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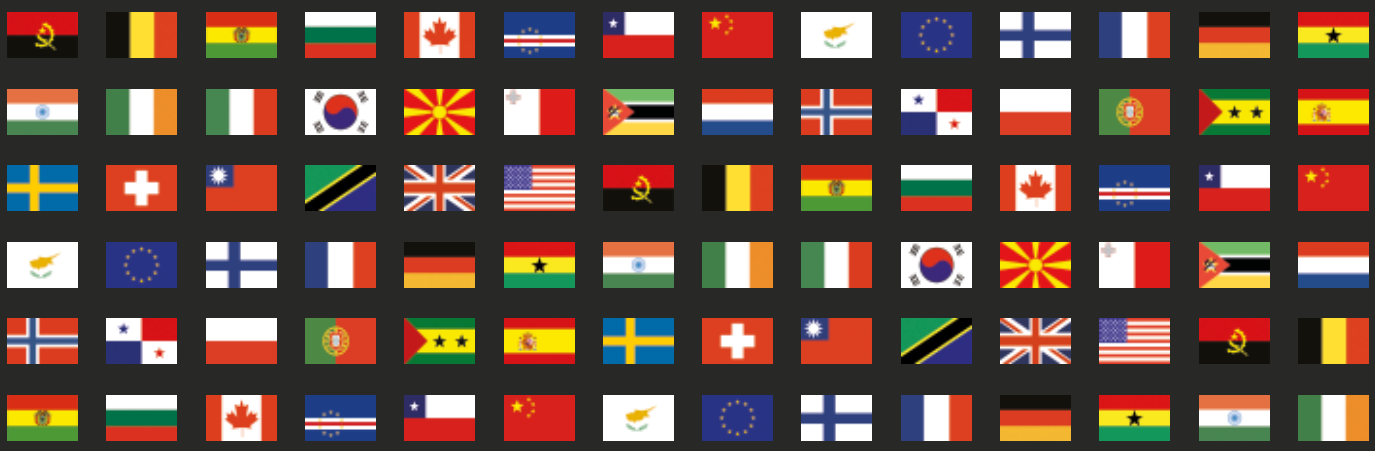
Contributing editor
Totis Kotsonis



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Getting The Deal Through

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Totis Kotsonis
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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Public Procurement*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Italy.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Totis Kotsonis of Eversheds Sutherland, for his continued assistance with this volume.

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EU Court guidance on the use of framework agreements

Totis Kotsonis
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In its judgment of 19 December 2018 (*Autorità Garante della Concorrenza e del Mercato – Antiturst, Coopservice Soc. coop. arl*, C-216/17, EU:C:2018:1034; the Judgment), the Court of Justice of the European Union (the Court) provided useful guidance on two important issues pertaining to the use of framework agreements, namely: (i) whether contracting authorities that are not 'direct parties' (ie, signatories) to a framework agreement may use them; and (ii) the extent to which contracting authorities wishing to use a framework agreement need to specify in advance the quantity of services they may require under that framework.

Relevant facts

The Judgment deals with a request for a preliminary ruling made by the Italian Council of State in the context of two actions relating to the use of a framework agreement for waste collection services by the regional health authority of Valcamonica. There was a dispute among the parties to the action as to whether or not the original arrangements that had been concluded by the regional health authority of Lake Garda constituted a framework agreement. Given that this issue was not part of the reference to the Court, the latter gave judgment on the basis that the original arrangements constituted a framework agreement. The framework agreement in question had been concluded by a different body, the regional health authority of Lake Garda, in 2012.

Italian regional health authorities are contracting authorities subject to procurement legislation. Under Italian law they are also obliged to purchase goods and services collectively through central purchasing bodies.

The regional health authority of Valcamonica was not a signatory to the framework agreement in question. However, the original tender specifications included a clause that provided for the possibility of extending that agreement to a number of regional health authorities identified in that clause, including the regional health authority of Valcamonica (the 'extension clause'). In 2015, the regional health authority of Valcamonica sought to rely on the extension clause and use the framework agreement for the purpose of meeting its waste collection services requirements, rather than initiating a new public procurement process for the award of a services contract.

This decision to call off a contract under the framework was challenged in the local courts and ultimately led to an appeal to the Council of State against the first instance court's decision to dismiss the challenge. The Council of State stayed the proceedings and made a reference to the CJEU essentially asking it to consider:

(i) whether EU procurement legislation allowed a contracting authority to conclude a framework agreement not only on its own behalf but also on behalf of other contracting authorities that were not direct parties (signatories) to that agreement but which were specified as potential users of that framework; and

(ii) assuming that the answer to (i) was positive, whether EU procurement legislation required contracting authorities that were not direct parties to a framework agreement to specify in advance the quantity of services that they may require under that framework, and whether this could be done by reference to their 'usual requirements'.

The Court's decision

In its decision, the Court confirmed that, in order to be able to call off contracts under a framework, a contracting authority did not have to be a direct signatory to the relevant framework agreement. Instead, it was sufficient for it to:

> *appear as a potential beneficiary of that framework agreement from the date on which it is concluded by being* clearly identified in the tender documents with an explicit reference *that makes both the 'secondary' contracting authority itself and any interested operator aware of that possibility. That reference can appear either in the framework agreement itself or in another document, such as an extension clause in the tender specifications, as long as the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with* (emphasis added).

The Court also concluded that, although contracting authorities were only subject to a requirement to use best endeavours to stipulate in advance the value and frequency of each call-off contract likely to be awarded under a framework agreement, it was imperative that they state the total quantity of services that the subsequent call-off contracts might comprise.

According to the Court, the principles of transparency and equal treatment of economic operators with an interest in the conclusion of a framework agreement would be affected if the contracting authority that established a framework agreement did not set out the total quantity of services that the agreement covered. Ensuring compliance with the transparency obligation in this manner was particularly important given that the contracting authorities did not have an obligation to publish a notice of the results of the award procedure for each call-off contract.

Equally, without an obligation to indicate at the outset of the process the quantity and maximum value of services that would be covered by that agreement, there would be an increased risk that framework agreements could be used improperly or in such a way as to prevent, restrict or distort competition.

In reaching these conclusions, the Court considered it relevant that EU legislation provided that where a framework agreement was

concluded with a single supplier, call-off contracts had to be awarded within the limits of the terms laid down in that agreement. It followed that the commitments made by the original contracting authority, on its own behalf or on behalf of the contracting authorities that were specified as potential users of that agreement, could only be up to a certain quantity of supplies or services and once that limit had been reached the agreement would no longer have any effect.

Finally, the Court did not consider that it would be sufficient to define the requirements of contracting authorities that had been specified as potential framework users merely by reference to their 'usual requirements'. This was because, even if it could be assumed that this reference might be sufficiently clear for national suppliers, it could not be assumed that this would also be the case for suppliers in other member states. Indeed, if the total quantity of supplies or services that those usual requirements represent was common knowledge, it should not be difficult to refer to it in the framework agreement itself or in another published document, such as the tender specifications, so as to ensure full compliance with the principles of transparency and equal treatment.

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Comments

Although these issues were considered in the context of Directive 2004/18, which was applicable at the time, the Court's conclusions are equally relevant to framework agreements established under Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242; the Public Contracts Directive) currently in force, which contains provisions on framework contracts that are substantively similar to those in Directive 2004/18.

Separately, it is arguable that the Court's conclusions are equally applicable to the award of framework contracts under Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374, which regulates the award of contracts by certain utilities (the Utilities Directive). This is because although the provisions relating to framework agreements in the Utilities Directive are less detailed than those provided under the Public Contracts Directive, and in some respects also different, the Court's conclusions were based substantively on the need for compliance with the underlying principles of transparency, equality of treatment and non-discrimination. These principles are equally relevant and applicable to the Utilities Directive.

In light of the Court's decision, it would now seem clear that the procurement documents that are made available at the start of a procurement process for the award of a framework agreement should specify:

- the contracting authorities that are potential users of the framework agreement; and
- an estimate of the total quantity and maximum amount of purchases to be covered by call-off contracts awarded under the framework agreement.

While the Court's decision does not address directly the question of whether the contracting authorities that are identified as potential users of a framework agreement should have provided (i) their express consent for being identified as such in the procurement documents, and (ii) a reasonable estimate of the likely volume of purchases to be made during the term of the agreement, these would seem to be the necessary implications of the Court's judgement.

This is on the basis that the obligation to specify at the outset of a procurement process the total quantity and maximum amount of purchases likely to be covered by call-off contracts awarded under a framework would seem to require that the potential users of a proposed framework consider specifically the possibility of making use of that framework. If they were to conclude that they intend to make use of the proposed framework it would seem logical that they would then need to communicate this information to the contracting authority carrying out the procurement process together with their (reasonable) estimates as to the volumes of purchases they are likely to make under the framework agreement. Without that information, the contracting authority carrying out the procurement process would not be able to set out in the contract notice, or some other procurement document made available at the start of the process, a meaningful estimate as to the total quantity and maximum amount of purchases to be carried out under the framework agreement.

