao & Lumineau, 2015; Clauß, 2013), the forming of relationships under public procurement regulations is largely unknown, as is the development of governing these relationships. "The literature reports sparse research on the nature of government buying or how commercial firms can successfully market to the government" (Wang & Bunn, 2004, p. 85). Specifically, literature research shows two knowledge gaps regarding public procurement. First, the key conditions for contractual and relational governance in this environment are not met. Second, customers in the RTE and their representatives do not naturally achieve the necessary conditions for applying the bilateral processes. These customers are monopolies, either as governments or as 'special sector companies'. For the latter a special EU directive is in force because of "the closed nature of the markets in which the entities in those sectors operate, due to the existence of special or exclusive rights granted by the Member States" (consideration 1 of 2014/25/EU, European Council, 2014). In summary, although relationship governance in general is well studied, such is not the case for relationships under public procurement regulations. Therefore, the governance of SCR within RTE is analyzed using various theories.

#### Theory Based Analysis

This section analyses RTE through three theoretical lenses, to establish whether the contractual and relational governance necessary for successful SCRs can develop. The theoretical perspectives (SET, RET, and TCE) each discuss various processes and how these processes result in forms of governance during the execution phase of the SCR. This section's analysis focusses on these processes. First, the SET perspective is used: the attitude and behavior of

parties towards each other is analyzed and translated into their effect on the pre-contractual processes. Then, the RTE effect is analyzed in terms of Relational Exchange Theory (RET). Finally, the TCE perspective is applied. Using the latter theoretical lens, it is argued there is governance in RTE tender phase, which is being analyzed as well.

### *SET Analysis*

Social Exchange Theory views a business transaction as a two-sided, mutually dependent process. In RTE, the contact setting between parties entering into a SCR is formal: the default method of communication is in writing, including reports of personal contacts between representatives of these parties. Further, the contracting entity can be held accountable for their choices and conduct. Such setting does not invite parties – even though such is permitted - to have “informal exchange of information” (Blau, 1964). Any action which could be seen as “furnishing benefits to the others” (Blau, 1964, p.16), is not in line with the leading principles of public procurement. This results for both parties in an abnormal setting: as if normal social interaction and reciprocation are forbidden. This disables the building of relational governance elements like trust, solidarity, and the use of informal rules and procedures, both for representatives from the customer as well as those from the supplier organization.

Moreover, given that in the EU, contracting parties chose the ‘open’ or ‘restricted’ procedure in 83% of the cases, the contacts between parties during the tender are in most cases in writing only, restricted to a public call for tender, submission of tenders, publication of award (see Fig. 3). This comes from the buyer’s point of view close to ‘discreteness’ as described by Macneil (1980): “ignoring the identity of the other parties”. Such indifference on the customer’s part can hardly be working towards relational governance. Because of the leading principles the written supplier’s questions (activities 4 and 11 in Figure 3) are anonymized before being answered by the assessors. So even supplier’s (in)activity in the Q/A cannot be considered in the assessments. From the seller’s point of view there is no opportunity whatsoever to initiate additional contact - let alone interaction - during the tender. Concluding, given the formal setting and default practice by contracting entities during the tender phase in public procurement the social interaction is very limited. Therefor preparatory processes for establishing relational governance cannot/do not take place during the tender phase.

### *RET Analysis*

Relational Exchange Theory views contracts being based on contract and relational norms. The RTE tender situation is now analyzed using the norms Macneil (1980) has developed. Most of these will be dealt with separately, although they should all be seen in their entirety. Only those norms which are obviously already important in the beginning of the SCR are discussed. These are discussed in their basic meaning (as ‘common contract norm’), and - where applicable - in their intensified way as relational norm: “the behavior that does occur in relations, must occur if relations are to continue, and hence ought to occur so long as their continuance is valued” (Macneil, 1980, p. 64).

Contractual solidarity - “the norm of holding exchanges together” (Macneil, 1980, p. 52) - is based on “a complex web of interdependence created by the relation itself” (Macneil, 1980, p.23). The intensified version is: preservation of the relation becomes the norm. Such solidarity can only emerge and develop by creating interdependency, as felt by both parties. During the

tender phase such is not the case, as the dependency is asymmetric: at any time, the contracting entity can abort the procedure without cause and compensation, whereas the suppliers must submit an unconditional and irrevocable offer. Only frequent interaction could lead to safeguards balancing the asymmetry. Given the basic tender modus as described, such is not the case. Mutuality: “this norm calls for a mutual perception of benefit, for some kind of evenness” (p. 44). Macneil concludes without it, the transaction will be stopped. Such mutual perception of benefit cannot come about without proper interaction between parties. Flexibility: “ongoing contractual relations must incorporate principles of flexibility within the relations (...) or it breaks apart under the pressure of change” (p. 50-51). Macneil describes a necessary “constant two-way flow of information, of consultation, advice, admonition, and adjustment in the various terms of the relation” (p. 51). During the tender process described, such is not taking place. Creation and restraint of power: “without shifts in power, (...) without restraint from absolute power the other norms would be rendered inoperative” (p. 56-57). The tender process as described is making use of absolute power.