The Advocate General's Opinion of 3 October 2018 (Case C 216/17, ECLI:EU:C:2018:797) also seems to be supportive of this conclusion. For example, according to that Opinion, for a contracting authority to acquire 'party' status to a framework, it is sufficient for it to have agreed to be bound by the terms and conditions of the agreement either by way of signature of the agreement, or by signature of any other legal act expressing such consent, provided that act is referred to and incorporated into the framework agreement (paragraph 67 of the Opinion).

Equally, according to the Advocate General:

> *the decisive point is that contracting authorities other than the contracting authority which signed the framework agreement should be identified as 'potential beneficiaries' at the time the agreement was entered into and were aware of its contents. If the conclusion of the framework agreement is preceded by a collective decision, in which a number of contracting authorities agree to make group purchases of certain goods or services, that prior collective decision can be used as the basis for a framework agreement signed by just one of those authorities on behalf (or with the consent) of them all* (paragraph 68).

and

> *if the indication of the (estimated) total quantity of services is not included or the bases for calculating those services are hypothetical, it will be difficult for candidates to assess whether it is worth their while taking part in the tendering process* (paragraph 78).

Although the Advocate General's Opinion is not binding on the Court, these points seem consistent with the Court's conclusions, and indeed, the basis on which those conclusions were reached.

An obvious implication of the need to provide a reasonable estimate of the total quantity and maximum amount of purchases under a framework is that the provision of a wide range of possible values is unlikely to be deemed, in most circumstances, to comply with the requirements of transparency and non-discrimination. That is likely to be the case, for example, where such a range has not been determined following consultation with the contracting authorities identified as potential users of the framework, but instead, it is purely hypothetical.

Finally, it is worth noting the Court's conclusion that a framework agreement which has been concluded with a single supplier cannot be used beyond the maximum value of purchasers specified in the framework agreement at the start of the process. While this conclusion is reached specifically by references to the provisions of the legislation as regards single-party framework agreements, in reality the same conclusion may be reached by reference to the underlying principles of transparency and non-discrimination. On that basis, therefore, the same principle is likely to apply in relation to multiparty frameworks, whether these are covered by the Public Contracts Directive or the Utilities Directive.

Angola

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The Public Contracts Law (PCL), approved by Law 9/16 of 16 June 2016 – which repealed earlier legislation, in particular Law 20/10 of 7 September 2010 – is considered to be the key legislation regulating the award of public contracts. The PCL is complemented by Presidential Decree 199/16 of 26 September 2016, which sets out the regime applicable to both the public procurement procedures and the execution of framework agreements and, in particular, by Presidential Decree 201/16 of 27 September 2016, which establishes the standard draft contracts relating to public works, public supply and public services.

Also relevant is Presidential Decree 202/17 of 6 September 2017, which establishes the legal framework for the access and use of the National E-Procurement System.

Moreover, a reference must be made to the Public-Private Partnerships Law, approved by Law 2/11 of 14 January 2011, which sets forth the regime applicable to the State intervention and participation in tender procedures, the award, the execution and the oversight of public-private partnerships.,

Finally, reference must be made to Decree Law 16-A/95 of 15 December, as amended, which approved the Administrative Procedure and Administrative Activity Code. This Law was partially repealed by the PCL, but it is still relevant as it is subsidiarily applicable to the public tender procedures.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Owing to the strategic and operational role of petroleum activities in Angola, there is a special regime that regulates access to petroleum activities: the Petroleum Activities Law, approved by Law 10/04 of 12 November 2004.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Angola is not a European Union member, or a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets between its parties.

Although Angola is not part of the GPA, the Portuguese legal framework has a major influence not only on the PCL, but also on other relevant legislation regarding the award of public contracts, and for that reason the PCL's framework closely follows that of the EU's procurement directives.

Proposed amendments

4 | Are there proposals to change the legislation?

Since the PCL, approved by Law 9/16, of 16 June 2016, is a recent piece of legislation, at this stage, no new amending proposals are expected.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Under the PCL, 'contracting authorities' are traditional public sector entities such as central and local authorities. The entities considered to be in this group include:

- the President of the Republic;
- the central and local administrative bodies;
- the National Assembly;
- the courts;
- the Attorney General's Office;
- the independent administrative authorities;
- Angola's representation offices abroad;
- municipalities;
- public institutes;
- public funds;
- public associations;
- public companies; and
- publicly held companies.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The PCL is not applicable to public contracts entered into by public companies and publicly held companies pertaining to (i) public works, public works concessions and public services concessions that fall below the 500 million Angolan kwanzas threshold and to (ii) leases, acquisitions of goods and acquisitions of services that fall below the 182 million Angolan kwanzas threshold. All other public contracts concluded with contracting authorities fall within the scope of the PCL. The type of procedure differs depending on the estimated value of the contract at stake. Nevertheless, the award of certain contracts may be exempted from complying with procurement law in some situations (for instance, when imperative grounds of urgency so require) and contracts with a value falling below the 5 million Angolan kwanzas threshold can

be awarded through a direct award (ie, a non-competitive procedure), although its terms are also regulated by the PCL.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Amendments to concluded contracts are permitted without a new procurement procedure on public interest grounds, and if the conditions under which the parties entered into the previous agreement changed in an abnormal and unpredictable way leading to a serious increase in the risks initially assumed by the original contractor.

Amendments can be introduced by a unilateral decision of the contracting authority based on public interest grounds, by an agreement entered into between both parties or by a judicial or arbitral decision.

The amendments introduced cannot alter the overall nature of the contract and cannot affect the competition which lied at the base of the procurement procedure. This means, for instance, that the changes to be introduced cannot alter the order in which the bids were previously evaluated.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

No, there has been no case law clarifying the application of the legislation in relation to amendments to concluded contracts.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Under the Angolan legal framework, privatisation processes do not fall within the scope of the PCL and are regulated by specific legislation, namely by Law 10/94 of 31 August of 1994.

The Angolan Privatisation Law applies to the disposal of shares held by public entities and prescribes that privatisation processes must be held via a public tender. Exceptionally, in some limited cases, the Angolan Privatisation Law also foresees that a privatisation process may be held through a limited tender with specific pre-qualified bidders or via a direct award.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

In accordance with the Public-Private Partnerships Law, approved by Law 2/11 of 14 January 2011, the setting up of a PPP is regulated by the applicable tender procedure in accordance with the terms set out in the PCL.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the National Gazette, in the Public Procurement Portal and in a major newspaper.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from being prevented from accepting contracting entities that fall within any of the exclusion grounds foreseen in the PCL, contracting authorities may only assess whether private contracting entities are qualified to participate in a tender procedure if such authorities launch a limited tender with prior qualification, a restricted procedure or a simplified procurement procedure.

In a public tender, it is not possible to evaluate the technical and financial qualifications of bidders.

In a limited tender with prior qualification, the evaluation of bidders' qualifications is made during the first phase of this procedure, in which bidders submit their applications. The qualitative criteria set out by the contracting authority to evaluate bidders' capacities must refer to bidders' economic and financial standing and their technical and professional abilities. Those qualitative criteria must be related and proportionate to the subject matter of the contract.

In respect of the other public procurement procedures referred to above (ie, the restricted procedure and the simplified procurement procedure), there are no specific phases in which the qualification of bidders formally takes place, since the selection of the bidders invited to participate is discretionary and is made prior to the launch of the such procedures.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

Following the assessment of the bidders and their compliance with the qualitative selection criteria referred to in question 12, a limitation on the number of bidders may occur.

In accordance with the PCL, if bidders demonstrate they comply with all the minimum qualitative selection criteria established, they will be invited to the second stage of the tender in which they will be invited to submit a bid.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' has not been formally established in the legal framework prescribed by the PCL. However, if the rehabilitation of a bidder has occurred, the bidder will not be excluded.

It is important to note that there is a list compiled and advertised in the Public Procurement Portal (www.contratacaopublica.minfin.gov.ao/PortalSNCP) identifying those economic operators deemed as having not complied with their contractual obligations in previous contracts. Such economic operators are kept on the said list for at least three years.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. PCL states that the fundamental principles for tender procedures include the principles of pursuit of the public interest, justice, equal treatment, competition, impartiality, transparency, probity, economy, efficiency, effectiveness and of respect for public heritage.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. Articles 3 and 8 of the PCL establish the principles of independence and impartiality as far as contracting authorities are concerned. In particular, article 8 prescribes an extensive set of rules applicable to public officials responsible for the public procurement procedures, and specifically stipulates that they shall act impartially and in accordance with the public interest prevent conflicts of interests, respect confidentiality rules and follow all rules and regulations regarding the conduct and the legal impediments of public officials.

Additionally, the PCL contains different mechanisms that aim to ensure impartiality. In certain situations, members of contracting authorities are prohibited from interfering in the decisions taken in a given public procurement procedure when, for example, they have a direct or indirect personal interest in the outcome of the procedure. In other cases, and under specific situations, members of contracting authorities may decide not to participate in certain procedures, with the purpose of not raising any doubts regarding the impartiality of the decisions to be taken.

It is also important to note that most public procurement procedures are accompanied by an Evaluation Committee that holds a wide range of powers to ensure compliance with all legal requirements throughout the procedure.

Conflicts of interest

17 | How are conflicts of interest dealt with?