Therefore, the tender situation as described is not warranting the development of relational norms necessary according to RET for ‘modern contractual relations’. Further to Macneil, it is analyzed whether such tender qualifies as a discrete transaction. Absent the norm of contractual solidarity, the contract resembles a discrete transaction, from the part of the contracting entity: “separating the transaction from all else between parties” (Macneil, 1980, p. 60). Further discreteness requires “ignoring the identity of parties to a transaction, ...strictly limiting the sources of communication, ...planning and consent should occur only through formal, specific communication” (p. 61). It seems that the EU directives and their conversion into Dutch law do exactly that. Macneil concludes that rules of bureaucracies to regulate in detail are “an effort aimed at presentation and discreteness, and everybody knows it will not work” (p. 77). On top of that, the resemblance of discrete transaction is only from the buyer’s perspective. By defining a “discrete transaction where each party is free to go ahead with a deal or not” (p. 26) Macneil makes equivalence between contracting entity and supplier a necessary condition. Such is not the case in a RTE tender. Concluding, according to Relational Exchange Theory the tender procedure in the RTE is deficient in many ways as start for a stable SCR as the necessary relational norms are not being developed.

### *TCE Analysis*

Transaction Cost Economics “assigns transactions ... to governance structures ... in a discriminating way (Williamson, 1985a, p.18) . In non-RTE situations, the pre-contractual process is not specified (Figure 1), therefore - in line with Williamson (1985) – this paper views the process there, as led by market governance. During execution the SCR is subject to contractual governance, ‘unified governance’ being excluded: the transaction is not “removed from the market and organized within one firm, subject to an authority relation (vertical integration)” (Williamson, 1985). Unified governance is by nature all-encompassing and irreversibly unilateral. Within RTE, however, during the tender phase there is clearly a specified process. Following analysis therefore focusses on the type of governance being employed during tender, and its effect for subsequent phases.

TCE argues that under conditions of bounded rationality and opportunism serious (contractual) difficulties arise, and “governance structures ... are evidently needed” (Williamson, 1985a,

p.63). For the tender situation, these conditions apply to both the contracting entity (customer-to-be) and the supplier-to-be: the obligation to tender and the long-term nature of the contract result for both parties in a situation of bounded rationality, as for neither party all potential situations are foreseeable. For each party opportunism by the other is present as well: for the supplier, it is uncertain whether the contracting entity will pursue the tender; for the contracting entity, it is uncertain whether the supplier's offers will be reasonable. TCE further argues that the extent of asset specificity determines which governance should be applied.

In case no transaction specific investments have to be made, TCE argues governance to be "discrete market contracting" (Williamson, 1985a, p.34). On the one hand this could be true from the perspective of the contracting entity: "parties have no continuing interest in the identity of one another" (Williamson, 1985a, p.31) as their interpretation of applying the principles of equal treatment and non-discrimination. On the other hand, however, such cannot be the case: if the customer's need is "for supplies quoted and purchased on a commodity market" no call for tender is required (EU 2014/25, art. 50g). As the contracting entity chooses to publish a call for tender, its need is more specific than can be bought on such a "fully contestable" (Williamson, 1985a, p.31) market (for services such markets are non-existent). From the supplier's perspective there are always transaction specific investments in the form of opportunity cost in submitting a tender. The offer must be unconditional and irrevocable and relates to a large transaction (for which a public tender is prescribed) or a stream of transactions during several years, thus sufficient production capacity has to be reserved for timely delivery; and compliance to other elements of the tender procedure have their cost as well. This is seen as transaction specific investment by the supplier. Thus, for both parties' market governance does not pertain.

Two alternatives remain: either the contracting entity offers safeguards, or it does not. This also applies when additional transaction specific investments are called for in the tender due to the nature of the need. If safeguards would be offered e.g. "to support and signal continuity through reciprocity, [TCE views this as] expanding the relation from unilateral to bilateral exchange" (Williamson, 1985a, p. 34). Given the procedure as described, no safeguards are being offered. According to TCE, normal bilateral governance does not apply during the tender situation under public procurement regulations. Without safeguards suppliers will offer a price higher than would be offered given safeguards. "Such transactions are apt to be unstable contractually" (Williamson, 1985a, p 34). This is not in line with the time and effort the contracting entity has invested so far, and the (mostly) long term nature of the contract on offer.

Finally, given the call for competition which should be fully transparent, it is not the intention of the contracting entity (nor presumably of the suppliers) to enter a relation where transactions are removed from the market and organized within one firm (and the other party dissolves). Therefore, unified governance is not applicable. As no contract is yet agreed upon, contractual governance in the strict sense cannot be present in this phase. Based on TCE market, unified, and normal bilateral governance are excluded options for the tender phase in RTE, no reciprocal safeguards are given. The process during tender resembles unified governance, both the substance and the process are set unilaterally: although both parties remain autonomous, their independency is fully asymmetrical. One party (the contracting entity) is calling the shots; the suppliers being nearly fully dependent in this process. On the scale of full autonomy for both to autonomy for one and none for the other, the tender process is one between these extremes, yet

near the latter end. The autonomous party is clearly the customer-to-be. Yet, the customer's actions to control, influence, or regulate the policy and affairs of the suppliers are regulated. Therefore - using TCE - such governance is best described as 'customer-led regulated unilateral governance'. Whether the unilateral aspect is later, during in the execution phase transitioned into a bilateral one as known in non-RTE situations, is not yet described in literature.