See question 16.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a bidder in the preparation of a tender procedure may be grounds for a decision of exclusion. However, this exclusion decision is only issued when such intervention is considered to have conferred advantages to the bidder and prejudiced competition.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure used is the public tender.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The PCL has a specific provision under which economic operators participating in a procurement procedure as a consortium are not entitled to participate in the same procedure individually or as members of other consortia. Violations of this rule lead to the exclusion of both bidders.

There is no specific provision that states that related bidders (as is the case of different companies within a same group, for example) must submit separate bids in the context of the same procedure. Nonetheless, in most cases, this situation would probably lead to the exclusion of both bidders. In fact, if certain companies belong to the same economic group, it would be very hard for them to demonstrate that they are independent and that they are not distorting competition, which constitutes another ground for exclusion.

The situation of a subcontracting party participating as a subcontracting party in more than one bid in the same procedure could also lead to the exclusion of all the bids in which the said subcontracting party participated, since that would probably lead to the conclusion that competition was distorted. Nevertheless, such a situation would entail a lesser degree of risk when compared to the case of related bidders submitting separate bids in the same procedure.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The inclusion of a negotiation phase is possible in all public procurement procedures outlined in the PCL, depending on a discretionary decision of the contracting authority at stake.

There are two main methodologies for selecting bidders to the negotiation phase: (i) all bidders that have previously submitted valid bids are invited; and (ii) bidders whose bids are classified in the first-ranked positions are invited.

The maximum number of bidders that may be invited to the negotiation phase has to be previously stated in the tender documents.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Both the PCL and the Presidential Decree 199/16 of 23 September 2016 regulate the regime applicable to framework agreements, which allow public contracting entities to set the terms and conditions applicable to contracts that will be entered into with one or more contracting entities or suppliers for a given period of time.

The PCL allows for two different types of framework agreements: (i) a single supplier agreement or (ii) a several suppliers agreement.

A framework agreement usually follows a public tender or a limited tender with prior qualification, since those procurement procedures do not have any thresholds. On the contrary, if a framework agreement is awarded through a direct award procedure, the global value of the contracts to be executed under such framework agreement cannot exceed the respective threshold.

24 | May a framework agreement with several suppliers be concluded?

A framework agreement may be entered into with several suppliers. The awarding of contracts under such agreements is preceded by an invitation sent to the previous selected suppliers (ie, the future contracting parties of the framework agreement) to submit a proposal regarding the specific aspects of the contract, and that will be evaluated.

In contrast, if a framework agreement is concluded with a single supplier, contracts based on that framework agreement will be awarded within the limits of the terms laid down in that same framework agreement. Those terms must also have been sufficiently specified in the procurement procedure that preceded the award of the framework agreement.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The general rule is for changes in a consortium not to be allowed during a procurement procedure, since the PCL expressly stipulates that all the members of a consortium, and only those members, may sign the contract. Nonetheless, it would be difficult not to accept a change to the composition of a certain consortium in the case of a merger or spin-off of a given member, since, conversely, such a change would necessarily have to be accepted if there were only one bidder in the procedure.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The PCL has no specific rule or mechanism that furthers the participation of small and medium-sized enterprises (SMEs) as far as procurement procedures are concerned. However, the PCL prescribes specific rules in order to preferentially assign contracts to national economic operators as well as to prioritise national production. It is important to stress that the PCL grants a certain number of advantages to national SMEs.

In terms of division of a contract into lots, there is a specific provision which states that the relevant threshold to be taken into account for the selection of the applicable procurement procedure shall be the total sum of all the estimated amounts associated with each lot.

There is no rule or case law that limits the number of lots single bidders can be awarded.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

The PCL defines variant bids as those bids that propose alternate conditions in respect of one or more contractual clauses included in the tender specifications. Variant bids are only admitted when specific provisions in the procedure documents expressly authorise their submission.

Moreover, bidders must, notwithstanding, submit a standard bid that is based on the requirements laid out in the tender specifications.

28 | Must a contracting authority take variant bids into account?

See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Any violation of the tender specifications that are not subject to competition and evaluation leads to the exclusion of the respective bid.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

There are two award criteria provided for in the PCL – the lowest price and the most economically advantageous tender – which must be disclosed in advance.

Regarding the latter, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, such as:

- quality;
- price;
- technical characteristics;
- aesthetic and functional characteristics;
- environmental characteristics and impact on public health;
- running costs;
- cost-effectiveness;
- after-sales service and technical assistance;
- delivery date; and
- delivery period or period of completion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

What specifically constitutes an 'abnormally low' bid is under the discretion of the Evaluation Committee, or other contracting authority. The Committee or other authority can require a bidder to submit a justification for their low bid.

32 | What is the required process for dealing with abnormally low bids?

If contracting authorities have stipulated the estimated price for the contract in the tender specifications and the bidder intends to submit an offer with a price that may be considered as 'abnormally low', the bidder must submit a declaration setting out the grounds for the submission of such a price. Otherwise, the Evaluation Committee may ask the bidder for an explanation. Failure to present an explanation or to objectively justify the submission of an abnormally low-priced bid constitute grounds for exclusion.

The mentioned explanations may refer to several factors, such as:

- the economics of the manufacturing process;
- the technical solutions chosen or any exceptionally favourable conditions available to the bidder;
- the originality of the works;
- the supplies or services proposed by the bidder;
- the specific conditions of work that the bidder benefits from; and
- the possibility of the bidder obtaining state aid.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The PCL repealed most of the regulation regarding appeals against review decisions prescribed in the Administrative Procedure and Administrative Activity Code.

According to the PCL, it is possible to challenge all decisions issued in the context of public procurement procedures either through administrative review proceedings, which are regulated by the contracting authorities, or through judicial review proceedings, under the jurisdiction of administrative courts.

Regarding this type of decision, it is important to mention the establishment of the Cabinet of Public Procurement, which is charged with supporting the executive branch in defining and implementing policies and practices on public procurement, judging administrative proceedings during reviews of procurement decisions and controlling the legality of the such procedures.

Administrative review proceedings in this context may not be refused on any grounds by the relevant administrative bodies.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

See question 33.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Review proceedings for procurement decisions are characterised by a pressing urgency aimed at avoiding excessive delays in the procurement procedure. In this sense, the review request should be brought within five business days following the decision that is being challenged. Furthermore, if the review concerns an award or qualification decision, the contracting authority must first invite other bidders to submit their views and only thereafter issue a final decision, within five business days counting from the deadline established for the other bidders to submit their views.

Judicial reviews can be initiated before the contract is formally signed and after its termination. Usually it takes no less than six months to obtain a first-instance decision.

Judicial proceedings regarding pre-contractual litigation must be filed within 60 days after the relevant decision has been issued and the bidder notified.

36 | What are the admissibility requirements?

All procurement decisions, as well as signed contracts, are justiciable. Any unsuccessful bidder can submit an application for the review of a decision or contract, provided the bidder demonstrates that it has been directly affected by an infringement and that it will obtain an advantage with the review decision being sought, based either on the legality or on the merits of the decision in question.

37 | What are the time limits in which applications for review of a procurement decision must be made?

See question 35.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

According to the PCL, the administrative procedure for reviewing procurement decisions does not automatically suspend the continuation of the procurement procedure. However, while there is no review decision on the case or while the legal deadline for such a decision has not yet expired, the contracting authorities cannot, depending on the stage of the procedure, qualify bidders, initiate the negotiation phase, award the contract or sign the contract.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders are notified of the award decision. The successful bidder is notified first and, as soon as the successful bidder pays the bond, the other bidders are notified. In public procurement procedures in which no bond is due, all bidders are notified of the award decision at the same time.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Throughout the public procurement procedure, all bidders have access to all the documents submitted by the parties and issued by the jury and by the contracting authority, except documents that bidders request to be classified.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Review applications are often filed, especially in those cases where the value or the strategic relevance of the contract is high.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, disadvantaged bidders can claim for damages.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, these situations are not very common.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Legal protection is still available in these situations.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

The typical costs of making an application for the review of a procurement decision rise to around 25 per cent of the value of the contract, but in the absence or impossibility of such a determination, costs are established in accordance with the subsidiary rules stipulated in civil proceedings.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Currently, the legislation setting the general framework of public procurement law, and supplemental Royal Decrees, are:

- the Law of 17 June 2016 on public procurements; and
  - the Royal Decree of 18 April 2017 regarding the award of public procurements in classic sectors; and
  - the Royal Decree of 18 June 2017 regarding the award of public procurements in utilities sectors;
- the Law of 13 August 2011 on public procurements in the field of defence and security; and
  - the Royal Decree of 23 January 2012 on the awarding of public procurements in the field of defence and security;
- the Law of 17 June 2013 relating to the motivation of decisions to award a public contract and the right of appeal; and
  - the Royal Decree of 14 February 2013 relating to the general rules for the performance of public contracts.

The legislation is enforced by administrative or civil jurisdictions, depending on the nature of the contracting authority (ie, whether it is a public or a private entity).

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

The legislation distinguishes public contracts depending on the contracting authorities' areas of activity (eg, classic sectors, utilities sectors or defence and security).

Public contracts falling outside the scope of public procurement law – such as services concessions or the provision of real estate property for the exercise of economic activity – must comply with the fundamental principles of transparency, equality and non-discrimination. These contracts must, in general, be put into competition according to specific rules of publication, depending on the interest that these contracts could represent for companies other than local companies.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The legislation's primary purpose is to transpose European Union public procurement law, which it supplements by adding specific rules (eg, impartiality of the contracting authority, material composition of the tenders, groups of candidates or tenderers, regularity of the applications and of the bids).