### *Theory Based Findings*

Further to the analysis by theory, RET and TCE each supports the arguments of the other theory and of SET. E.g. Williamson points to the necessity of concerted use of reciprocity in establishing safeguards (Williamson, 1985a, p.34), "good faith and trust are vital ... in the basic substantive workings of contractual relations" (Macneil, 1980, p.68), and "transaction cost economics should often be used in addition to, rather than to the exclusion of alternative approaches" (Williamson, 1985, p.18)

Based on an analysis of the behavior by parties in public procurement during the tender – using SET and RET – the processes which lay the foundations for relational and contractual governance are not in force, and – using TCE – all governance options as offered by literature seem not to be applicable as contact between parties is regulated. In our research we conclude that unilateral governance is likely, and an extraordinary governance for the tender process is used. It is positioned near the hierarchy end, where the customer's organization has near-full autonomy. It is called customer-led regulated unilateral governance.

SCR literature builds upon the cooperative premise of Ring & Van de Ven (1994), where parties actively and reciprocally regard their relational expectations as similar. Based upon the analysis above, such is not the case at the start of a RTE tender. In RTE nor the initial condition, nor the processes are in place which in non-RTE lead to a bilateral contractual and relational governance. Yet, also within RTE parties to a SCR intend to develop a successful relationship. The next section investigates whether BVA can enable this.

## **Best Value Approach Viewed Through the Governance Lens**

This section describes the BVA phases, episodes, and activities as they are performed within RTE. Further, the Best Value Approach is viewed through the governance lens. This leads to a further differentiation of the governance concept.

### *BVA's Essentials per Phase*

BVA offers an approach and method to improve the value of Supplier-Customer Relationships. The result of BVA is measured against the goals set by the customer (Kashiwagi, 2015). As in the Supplier-Customer Relationship literature, BVA distinguishes a number of phases, and divides activities in those for the customer, the (potential) supplier(s), and for both (Rijt, van der J, & Santema, 2013). The BVA phases within RTE are: I Preparation (up to the public call for competition, yet including the explanatory meeting on Best Value), II Assessment (selecting qualified suppliers and best ranked supplier), III Clarification (detailed assessment of best

solution, contracting and definitive awarding of the contract), IV Execution (Rijt, Witteveen, Santema, 2016). See Figure 4.

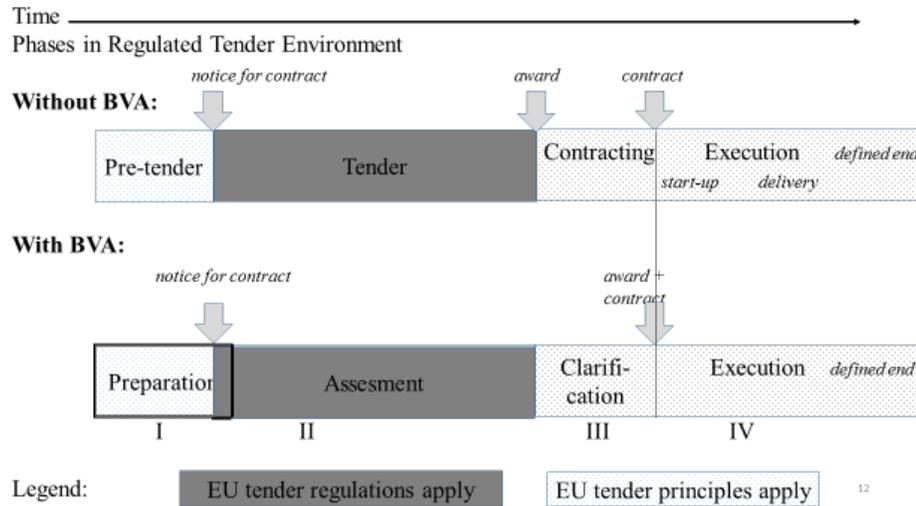


Figure 4: SCR phases in Regulated Tender Environment (RTE) without and with BVA.

An essential difference is that in BVA the award and contracting are after the clarification phase, whereas in non-BVA clarification takes place during start-up, after contracting. For all essential BVA activities per phase, as performed by each party or together, see Figure 5. In the RTE, the BVA Preparation activities of inviting potential suppliers and having an explanatory meeting regarding the aim and procedure of the tender are after the public notice for contract, therefore the Regulations apply.

| Time                  |  | Contract  |  |   |                                     |
|-----------------------|--|---|--|---|-------------------------------------|
|                       |  | I   | II   | III   | IV                                  |
| Phase                 |  | Preparation   | Assessment   | Clarification   | Execution                           |
| Customer's activities |  | 1 Establish goals and procedure<br>2 Invite potential suppliers | 5 Select expert suppliers<br>8 Provisionally award best ranked supplier  | 11 Abstain from decisions, changes in aim, secure conditions for expert to work unencumbered  | 15 as 11.                           |
| Joint activities      |  | 3 Explanatory meeting regarding aim and procedure               | 7 Interview  | 9 Dialogue on solution details and reciprocal expectations and allocation of risks to best suited party<br>12 Meetings/reports<br>13 Agree contract | 16 as 12.                           |
| Suppliers' Activities |  |   | 4 Show expertise through references and metrics<br>6 Offer project capabilities, ranked risks and added values, named experts, priced to win and secure own aims | 10. Detailing solution boundaries, KPI's, risks, info needed, assumptions, weekly report, plan  | 14 Deploy solution, provide metrics |

Numbers refer to sequence of activities

Figure 5: Essential activities of the Best Value Approach per phase.

### BVA in Governance Terms

After the activities, now the governance is analyzed. Governance as employed by the customer, the supplier, or jointly in the BVA phases. The result is shown in Figure 6, each letter of which is explained below. The letters specify different types of governance. The alphabetical order is in

line with the activity sequence (numbers in Figure 5). In BVA, during preparation, the customer is in charge: setting the goals for the SCR (activity 1, Figure 5). Based on the definitions (see Introduction) this is viewed as (part of) ‘contractual governance’, unilaterally performed by the customer. The goal primarily concerns the substance of the SCR: the services rendered, goods, and/or works being delivered. The goal can be specified at three levels. Strategic: what the outcome for the customer’s organization (or even its customers) should be; tactical: how the substance should function for the customer’s organization (functional specification); operational: how the substance is to be produced by the supplier to function in the customer’s processes.

BVA prescribes, substance should solely be specified at the strategic level. This introduces a new phenomenon: ‘strategic contractual governance’ (A in Figure 6). This governance is continued by the customer during all phases (A, C, F1, and K1 in Figure 6). F1 and F2, K1 and K2 signify the bilateral nature of the contractual governance. Relational governance is by nature bilateral. At the same time, in BVA the customer is setting the procedure for the assessment phase: e.g. choosing BVA and setting the minimum requirements for selection, awarding criteria, and their weights (B, Figure 6). This activity is not related to the substance of the SCR, only to the process of forming the relationship. Like this phenomenon in RTE, it is performed unilaterally, and is called process governance; but is not regulated (unless the SCR is tender within the RTE, see next section). This process governance is continued by the customer during the assessment phase (D, Figure 6). However, during the latter phase there is also room for relational governance (E, Figure 6), or at least interaction processes necessary for sense making mechanisms elucidated above. Staging the explanatory meeting (3, Figure 5), the interview (7, Figure 5), and utilizing it for a dialogue (9, Figure 5) are proof for that.

| Time →                   |  | Preparation                       | Assessment                                      | Clarification                      | Execution                                 |
|--------------------------|--|-----------------------------------|---|------------------------------------|---|
| Customer’s Governance:   | A Contractual strategic level and B process governance | C Contractual strategic level     | D process governance                            | F1 Contractual strategic level     | K1 contractual strategic level            |
| Joint Governance:        |  | E room for: relational governance | G process governance<br>H relational governance | I bilateral contractual governance | J relational governance                   |
| Suppliers’ s Governance: |  |                                   | F2 contractual tactical/operational level       |                                    | K2 contractual tactical/operational level |

Figure 6: Essentials of BVA in governance terms.

In the clarification phase, BVA prescribes that after the selection of the best value solution the governance changes. It is the supplier who also takes on contractual governance - be it at the tactical and operational level – by explaining and clarifying the solution, proposing the key-performance indicators, and drafting the contract (F2, Figure 6). BVA introduces a split in contractual substance governance: simultaneously performing both strategic and tactical/operational contractual governance, each unilaterally, and by different parties. (F1 and F2, Figure 6). During this phase, process governance continues and changes as well. Now both parties take an active role (e.g. the supplier is setting the agenda): process governance becomes

bilateral (G, Figure 6). Further, based on the joint activities during assessment, and the joint process governance parties develop relational governance (bilateral, by nature) (H, Figure 6): parties interact frequently (weekly reports, meetings), in dialogue, and regarding many subjects (see activities 9, 10,11 and 12, Figure 6). This phase ends by jointly signing the contract (activity 13, figure 6). At the same time bilateral contractual governance sets in (I, Figure 6), replacing process governance. All the while the relational governance can (and should, see Cao and Lumineau, 2015) be build and continued from here onwards (J, Figure 6).

In the execution phase the customer's governance remains at the strategic contractual level (focusing on its goals and abstaining from 'Manage, Direct and Control') while the supplier's contractual governance remains at the tactical /operational: delivering what has been agreed. This paper has not analyzed how the governance operates during major changes. It is assumed this is being dealt with through the dynamics in bilateral contractual and relational governance (Huber & Fisher, 2013).