Some contracts fall outside the scope of EU law (eg, public contracts, the value of which is below the thresholds for the application of European public procurement rules (the EU thresholds)). However, EU law also has an impact on these contracts because of the application of the underlying fundamental principles of transparency, equality and non-discrimination.

Finally, Belgian law guarantees the participation of enterprises of member states of the World Trade Organization Agreement on Government Procurement (GPA), within the conditions provided by the GPA. These enterprises enjoy rights equivalent to those of Belgian businesses (see article 4, subparagraph 2 of the Law of 17 June 2016).

Proposed amendments

4 | Are there proposals to change the legislation?

The new legal framework entered into force in July 2017, when the four Royal Decrees were finalised.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The 'contracting authority' is defined by reference to the EU legal definition.

Besides public authorities, in the traditional sense of the term (ie, the federal state, territorial entities and bodies that have been set up by them to carry out public service missions), private entities that perform public services other than with industrial or business characters, are also subject to public procurement laws when they are under the influence of public authorities, or other contracting authorities, that control their decision-making bodies or funding (eg, universities, hospitals and social housing). Private entities that are not subject to public procurement law are identified because they are excluded under the legal definition.

Currently, the European Commission does not exempt utility activities in Belgium from the application of Directive 2014/25.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

One should note that, unless provided otherwise by the law, all public contracts are, in principle, subject to the legislation on public procurement. The threshold set by regulation (in Belgium, by Royal Decrees) only determines the application of the EU law and the scope of application of the negotiated procedures.

The estimated value of a public contract is the criterion used to separate public contracts governed by EU public procurement law from those that are not.

The rules governing assessment methods of public contracts' value are a transposition of the EU provisions. Pursuant to the European Court of Justice's (ECJ) case law, the value of a contract is determined by taking into account the contracting authority's project considered as a whole (irrespective of the fact that the project could be performed in phases separated in time or of the fact that the contracting authority is not certain to be able to fully perform it, eg, because of uncertain subsidies).

EU public procurement law shall apply to public contracts that have a value (exclusive of VAT) estimated to be equal or greater than the following:

- for public work contracts: €5.548 million;
- for works or services concessions: €5.548 million;
- for public supply contracts: €221,000 in classic sectors (€144,000 for public supply contracts entered into by federal contracting authorities) and €443,000 in other sectors;
- for public service contracts: €221,000 in classic sectors (€144,000 for public supply contracts entered into by federal contracting authorities) and €443,000 in other sectors; and
- for public service contracts relating to social services and other specific services: €750,000 in classic sectors and €1 million in utilities sectors.

Below the EU thresholds, the Law of 17 June 2017 applies the negotiated procedure with prior publication to public supply contracts and public service contracts, the estimated value of which is below the EU thresholds, and to public works contracts the estimated value of which is less than €750,000.

Finally, with regard to or concession contracts, a Royal Decree specific to the Law of 17 June 2016 applies to contracts the amount of which surpasses €5.548 million.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The extension of an existing contract has been considered under both legislation and case law.

According to the national legislation (which essentially transposes EU law), the negotiated procedure without publication applies in two cases:

- when the adaptation of the contract was made necessary as a result of unforeseen circumstances; and
- when it relates to works, supplies or additional services that are considered from a technical perspective as not severable from the initial contract, provided that this awarding was already considered in the initial conditions of the original contract.

In addition to these two cases, the amendment of an existing public contract is regulated, at the EU level, in article 72 of the Directive 2014/14 and, at the Belgian level, in articles 37 and following the Royal Decree of 14 January 2013 to the general rules for the performance of public contracts. This Royal Decree specifies in more detail the conditions under which a concluded contract can be subject to an amendment without a new procurement procedure.

Schematically:

- from a qualitative point of view, a substantial change consists of any change that would have allowed the admission of other tenderers, or the selection of another tender, if this change had been included in the initial conditions of the contract; and
- from a quantitative point of view, the legality issue must be raised as soon as the extension reaches the EU threshold.

These principles have, in fact, integrated the ECJ case law, in particular its *Pressetext Nachrichtenagentur GmbH* (C-454/06) judgment of 19 June 2008. Following this decision, an amendment to an existing public contract (eg, extension, modification of the technical conditions for its execution, costs increase, change in the contractual partner or change in the composition of a consortium of contractors) can be regarded as a public contract that should be put out to competition when causing a 'material contractual amendment', or substantial change, in the initial conditions of the original contract.

Apart from cases where the negotiated procedure without publication is applicable, the issue of the legality of amendments made to an existing public contract (ie, is this amendment to be considered as a change similar to a new public contract that should have been put out to competition) is appreciated by the contracting authority (provided that it is aware of it) and, ultimately, by the judge in charge of public contracts.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

We did not find any relevant national case law regarding the application of the legislation in relation to amendments to conclude contracts.

However, recently, the Council of State has, on multiple occasions, applied the case law of the ECJ and the directives regarding the modification of a public contract during its performance. It strictly applied the *Pressetext* case of the ECJ:

- to sanction a substantial modification decided by a contracting authority. See for example, two judgments for *SGI Security* of 1 February 2016 (Case No. 233,677) and 1 March 2016 (Case No. 233,982), in which the Council of State decided that a contracting authority cannot extend an existing contract using a new provision, the amount of which is ultimately greater than the initial provision. In this case, the initial contract related to the provision of guarding of a building during working hours for a total amount of €50,000 per year; the extension related to provision of guarding of another building for a total amount of €250,000 per month and included several new provisions (use of metal detection equipment, excavation of luggage etc);
- to validate marginal amendments justified by the need to re-establish the economic equilibrium of the contract (eg, the *Clear Channel* case of 3 March 2016, Case No. 234,014); or
- to validate amendments that did not affect the economic equilibrium of the contract and would not have allowed the admission of applicants, other than those initially selected (eg, the *Clear Channel* case of 1 December 2016, Case No. 236,642).

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

In principle, the transfer of a state-owned company or of a public service to private ownership should not be subject to procurement procedures. However, such a transfer is subject to the fundamental principles and, normally, has to be put out to competition.

The transfer only falls within the scope of the public procurement law when its genuine purpose consists of a public contract (eg, when the company's business may only be continued or the service may only be performed if important works are carried out; see mutatis mutandis ECJ, 6 May 2010, *Club Hotel Loutraki*, EU:C:2010:247, C–145/08).

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

There is no specific legislation governing PPPs. However, the legislation identifies two forms of PPP:

- works concessions generally used for the construction and operation of major infrastructure projects; and
- projects aiming at providing the contracting authority with a work under specific legal forms (eg, the transfer of a right in rem on a real estate property owned by the contracting authority, with a view to constructing a structure to be made available to the contracting authority via a transfer with a deferred payment or by means of a lease agreement, possibly paired with a purchase option).

Such PPPs must be considered as public work contracts.

Since the decision of the Council of State in the case *sa Constructions Industrielles de la Méditerrannée*, Case No. 145,163 of 30 May 2005, relating to the setting up of a company for the construction and operation of a waste incinerator, PPP is generally considered to be subject to public procurement law. Recently, in the *sa Bopro* case (No. 240,044 of 30 November 2017), the Council of State once again confirmed that a PPP regarding the development of a residential area in Flanders constituted a public work contract and was subject to public procurement law. In particular, the Council of State considered that this contract fell within the definition of a 'public procurement' since it was a contract for a pecuniary interest between a contracting authority and an economic operator that would meet the needs of a contracting authority as defined in the contractual documents.

Finally, one should note that one of the vehicles used by PPPs is the concession contract of services. As a part of the transposition of EU directives, these contracts have been included in the new legislation on concession contracts.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

The advertising of a procurement contract, which falls within the scope of the legislation on public procurement, depends on its amount. If it is above the EU threshold the contract has to be published in the Official Journal of the EU (OJEU) and the e-Notification. If it is below the EU threshold, the contract has to be published only in the e-Notification, unless the law provides otherwise.

Contracts that do not fall within the scope of the legislation on public procurement are subject to an 'adequate publicity' rule in order to comply with the fundamental principles of transparency, equality and non-discrimination. However, in some cases, public authorities publish their most important contracts in the OJEU and the e-Notification in order to ensure the widest possible call for tenders.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

This differs depending of the category of public contract (procurement or concession) and of the sector (classical or utilities sectors).

In the concession contracts, the contracting authority must set selection criteria (capabilities).

In the procurement contracts in the classical sectors, the contracting authority is entitled to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure. However, this rule is not applicable to public procurement awarded following the negotiated procedure without prior publication.

In procurement contracts in the utilities sector, the contracting authority is not obliged to set selection criteria to assess whether an interested party is qualified to participate in a tender procedure.