In summary, BVA in governance terms knows all the elements of governance, but in a different configuration than often found. First, BVA splits the contractual substance governance in strategic (by the customer) and tactical/operational (by the supplier). Second, BVA uses process governance, changing from unilateral in the assessment phase to bilateral during clarification. Third, BVA - in the transition from clarification to execution – replaces this by bilateral contractual governance, as process and substance governance are combined, based on the negotiated contract. Fourth, BVA promotes interaction and reciprocal sense making in all phases and enables relational governance as from clarification phase.

Concluding the first step of the analysis, BVA prepares the conditions for maximizing SCR value and improving satisfaction for both parties during execution. Because, BVA promotes adherence and performance to strategic goals; BVA employs bilateral contractual and relational governance; BVA promotes early exchange of expectations, preventing misaligned expectations and early SCR dissolution (Harmeling & Palmatier, 2015). The next section analyses the BVA governance when applied in RTE.

### *BVA Governance in the RTE*

To deduce the governance as applied in the RTE, following steps are undertaken. First, the activities as performed in BVA within RTE are laid down. To this end, the essentials of BVA (Figure 5) are combined with the activities as normally performed within RTE (Figure 3). See Appendix I for details. Based on this, the governance as applied for each phase is determined. For the pre-tender and tender phases, there is no difference within RTE whether BVA is applied or not. In all cases the customer performs unilateral contractual governance, both related to substance and to process. Specifically, within BVA, the substance is only set at the strategic level, and the process is according to BVA format. Even though formal interactions are allowed, the informal, recurrent interactions and development of relational norms are not. Therefore, in all cases there is no reciprocal sense making, no mechanisms leading to relational governance are taking place during Assessment. This leads to the following constellation of governance of BVA within RTE, see Figure 7.

Concluding, also when applying BVA in RTE the interaction between customer and each of the aspirant suppliers is disabled during tender. As in all RTE tenders, also when using BVA, this is invoked by the customer's dominance in executing a fair, equitable, transparent, and non-discriminatory contract awarding, and by the risk of a supplier using its 'hindrance power' to object to the decision and delay the process. In the next section, interventions are proposed which could alleviate this.

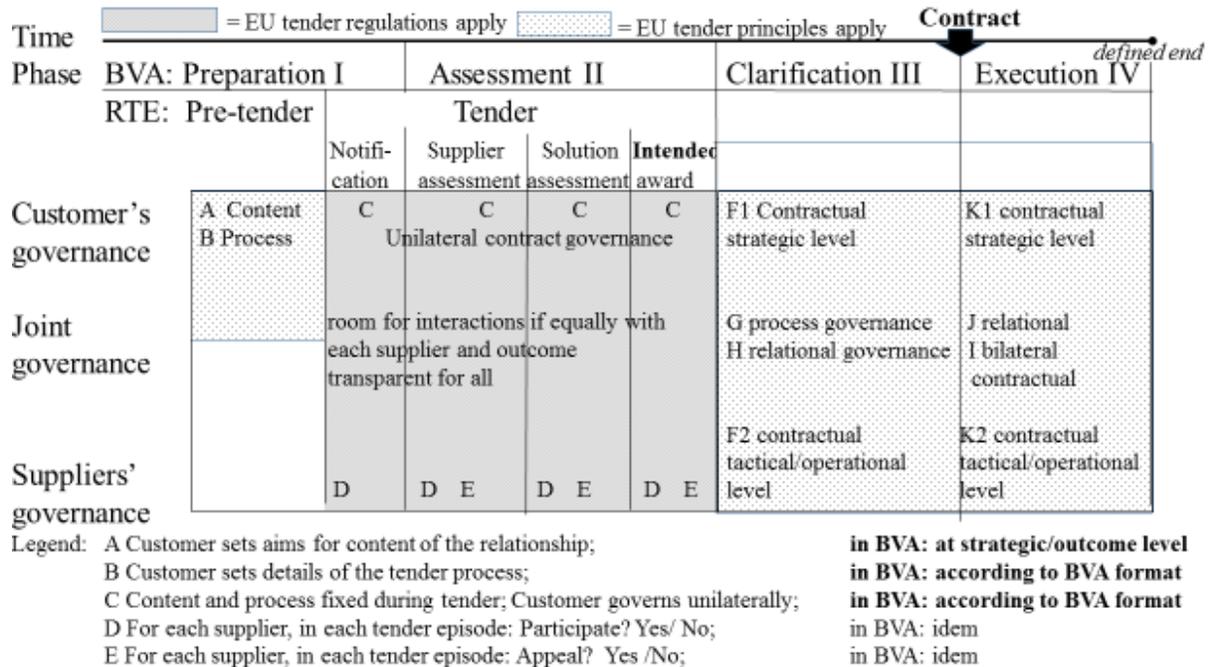


Figure 7: BVA governance within RTE.