The criteria must be related to the technical and professional capabilities of an economic operator or their economic and financial standing. When establishing such criteria, the action is framed by the legal provisions determining the elements that may be taken into account (eg, turnover, references to similar public contracts, human and material resources, staff experience). These selection criteria must be relevant, linked to the subject matter of the contract and proportionate. Requiring references that significantly exceed the needs of the contracting authority (eg, a supply for a period of time or quantities exceeding those of the contract) or that are unrealistic (eg, a number of references to similar contracts performed by the tenderer that would exceed the capacity of the concerned business sector) are thus not allowed.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

In the restricted procedure, the negotiated procedure with prior publication, the competitive dialogue and the innovation partnership, a contracting authority may limit the number of bidders that can participate in a tender procedure. The minimum number of bidders cannot be less than five in the restricted procedure and three in the negotiated procedure with prior publication, the competitive dialogue and the innovation partnership.

The number of candidates allowed to submit tenders must be sufficient to ensure genuine competition. In cases of the contract being subject to a European public notice and prior open bid, the contracting authority must indicate in the procurement notice the minimum and, if appropriate, the proposed maximum number of candidates.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' has been transposed into Belgian law as part of the transposition of the EU directives on public procurement and concession contracts. Indeed, an economic operator can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and effectively preventing further occurrences of the misbehaviour. Those measures might consist of personnel and organisational measures, such as:

- the severance of all links with persons or organisations involved in the misbehaviour;
- appropriate staff reorganisation measures;
- the implementation of reporting and control systems;
- the creation of an internal audit structure to monitor compliance; and
- the adoption of internal liability and compensation rules.

Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures that have been taken with a view to possible admission to the procurement procedure be examined.

The candidate or tenderer must prove, on his or her own initiative, that he or she has paid or undertook to pay compensation for any damage caused by the criminal offence or fault, or that he or she has fully clarified the facts and circumstances by actively collaborating with the authorities responsible for the investigation, and took concrete technical, organisational and personnel measures to prevent new criminal offences or misconduct. The assessment of the compliance measures taken by the candidate or the tenderer shall take into account the seriousness of the criminal offence or fault and its particular circumstances. In all cases, the contracting authority should take a decision that must be motivated both materially and formally. Where the measures are considered insufficient, the reasons for the decision concerned are sent to the economic operator.

Finally, a contracting authority cannot automatically exclude an undertaking that falls under optional exclusion criteria. In order to comply with the principle of sound administration, the contracting authority must verify if this situation raises serious doubt about the undertaking's capacity to perform the contract. An exclusion decision of the contracting authority has to be proportionate and shall state formally the reasons why the undertaking is to be excluded, owing to the existence of optional exclusion criteria. Given this procedure, the exclusion of a tenderer on the basis of an exclusion ground tends to be more objective. The contracting authority is indeed obliged to analyse more concretely the situation of a company in light of the grounds for exclusion before taking an exclusion decision.

Recent development in the case law of the Court of Justice of the European Union (CJEU) should be taken into account in the implementation of the self-cleaning procedure in Belgium in case a operator falls within the scope of an optional ground for exclusion. In the *Vossloh Laeis GmbH* case of 24 October 2018 (C-124/17, EU:C:2018:855), the Court of Justice has considered that, if conduct falling within the relevant ground for exclusion was penalised by a decision of the competent authority, the duration of three years is calculated from the date of that decision.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

For each text it adopts – be it an overhaul of legislation, transposing EU law or modifications induced by EU law – the legislator recalls the European origin of the intervention as well as the applicable fundamental principles.

For instance, article 4 of the Law of 17 June 2016 expressly states that the treatment of economic operators must be in compliance with:

- the principle of equality;
- the principle of transparency governing the contracting authority's action;
- the principle of competition for the award of public contracts; and
- the principle of proportionality.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Contracting authorities do not have to be independent in the exercise of their functions. However, impartiality is a general principle of law that applies to public action.

This also applies to the contracting authority in the course of the procedure of awarding public contracts, as well as to the consultants or external advisory bodies that assist it in its decision-making process.

The principle is set out in the case law of the judge in charge of public contracts. In principle, a contracting authority's lack of impartiality must be concretely established, and it must be shown that the bias could exercise significant influence on its decision.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Conflicts of interest are subject to specific provisions under public procurement legislation and constitute a specific infringement under the Criminal Code.

The provisions governing conflict of interest apply to any natural or legal person involved with the contracting authority in the award procedure independently of his or her position (eg, official, public officer or adviser) and covers his or her personal interest (eg, parenthood, alliance relationships with a candidate or a tenderer, or a person exercising a managerial or leadership position in such an undertaking), as well as his or her own economic interests (eg, the fact of owning interests or of being empowered with the decision-making powers of an undertaking while being a candidate or a tenderer, directly or through an intermediary).

The legislation provides, on the other hand, that the contracting authority shall take the necessary measures to prevent, detect and effectively correct conflicts of interest arising during the award and the performance of the contract, in order to avoid any distortion of competition and ensure the equal treatment of all economic operators.

On the other hand, a person with a conflict of interest shall recuse himself or herself.

Following some high-profile cases, the legislator or the government occasionally intervened to regulate the action of public officials or agents. Examples of such legislation are:

- the Decree of the Walloon Region on auditors' control missions within organisations of public interest, inter-municipalities and public housing companies, and enhancing the transparency of the award procedure of auditing services by a Walloon contracting authority;
- the Circular of 21 June 2010 of the Federal Public Service of the Chancellery of the Prime Minister on ethics and conflicts of interest;
- the Act of 8 May 2007, approving the United Nations Convention against Corruption; and
- the Circular of 5 May 2014 of the Federal Public Service of the Chancellery of the Prime Minister to undertakings that participate in public contracts – revolving doors mechanism.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Under the previous legislation, any company that had been involved upstream in the preparation of a tender procedure or any company related to it was formally prohibited to respond to the call for tenders.

The current legislation provides that when a candidate or tenderer, or an undertaking linked to a candidate or tenderer, has been involved in the preparation of the award procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. These measures include communicating to other candidates and tenderers relevant information exchanged in the context of the participation of the candidate or tenderer referred to above in the preparation of the procedure, or resulting from such participation and to set adequate deadlines for the receipt of tenders.

The candidate or tenderer that participated in the preparation of an award procedure shall be excluded from the procedure only if there

are no other means of ensuring compliance with the principle of equal treatment. However, before being excluded, the candidate or tenderer is given the opportunity to prove, by means of a written justification that his or her prior participation is not likely to distort competition.

The case law rigorously applies this provision: the contracting authority must raise the (potential) conflict of interest and ask the company for further information about it. In general, the advantage gained through the upstream involvement in the preparation procedure can be neutralised, unless if the advantage is too significant, by sharing the information obtained within the framework of the work carried out prior to the invitation to tender or by extending the legal deadline for the filing of the application and tender files.

The current legislation follows, in our views, the principles settled in the judgment of the ECJ of 3 March 2005 in the *Fabricom* cases (C-21/03 and C-34/03).

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

In the classic sectors, the most common procedure is the call for tenders, on a multi-criteria basis, allowing the contracting authority to adapt the criteria to its needs (eg, criterion of the most economically advantageous tender). Relatively standardised public contracts or simple works public contracts are awarded on the basis of the price criterion alone (a procedure called 'adjudication').

Below the EU thresholds, there has been an increase in the use of the negotiated procedure, encouraged by the legislator. Indeed, the Law of 17 June 2016 generalises the negotiated procedure with prior publication to public supply contracts and public service contracts the estimated value of which is below the EU thresholds, and to public works contracts the estimated value of which is less than €750,000.

In the utilities sectors and in the field of defence and security, the usual procedure is the negotiated procedure with prior publication.

For the award of complex contracts, such as PPPs, the contracting authority generally chooses the competitive dialogue procedure or the negotiated procedure with prior publication, while standardised and ongoing provisions are, in general, awarded through framework agreements or by a central purchasing body.

Finally, the award of concession contracts is generally done through the negotiated procedure with prior publication.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Except for public contracts subdivided into different lots (where each lot is regarded as constituting a distinct contract) and variants, the tenderer can submit only one bid for the award of a contract. If a tenderer submits several bids for a single public contract, all of them must be considered as irregular.

Consortia are also prohibited from making multiple bids for the same contract. Indeed, a company participating in a consortium cannot submit a competing bid, alone or part of another consortium. However, this prohibition does not apply to subcontractors, since a tenderer may simultaneously be the subcontractor of a competing tenderer.

Finally, related bidders can also submit separate bids in one procurement procedure; it is only forbidden for related bidders to commit acts or conclude agreements to distort competition. It is therefore up to the contracting authority to examine, in concrete terms, whether the links between the undertakings in the same group have affected the content of the tenders lodged by those companies and, thus, to verify that it is not facing a 'disguised' agreement.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The recourse of the competitive dialogue or the competitive procedure with negotiation is legally authorised in the following cases:

- when the needs of the contracting authority cannot be met without the adaptation of a readily available solution;
- when the public contract includes design or innovative solutions;
- if the contract cannot be awarded without prior negotiations because of particular circumstances related to its nature, its complexity, the legal and financial framework, or because of the risks associated with it;
- when technical specifications cannot be established with sufficient precision by the contracting authority; and
- when only irregular or unacceptable tenders were submitted (in such situations, contracting authorities are not required to publish a contract notice).