### Enhancing BVA's Preparatory Phase

In this section a regulations compliant trigger is developed for early and fully enabled interaction for an RTE tender. This is positioned in the pre-tender or preparation phase. Although the regulatory principles apply, no formal regulations are inhibiting the chosen formats. In this setting, parties can choose for an open exchange of suppliers' tender experiences and customer's tender expertise. This can prevent negatively contrasting expectations (Harmeling & Palmatier, 2015). The starting condition of the tender phase is changed. Starting from more aligned expectations, the tender phase could also be used for assimilation, establishing relationship building mechanisms like demonstration, negotiation and learning (Harmeling & Palmatier, 2015). After all, the EU directives do not prescribe how process governance is shaped and performed, a fortiori: who governs. Therefore, a bilateral process governance would be RTE compliant. In such case, apart from using the tender phase for selecting the winning supplier cum solution, bilateral mechanisms would be practiced. This certainly improves the starting condition for the later phases.

Using TCE, such bilateral process governance increases (joint) rationality and reduces opportunism. From a SET point of view, 'informal exchange of information' is possible, if the

benefits are furnished to all others. Viewed through the RET lens, parties would establish norms of contractual solidarity, mutuality, flexibility, and creation and restraint of power. For this, however, the bilateral process governance should be of a principle-based kind. If a ruled based attitude by either party would prevail, such mechanisms could not flourish: the shadow of future use of either party's power (for the customer: to abort the procedure, for the supplier: to appeal) prevents assimilation and the process would fall back to the default situation.

#### *Addition to BVA's Preparatory Phase*

How can the unilateral starting condition of the tender phase in the RTE be altered when applying BVA? This is to be the result of actions taken in the preparatory phase. The customer performs (in most cases) market research and sometimes market consultation during this phase (Figure 1). However, as market consultation in RTE is hardly used (TED structured dataset, 2015), no metrics on its effect are available. In that case the leading principles of the directives apply, foreshadowing the regulations during the tender phase. During market consultation there can be actual (face-to-face) interaction with potential suppliers (and other contracting entities), whereas market research is purely desk research.

Market consultation and research are predominantly being used to learn about the market for the services, goods and/or works intended to be contracted: substance focused. However, market consultation can also be used to be better informed about suppliers' expertise, experiences, and expectations regarding the RTE tender process, and RTE tender expertise of other contracting entities. Preparing for RTE tender, customers can use the official means for notifying their 'call for competition' (in the EU the TED website, for the Netherlands TenderNed) to arouse early interest and contact potential suppliers for market consultation. If in such a 'notice of market consultation' the procedure for this consultation is transparent and follows the other leading principles, the customer is RTE compliant when having a dialogue and even in-depth discussions with each interested supplier separately. During the tender phase, the lessons learnt regarding the procedure should become transparent in the request for information incl. selection criteria and request for proposal incl. award criteria. For the proposed steps to be taken in such an enhanced preparatory phase, by the customer, each interested supplier, and each customer-supplier combination, see Figure 8.

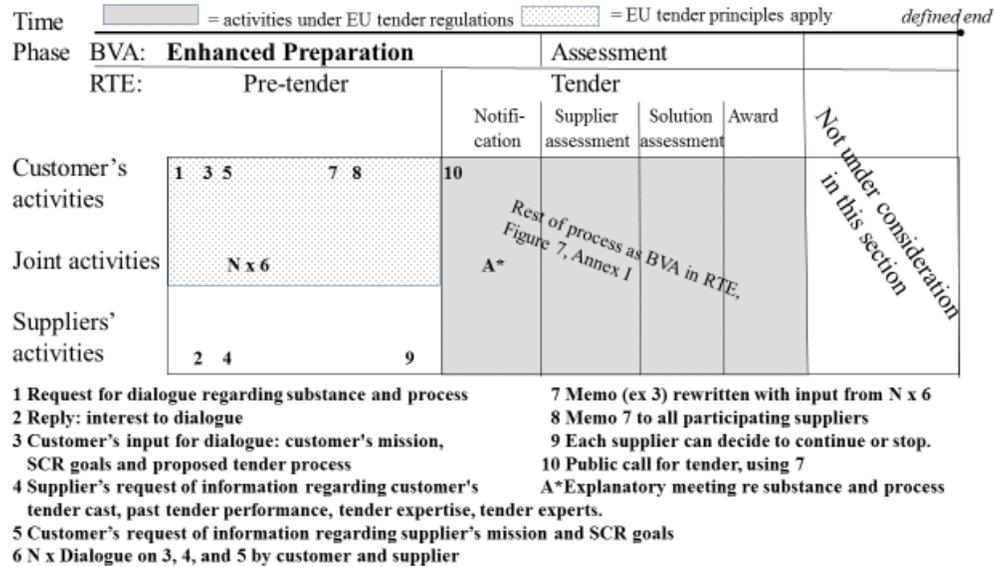


Figure 8: BVA activities in enhanced preparatory phase.

Market consultation can also be positioned as a dialogue, focusing on the tender process to be applied, next to the substance of the planned SCR. This constitutes an enhancement to the preparatory phase: enabling suppliers to air their experiences with and attitude towards participating in RTE tenders, suggest elements for such process, and show preference for certain RTE procedures. Without any obligation to use these ideas, the customer would benefit from adding these to its own expertise regarding choosing the procedure and setting the process. Suppliers can benefit from early contacts with the customer's team and tender details. The formal tender procedure will follow the steps as elucidated above. The tender of course being open to both suppliers participating in the preparatory dialogue and those who did not.

The preparatory phase would be utilized for interaction and relationship building mechanisms. This could be a forebode for bilateral process governance during the tender. This governance constellation is depicted in Figure 9.

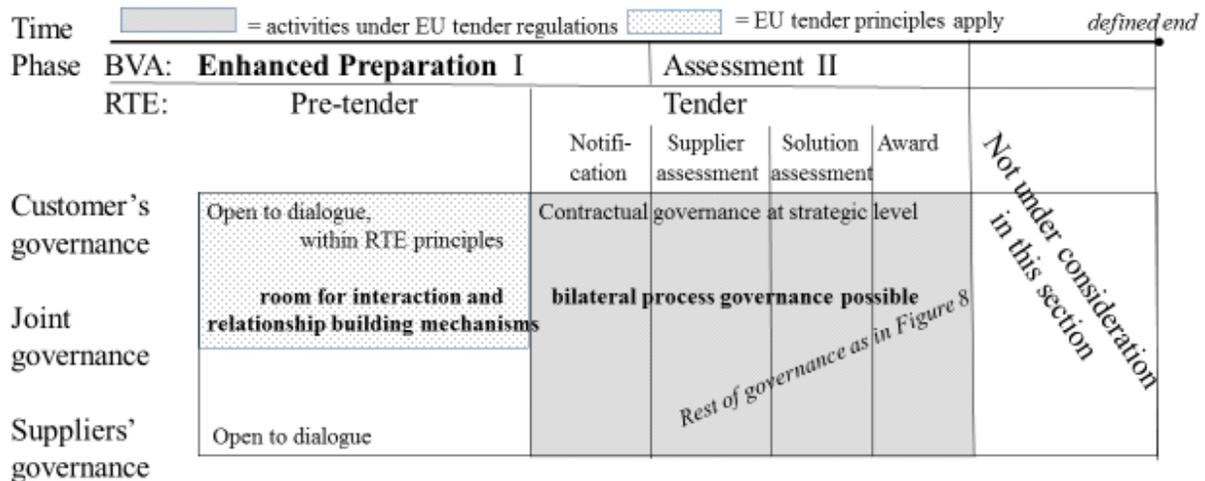


Figure 9: Governance with enhanced preparatory phase under BVA within RTE.

### Conclusion & Discussion

It is concluded, such enhancement of the preparatory phase could improve the value of the SCR in two ways. First, bilateral governance is practiced right from the start, enabling early sense making mechanisms, promoting relational governance, and thus leading to a condition for maximizing the SCR performance and satisfaction. Second, by reducing the risk of negatively contrasting expectations: such misalignment foreshadows parties potentially destroying the SCR.

Within RTE, such enhancement can only take place in the – pre-tender part of the - Preparation phase. This added sense making during Preparation can improve the value of SCRs for both customers and suppliers in an early phase, to be built upon during the Assessment by applying bilateral process governance and continued sense making. Together, this will improve the employment of bilateral contractual and relational governance, prevention of misaligned expectations and early SCR dissolution, and solidify the performance to strategic goals during Execution. The Enhanced Best Value Approach therefor sets the conditions for maximizing SCR value and improving satisfaction for both parties.

### Suggestions for Future Action

For practitioners, the effect of this suggested enhancement can be tested in practice. Both customers and suppliers can take the initiative for this. Scholars could then study these effects. Regulators could contemplate the effects of their detailed regulations.

### Appendix I

#### BVA activities in RTE phasing

To represent the BVA activities within RTE, the essentials of BVA (Figure 5) are now combined with the activities as normally performed within RTE (Figure 3). The phases, episodes, and BVA activities within RTE are presented in the figure below.

| Time   | = activities under EU tender regulations                        |                     | = EU tender principles apply |       | defined end   |                  |           |
|--|---|---------------------|------------------------------|-------|---|------------------|-----------|
| Phase  | BVA: Preparation  |                     | Assessment                   |       | Clarification                                       | Execution        |           |
| RTE: episode   | Notifi- cation  | Supplier assessment | Solution assessment          | Award | Contracting   | Start-up         | Execution |
| Customer's activities                                    | Market research   | 1                   | 3 5 6                        | 8 10  | 11*   |                  | 13        |
| Joint activities   | Market consultation   | <b>A</b>            | <b>B</b>                     |       |   | contract signing |           |
| Suppliers' s Activities                                  | Marketing incl. being consulted                                 |                     | 2 4 7                        | 9     |   |                  | 12        |
| 1 Public call for tender                                 | 3 Request for information incl. selection criteria              |                     |                              |       | 10 Assessment of offers                             |                  |           |
| 2 Reply for interest                                     | <b>4 Show expertise: ref. + metrics</b>                         |                     |                              |       | <b>11* Notification pending clarification</b>       |                  |           |
| <b>A Explanatory meeting regarding aim and procedure</b> | 5 Assessment of suppliers                                       |                     |                              |       | <b>12 Appeal Y/N: at end of clarification</b>       |                  |           |
| <b>B Interview</b>                                       | 6 Notification of admission: Y/N                                |                     |                              |       | <b>13 Definitive award: at end of clarification</b> |                  |           |
|  | 7 Appeal: Y/N   |                     |                              |       |   |                  |           |
|  | 8 Request for proposal incl. award criteria                     |                     |                              |       |   |                  |           |
|  | <b>9 Offer: expert solution, ranked added values and risks,</b> |                     |                              |       |   |                  |           |

Appendix Figure 1: BVA activities within RTE. BVA specific activity or phasing in bold.