The competitive dialogue departs from standard procedures by authorising the selected tenderers to develop their solutions before submitting a bid to the contracting authority. Therefore, the conditions for its application are strictly interpreted. In practice, the competitive dialogue procedure is reserved for the awarding of particularly complex contracts, where the contracting authority is unable to deduce the technical solutions that would meet its needs. Since this procedure has been recently introduced, no significant Belgian case law regarding it can be highlighted at this stage.

With the exception of the pre-negotiation dialogue stage, which allows the adaptation of tenderers' initial solutions and the limitation of the scope of competition to the solutions that are the most likely to meet the needs of the contracting authority, the competitive dialogue procedure is governed by principles similar to normal procedures, which include:

- publication;
- setting of selection and award criteria and of the technical requirements in the tender documents; and
- prohibition of any amendment to the bid, except for the modification of non-significant elements that are not likely to distort competition.

The contracting authority can also use the negotiated procedure with prior publication to award public supply contracts, and public service contracts the estimated value of which is below the EU thresholds, and to public works contracts the estimated value of which are below €750,000. In this procedure, the contracting authority may negotiate the initial tenders with the tenderers, and any subsequent tenders submitted by them, with the exception of final tenders, with a view to improving their content. However, the minimum requirements and award criteria are not subject to negotiation.

Finally, under exceptional circumstances, the contracting authority can use the negotiated procedure without prior publication listed in the legislation. This permits the contracting authority to negotiate the initial tenders with the tenderers, and any subsequent tenders submitted by them, in order to improve their content. The award criteria are not subject to negotiation. For contracts where the estimated amount is equal to or higher than the thresholds for European advertising, the minimum requirements are also not subject to negotiation.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

There are four procedures that permit negotiations with bidders:

- the negotiated procedure with prior publication (generalised to public supply contracts and public service contracts the estimated value of which is below the EU thresholds, and to public works contracts the estimated value of which is less than €750,000);
- the negotiated procedure without prior publication;
- the competitive dialogue; and
- the competitive procedure with negotiation.

The 'negotiated procedure with prior publication' is the procedure most often used by contracting authorities.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

A framework agreement is generally used by a contracting authority to award a public contract for works, supplies or services of a repetitive nature (but subject to contingency variations), but the ultimate scope of which cannot be estimated at the moment of the invitation to tender (eg, road repair works, provision of legal assistance to the contracting authority in the case of disputes).

Framework agreements must be awarded in compliance with normal procedures applicable for the award of public contracts.

It should be added that, in the recent case *Autorità Garante della Concorrenza e del Mercato* of 19 December 2018 (C-216/17, EU:C:2018:1034), the CJEU has set the limits under which a contracting authority may use a framework agreement. The Court has considered that the fundamental principles governing the awarding of public contracts imply that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question. On this basis, the Court decided that:

- in order for it to be able to award a subsequent contract on the basis of a framework agreement, a contracting authority must appear as a potential beneficiary of that framework agreement from the date on which it is concluded by being clearly identified in the tender documents with an explicit reference that makes both this contracting authority itself and any interested economic operator aware of that possibility; and
- the quantity of the services to be provided should be indicated in a framework agreement; once that limit has been reached the agreement will no longer have any effect.

This case law is important in the Belgium, since the practice of several public entities is not always in conformity with this requirement. As a consequence, litigation is to be expected in the next years in order to force the contracting authorities to adjust their practices.

24 May a framework agreement with several suppliers be concluded?

Framework agreements may be awarded to one or more companies.

When awarded to several companies (at least three), the award process of the subsequent contracts must be provided for in the framework agreement documents (a procedure with or without reopening competition can be contemplated, possibly on the basis of a ranking of the selected companies).

The contracting authority is allowed to reopen competition for subsequent contracts only in the event that all the terms of these contracts had not been specified in the framework agreement documents. In general, the reopening will focus on the price issue.

In the utilities sectors, the bids submitted for the awarding of subsequent public contracts may also be subject to negotiation.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The issue of a change in the composition of a bidding consortium in the course of a procurement procedure does not arise after the filing of the bid, as no modification can occur once the filing has been made, except in the context of a negotiated procedure. In principle, a change in the consortium's composition makes the bid illegal.

However, in some procedures, the legislation allows the change of a member of a bidding consortium. For example, in the case of a member of a bidding consortium being effected by an exclusion criteria or does not meet the participation requirements, the contracting authority is obliged to ask the remaining members of the consortium to replace the excluded member.

On the other hand, for the two-stage procedures involving the selection and the subsequent filing of the bids made by the selected candidates, the consortium's composition can be changed in order to allow a non-selected company (or a company that did not take part in the selection procedure) to join the consortium, if tender documents allow for this possibility.

Participation of small and medium-sized enterprises

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The legislation contains general tools that can be used by small and medium enterprises (SMEs) to access the public procurement procedure: consortia and contracts divided in lots.

The consortium is the first course that can be taken by SMEs to access public sector procurement opportunities to which they could not get access on their own, either because of the size of the contract or because of the professional requirements that are set for its implementation. It is acknowledged that the ability criteria (eg, sufficient human and material resources, experience in similar contracts, turnover) are assessed by combining the capabilities of each member of the group.

Moreover, legislation states that the tenderer may apply the capabilities of a subcontractor to the selection criteria, provided it can demonstrate that it will be able to make use of its subcontractor's capabilities in the implementation of the contract (eg, through a commitment of the concerned subcontractor; this requirement is also applicable when the subcontractor is a related company).

The subdivision into lots also facilitates the access of SMEs to public procurements, since the capabilities required under the condition for participation are estimated lot by lot, subject to the possibility of setting a specific level for the award of several lots to the same tenderer. Indeed, the legislation provides that the contracting authorities must consider the division into lots of a public procurement if its value is above or equal to the EU threshold. More precisely, the

contracting authorities will have to indicate, in the contractual documents, their decision not to subdivide the contract into lots.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

For contracts the value of which is below the EU thresholds, elective alternative bids are still allowed. For contracts above them, elective alternative bids must be authorised by the contracting authority and minimum technical requirements are specified in the tender documents.

Elective alternative bids are not authorised in the context of open or restricted procedures where price is the sole award criterion (adjudication procedure).

28 | Must a contracting authority take variant bids into account?

Mandatory and optional alternative bids must be taken into account in order to identify the lowest offer (adjudication procedure) or the economically most advantageous offer (multi-criteria procedure; unless otherwise specified in the tender documents).

The integration of elective alternative bids in the assessment procedure of the bids is at the discretion of the contracting authority.

These legal requirements are not applicable to the negotiated procedure and the competitive dialogue procedure.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

It is considered that a change in the tender technical specifications by a tenderer, or the integration of its own standard terms of business in its bid, make it irregular.

In general, any change in the technical specifications upsets the terms of the tender and prevents comparison between the bid containing this change and bids that have been submitted by tenderers that strictly complied with the requirements laid down in the tender documents. The process makes the bid irregular from a technical perspective.

Companies' standard terms of business are generally inconsistent with the rules that apply to the implementation of public procurements (Royal Decree of 14 January 2013), in particular with respect to deadlines and payments, or even the counterparty's liability. They tend to economically favour the tenderer that claims their application in relation to its competitors and that comply with the constraints inherent to the rules governing the implementation of public contracts. The process makes the offer technically illegal because of the contradiction that it (always) brings to the essential requirements of a public contract.

However, the legislation enables the tenderer to correct errors or omissions preventing the determination of its price or comparison between the bids, provided that the tenderer concerned announces them to the contracting authority before the filing of the bids.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The legislation identifies the award criteria through specific examples (eg, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, social considerations, running costs, profitability, customer service and technical assistance, projected time of completion, guarantees).

Contracting authorities are, in principle, free to choose the elements they will be using in order to identify which offer best fits their needs. It is only required for a criterion to be connected to the object of the public contract concerned, to be relevant (within the meaning of 'adequate for the purpose of comparison of the bids') and to be non-discriminatory.

In principle, the award criteria cannot concern elements of ability taken into account under the selection criteria, such as experience in similar markets. However, reference can be made to elements of ability while awarding public service contracts, if the ability is a key element with respect to the quality of a technical proposal (eg, the experience of the staff members who will be assigned to the implementation of a complex information technology contract).

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

According to law, an 'abnormally low' bid is only relevant when it concerns low price.

An 'abnormally low' price is generally defined as the price at which the tenderer cannot perform the contract in accordance with the technical requirements set by the contracting authority. Most of the time, an abnormally low bid results from a misunderstanding of the needs of the contracting authority or from speculation.

This issue is frequently raised in proceedings brought against the award decision of a public contract. Therefore, the legislation has taken this issue into account while setting the framework for the contracting authority's action in verifying the price (obligation to verify the prices, obligation to ask the tenderer whose bid is deemed as abnormally low for further information, obligation to substantiate their decision – see question 32).

According to the case law, in the case of a price being considered as abnormally low and the justifications given by the bidder not being acceptable, the bid must be rejected, even when the abnormality only affects a quantitatively insignificant part of the bid.

32 | What is the required process for dealing with abnormally low bids?

An abnormal price is evidenced by a significant deviation from either the average price offered by competitors, or the estimated costs of the contract made by the contracting authority. When seemingly abnormal prices are detected, the contracting authority must open specific proceedings to check the price, during which it asks the tenderer to provide for any information likely to justify its prices.