The figure has its own activity numbering, the BVA specifics are mentioned in bold. To show that activities in RTE are phased differently when using BVA or not, the phases and episode are both mentioned in the figure. The explanatory meeting (A) and the interview (B) are introduced in a RTE compliant way. The BVA variant of the qualification information (4) is the expertise shown by the suppliers through references and metrics. The offer submitted by each supplier in BVA (9) becomes the expert solution, including metrics, project capabilities, ranked risks and added values, named experts, priced to win and secure supplier's own aims. The notification of intended award becomes a notification pending clarification: only after the best offer has been sufficiently clarified, and a contract been agreed upon, all other suppliers which have send in their expert solution are on hold. The possibility to appeal and the final award (12 and 13) are therefore postponed.

## References

- Bergema, C. P. A. M. (2016). An Action Repertoire for the Collaboration in Innovation Networks.
- Blau, P. (1964). Exchange and power in social life. *New York, Wiley 1964.*
- Cao, Z., & Lumineau, F. (2015). Revisiting the interplay between contractual and relational governance: A qualitative and meta-analytic investigation. *Journal of Operations Management.*
- Clauß, T. (2013). Strategische Zusammenarbeit mit Zulieferern: Empirische Befunde zur Governance im Kontext von Zielsetzung und Beziehung. *Betriebswirtschaftslehre Für Technologie Und Innovation Band-Nr. 67 Springer Fachmedien Wiesbaden 2013.*
- Dwyer, F., Schurr, P., & Oh, S. (1987). Developing buyer-seller relationships. *The Journal of Marketing.*
- Dyer, J. H., & Singh, H. (1998). The Relational View: Cooperative Strategy and Sources of Competitive Advantage. *The Academy of Management Review, 23*(4), 660–679.
- European Commission (2015) *TED Structured Dataset (2009-2014), Tenders Electronic Daily, supplement to the Official Journal of the European Union. DG Internal Market and Services*; received on 2015-03-18.
- European Council (2014), *Directive 2014/25/EU of the European Parliament and of the council, on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC*; WWW document; URL <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0025&from=EN>
- European Council (2014), *Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC*; WWW document; <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0024&from=EN>
- Harmeling, C., & Palmatier, R. (2015). Relationship Dynamics: Understanding Continuous and Discontinuous Relationship Change. *Handbook of Research on Distribution Channels.*
- Heide, J., & John, G. (1992). Do norms matter in marketing relationships? *The Journal of Marketing.*
- Kashiwagi, D. (2015). *Best Value Approach. Group, Tempe, AZ. Publisher: KSM Inc.*
- Kashiwagi, D., & Kashiwagi, J. (n.d.) Best Value Approach. Retrieved from <https://ksmuniversity.ksm-inc.com/wp-content/uploads/2015/11/Class-Introduction.pdf>
- Kashiwagi, D., & Slater, C. (2003). Impact of Information Concepts on Construction Performance. In *Construction Research Congress* (pp. 1–11). Reston, VA: American Society of Civil Engineers.
- Macneil, I. R. (1980). The new social contract: An inquiry into modern contractual relations.
- Macneil, S. (1980). *The New Social Contract: An Inquiry into Modern Contractual Relations. Journal of Public Policy & Marketing* (Vol. 15).
- Morgan, R., & Hunt, S. (1994). The commitment-trust theory of relationship marketing. *The Journal of Marketing.*
- Poppo, L., & Zenger, T. (2002). Do formal contracts and relational governance function as substitutes or complements? *Strategic Management Journal, 23*(8), 707–725.
- Rijdt, J., Witteveen, W., Santema, S. (2016). (2016). *Best Value stroomt, inzichten uit de praktijk, de jurisprudentie en de wetenschap.*
- Rijdt, J. van de, & Santema, S. C. (2012). The Best Value Approach in the Netherlands: A reflection on past, present and future.
- Rijdt, van der J, & Santema, S. C. (2013). Prestatieinkoop: met Best Value naar succesvolle projecten.
- Ring, P., & Ven, A. Van de. (1994). Developmental processes of cooperative interorganizational relationships. *Academy of Management Review, 19*(1), 90–118.

- Telgen, J., Harland, C., & Knight, L. (2006). Public procurement in perspective.
- Tulling, D., Conflicts in Best Value, 2018, TUDelft repository.
- Wang, S., & Bunn, M. (2004). Government/business relationships: insights into contract implementation. *Journal of Public Procurement*.
- Williamson, O. E. (1985). The economic institutions of capitalism.
- World Trade Organization. visited 2016; [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)