The justification must be concrete and specific to the tenderer (eg, technical processes applied, technical solutions) – an element that can be shared by its competitors is in principle not acceptable. For example, it is not sufficient to rely on experience in similar public contracts; it must be shown how this experience enables the bidder to offer a significantly reduced price. This phase is automatic in the context of public work contracts awarded on the sole criterion of price (adjudication procedure) when the deviation from the average prices of the other bids exceeds 15 per cent.

The contracting authority must reject bids if the price is considered abnormally low and when the justification provided has been refused.

Except for the verification phase, these legal requirements are not applicable in the context of the negotiated procedure, but the contracting authority, rationally, could hardly accept a tender the price of which is obviously abnormal.

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

There is no organised administrative remedy; appeals against decisions of the contracting authority have a judicial nature.

Depending on the nature of the contracting authority, appeals must be lodged before the Council of State (administrative authority) or a civil judge (private entities that cannot be regarded as an administrative authority). The qualification of an administrative authority cannot be confused with that of a contracting authority.

The Council of State's judgments are not subject to appeal.

A civil judge's judgments can be challenged. However, as it has no suspensive effect, the appeal against such a judgment is not very relevant for the tenderer, the appeal of which has been rejected in first instance (see question 40) and is therefore generally not initiated.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Each authority can suspend or annul the decision to award public contract and grant compensation (see question 43).

However, only a civil judge has the power to annul a contract (an 'action for declaration of ineffectiveness') that has been concluded:

- in violation of the 'standstill' period of an action for declaration of ineffectiveness (an annulment) made against a contract concluded in violation of the publication obligation;
- before the expiration of the 'standstill' period between communication of the award decision and the signature of the contract; or
- without having waited for the result of the suspension request submission, provided that the disputed decision seriously infringes public procurement law.

Timeframe and admissibility requirements

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The suspension request is the preferred means for contesting decisions taken by the contracting authority during the award procedure (from the decision setting out the tendering conditions to the award decision). This request generally enables the freezing of the procedure and reintegration of the candidate that has been excluded or the tenderer that has had their offer rejected.

The suspension is implemented through interim proceedings, within 15 days from the publication, the notification or the knowledge of the relevant decision (see question 37). Suspension requests are processed relatively quickly: one month before the Council of State to three months before a civil judge.

An action for annulment, which does not present any practical interest (as it does not avoid the implementation of the public contract), is subjected to longer deadlines: more than a year on average.

36 What are the admissibility requirements?

The disputed decision must be an act likely to adversely affect the claimant.

Appeals can notably be lodged against:

- the conditions for participating in the award procedure of the public contract or its mandatory technical specifications where they prevent an undertaking to participate or are discriminatory;
- the choice to apply the negotiated procedure without publicity;
- abandonment of the implemented procedure;
- any decision that directly relates to the undertaking (non-selection, declaration of irregularity);
- the award decision; or
- amendment to an existing contract similar to a new public contract that must be subject to a new invitation to tender (see question 8).

The plaintiff must show an interest in acting. In particular, it must:

- have participated in the award procedure of the public contract or have been barred from participating in the award procedure while it could have in normal circumstances;
- be adversely affected by the disputed decision (eg, the undertaking that satisfies the selection criteria does not have any interest in contesting such criteria); and
- raise relevant objections likely to call into question the ranking of the bids.

In the case of applications or bids made through a consortium, each member of the consortium has to bring an action (since *sa Espace Trianon*, C–129/04, ECJ, 8 September 2005).

Suspension requests are not subject to the usual conditions for interim proceedings (ie, urgency, serious and not easily reparable damage), but the judge can decide, after balancing of interests (at the express request of the contracting authority), to reject the request despite the irregularity that has been raised.

37 What are the time limits in which applications for review of a procurement decision must be made?

The time limits depend on the request of the plaintiff:

- suspension request: 15 days;
- annulment request: 60 days;
- action against a contract that has been irregularly concluded (declaration of ineffectiveness; only applicable to public contracts subject to publication pursuant to EU law): six months – reduced to 30 days where the contracting authority has voluntarily published a contract award notice in the OJEU or has informed the candidates or the tenderers about the conclusion of the contract; and
- action for compensation: five years.

The time limit starts, depending on the case, at the publication, notification or the knowledge of the award decision, provided that the communication contains the reasons that justify this decision.

However, as a consequence of the ECJ *Idrodinamica* case (8 May 2014, Case No. C–161/13, EU:C:2014:307), the time limit for bringing an action against a decision awarding a contract starts to run again where the contracting authority adopts a new decision, after the award decision has been adopted but before the contract is signed, which may affect the lawfulness of that award decision. That period starts to run from the communication of the earlier decision to the tenderers or, in the absence thereof, from the moment they become aware of that decision.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The suspension request does not automatically suspend the procurement procedure and the conclusion of the contract, except if the appeal is lodged against the award decision of:

- a public contract governed by EU law and entered into through the open or the restricted procedure or through the negotiated

procedure with publication (standstill period provided for by Remedies Directives 89/665 and 92/13); or
- a works contract (either procurement or concession) the value of which exceeds half the EU threshold (€2.774 million; extension of the standstill period) but is less than the EU thresholds.

For other public contracts, the contracting authority can voluntarily apply the standstill period. However, this choice produces limited effects; legally it does not prevent the conclusion of the contract before the expiry of the standstill period.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

The Council of State rejects the majority of lawsuits, either because the action is groundless or because the nature and complexity of grievances is not compatible with the conditions of a procedure of extreme urgency (which implies a manifestly serious grievance and a prima facie evaluation).

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Information to applicants or tenderers prior to the conclusion of the contract is only mandatory for public contracts subject to the standstill period (see question 38). For these public contracts, the contract may only be entered into when the time limits to submit a request expire and if no request has been submitted, or after the rejection of the suspension request that has been submitted.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Access to decisions and other supporting documents (in particular the application and the bid files) is organised according to a complex procedure depending on the position of the candidate or the tenderer. According to the legislation, a non-selected applicant and tenderer, having submitted an irregular bid, must be informed of extracts of decisions that relate to them.

However, the judge in charge of public procurement is entitled to request the contracting authority to provide him or her with additional documents that did not have to be disclosed to the applicant during the award procedure. Before the Council of State it is customary that the contracting authority produces all the documents belonging to the administrative procedure that has led to the award decision. The appellant has a right of access to the file, except to documents for which confidentiality has been requested.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

An appeal should generally be lodged where serious grounds have been identified (breach of public procurement law or of the fundamental principles, manifest error of assessment, etc). Unfortunately, this is not always the case in practice.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

If a violation of public procurement law has been established, the bidder who has been irregularly foreclosed has a choice between two actions.

It can lodge an action for compensation – unless, in the meantime, it obtained a suspension and the contracting authority took a new decision correcting the illegality. This action must be lodged before the civil judge within five years following the publication, notification or knowledge of the award decision. In this case, compensation is generally based on the principle of loss of opportunity (probability of having the contract awarded if no irregularity had been committed), concretely a percentage of the benefit that could have been obtained from the implementation of the contract. Or, in the case of the contracting authority being an 'administrative authority', an enterprise can also lodge an action for compensation before the Council of State within 60 days after the notification of the annulment judgment of the Council of State.

However, both actions (in compensation before the civil judge and the action for compensation before the Council of State) are not cumulative: an enterprise has to select one.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

For public contracts subject to the standstill period (see question 38), the Act of 17 June 2013 provides for an action for a declaration of ineffectiveness against a contract that has been concluded:
- in violation of the publication obligation; or
- before the expiry of the standstill period between communication of the award decision and the signature of the contract, or without having waited for the result of the suspension request that has been submitted (provided that the disputed decision seriously infringes public procurement law).

This action can be lodged at the request of any interested undertaking, within six months after the conclusion of the contract, even if the enterprise has not been informed of the conclusion of the contract by the contracting authority.

The declaration of ineffectiveness does not apply to other circumstances.

Regarding the parties to the contract, the issue arises differently. The law does not provide for any measure with respect to them and the challenge of the contract depends on their action. The judge in charge of public procurement has already admit the challenge of a contract by the contracting authority when the contract had been concluded in breach of the obligation to put out to competition (Brussels Court of Appeal, 28 December 2013).

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

See question 44 for where the contract has been concluded in breach of the obligation to put out to competition.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

Basic amounts before the Council of State are €200 (for an application) and €700 (for the procedure indemnity), but the cost varies between €140 and €2,800.

Basic amounts before the civil judge are a few hundred euros to enter the hearings schedule and for the bailiffs' charges, or €1,440 for a procedure indemnity (but this amount varies between €90 and €12,000).

In both cases, undertakings must take legal fees into account.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

As part of an important public building project (opened by a building prospection notice in which the Region of Brussels-Capital expressed the need to rent an existing building meeting a series of features and requirements, including a surface area of approximately almost 50,000 m2), Belgian courts have rendered two important decisions on the judicial protection for contracts falling outside the scope of public procurement directives and on the notion of public contract of works.

On the one hand, the Court of Appeal of Brussels organised a waiting period between the decision awarding the contract and the conclusion of the contract, by analogy with judicial protection mechanisms in public procurement law, in order to guarantee the right to an effective remedy. This case law is based on fundamental principles and shows the judge's concern to extend judicial protection mechanisms outside the law of public procurement that have proved their effectiveness.

On the other hand, the Council of State has suspended the award decision. Since the Region has selected, as the best offer, the offer for an office building authorised but whose construction work had not yet started, the Council of State considered that, to the extent that the building is still to be built, it is a public works contract and should comply with the public procurement rules. This judgment is consistent with the legal exception; in the absence of a legal definition and considering the restrictive interpretation of any exception to a legal obligation, a building cannot be considered as 'existing' if it is in the state of 'project', even if it has all the necessary authorisations for its construction.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

The main regulation applicable to the award of public contracts is Supreme Decree 0181, 28 June 2009 (Supreme Decree 181). Although this regulation is hierarchically inferior to a law, given the current legislative strategy of the Bolivian administration, it was the fastest and most efficient way in which to standardise public procurement procedures.

Given the many limitations included in Supreme Decree 181 (such as the limitation on awards of public procurement contracts to foreign companies and the limitations on negotiations of certain types of contracts), the Bolivian government issued a series of other regulatory supreme decrees whereby certain ambiguities were corrected. An example is Supreme Decree 26688, modified by Supreme Decree 2030, which provides that public entities will be able to award public contracts to foreign companies when such awards are justified through legal and technical reports, and as long as such goods and services are not available in the domestic market and offers cannot be received in the country. Before Supreme Decrees 26688 and 2030, foreign companies wishing to take part in public procurements had to be incorporated in Bolivia.

In addition to Supreme Decree 181, the government created a series of productive public entities (PPEs) in economic areas into which the current administration was planning to venture, such as the export of almonds and almond-based products, the sale of paper and carton-based products, and the creation of a state bottling company. These PPEs are regulated and supervised by the Service for the Development of Productive Public Companies (SEDEM). The creation of PPEs and SEDEM gave the government an opportunity to expand the application of Supreme Decree 181 and take foreign negotiation and contractual principles into consideration during public procurement procedures.

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

Several sectors have been classified as 'strategic development enterprises'. Such enterprises include:

- the national oil and gas company;
- the national electricity company;
- the Bolivian mining corporation; and
- the national telephone company.

Such strategic development enterprises have their own sector-specific procurement regulations, which, following the general principles of the general procurement norms (Supreme Decree 181), may have different requirements and exceptions.

In addition, as stated above, the government created a series of PPEs, which are currently dedicated to the following areas:

- milk;
- carton-based products;
- sugar;
- almonds and almond-based products;
- cement;
- bottles; and
- any other public entity that the government believes would be beneficial for the state.

Each of these companies is supervised and developed by SEDEM. In order to differentiate public procurement procedures applicable to every other public entity from PPEs, the government issued a special regulation for SEDEM and Supreme Decree 2030, which allows PPEs to contract foreign companies for the provision of goods and services, as long as such goods and services cannot be procured within Bolivia and are beneficial for the state.

Additionally, in 2015 the Bolivian government issued Supreme Decree 2497, which specifically ordered the direct contracting of companies, by means of turnkey contracts, for the construction of public hospitals. However, only recently has the government begun enforcing this Supreme Decree and hiring such contractors, through particular ministerial resolutions issued by the Health Ministry for each specific case.

International legislation

3 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Bolivia is not a part of the EU procurement directives or the World Trade Organization's Agreement on Government Procurement (GPA). In this regard, it is worth mentioning that Supreme Decree 181 provides principles that are manifestly the opposite of the governing principles of the GPA, mainly in the difference in treatment between national and foreign companies, and the fact that dispute settlement may only be carried out pursuant to Bolivian law and generally before Bolivian tribunals.

Proposed amendments

4 Are there proposals to change the legislation?

No, there are no proposals to adapt the current legislation to comply with EU law requirements or to those of the GPA.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Law 466, also called the Law of Public Companies, provides the conditions under which public or mixed (a combination of both state and privately controlled) entities or companies may be called 'public entities'.

Article 1 of Law 466 specifies that, according to article 248 of the Bolivian Constitution, the executive in Bolivia has the faculty to create and incorporate public entities and companies. In this regard, any state-owned enterprise, mixed enterprise, joint venture and intergovernmental state enterprise, or any other legal entity in which the Bolivian state takes part and carries out its activities at a state-private level, is considered a public entity under Law 466's spectrum.

As a consequence, any company or entity not controlled, or that does not have the participation of the Bolivian state, is not considered a public entity, and as such, may not fall within the standards applicable to contracting entities included in Supreme Decree 181, described above, for public procurement procedures.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

As long as the procurement is carried out by a public entity, no contract and no value is excluded from public procurement conditions.

The threshold values are divided as follows:

- minor procurement: one to 20,000 bolivianos;
- national support for production and employment: 20,001 to 1 million bolivianos;
- public bidding: from 1,000, 001 bolivianos;
- contracting by exception: unlimited amount;
- emergency contracting: unlimited amount; and
- direct contracting of goods and services: unlimited amount.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Supreme Decree 181 allows for the modification of concluded contracts without the need for a new procurement process if the following conditions are met:

- the modifications are supported by technical and legal reports and are contained in a modification contract;
- the modifications' costs must not exceed 10 per cent of the principal amount; and
- there are a maximum of two modifications, provided they do not exceed the term of the main contract.

In the case of construction contracts (EPCs), modifications may be carried out through change orders; again, such orders may only be applicable when the required change involves a modification of the price of the contract or its term, without giving rise to the increase of unit prices or the creation of new items.

Change orders must be approved by the entity responsible for monitoring the work and may not exceed 5 per cent of the principal contract's amount.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There have been many cases regarding modification contracts. However, no case law amends the regulations applicable to concluded contracts or discusses modifying contracts in depth.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Since the current administration reached office in 2009, no privatisation procedure has been concluded. The applicable regulation on the subject at the moment only focuses on expropriation and nationalisation of private entities.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

At the moment, there is only one very broad PPP supreme decree applicable in Bolivia that regulates the general content required in future Joint Venture Strategic Alliance Contracts, but it does not yet provide anything about procurement procedures.

However, Supreme Decree 3469 provides suggestions and clues that public procurement will be required for PPPs of strategic sectors (see question 2), where the Bolivian state will need to have a majority participation, and, as a consequence, will need the use of Law 466 (Law of Public Companies) and Supreme Decree 181.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

Procurement contracts must be advertised in the official state website called the system for public contracting (SICOES).

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Supreme Decree 181 does provide for certain specific criteria when contracting for tender procedures. Based on a publication by the Ministry of Finances on 29 June 2006, the day on which Supreme Decree 181 was issued, this regulation provides convenient criteria for contracting, but also incorporates mechanisms of social control. Among the modifications, article 14 provides that the reference price will be public, and included into the Basic Document of Contracting (DBC). This will avoid the discretionary use of information and, therefore, of corruption.

Supreme Decree 181 provides criteria and parameters that limit certain contracting procedures. Another example of these types of limitations is article 30, which provides that certain conditions will be given an additional margin when grading. In this regard, companies with participation of Bolivian partners holding more than 51 per cent of the company get a 5 per cent margin increase when competing against other international companies.

In conclusion, Supreme Decree 181 does provide for a series of limitations when organising public tender procedures and most such

limitations are based on the preference of contracting Bolivian nationals over international competitors.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Article 59 of Supreme Decree 181 states that an indeterminate number of bidders may take part in a tender procedure. Generally, when there are fewer than three bidders, the tender may be declared deserted and a new tender should be convened, with bidders that took part in the first tender invited to bid again.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Article 43 of Supreme Decree 181 provides for problematic conditions in tender procedures. In this regard, the Article divides such conditions into two categories: those that cannot be regulated and those that, after a certain amount of time has elapsed, may be regulated.

The first category includes the following situations:

- having unresolved debts with the state;
- executed sentences prohibiting the bidder to exercise trade activities;
- executed criminal sentences regarding crimes included in Law No. 1743 of January 1997, which approves and ratifies the Inter-American Convention against Corruption or its equivalent crimes provided in the Bolivian Criminal Code;
- bidders that are associated with consultants that advised in the elaboration of the content of the DBC;
- bidders declared as bankrupt; and
- bidders whose legal representatives or whose shareholders or controlling partners have a marriage or kinship relationship with the maximum authority in charge of the tender, up to the third degree of consanguinity and second degree of affinity, in accordance with the provisions of the Bolivian Family Code.

The category that allows for the regulation of impediments includes the following situations:

- former public servants who performed functions in the convening entity, until one year before the publication of the tender, as well as the companies controlled by them;
- public servants who currently exercise functions in the convening entity, as well as the companies controlled by them;
- bidders that, after having been adjudicated, have withdrawn from executing the contract, may not participate until one year after the date of withdrawal, except for reasons of force majeure or fortuitous events, duly justified and accepted by the convening entity; and
- suppliers, contractors and consultants that have had contracts terminated due to causes attributable to them, causing damage to the state, may not participate until three years after the date of the termination, according to information registered by the corresponding entity in SICOES.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The relevant legislation specifically states the fundamental principles for tender procedures, providing such principles from the public officer's perspective.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Supreme Decree 181, which includes every type of public procurement, does provide that public officers in charge of public procurement procedures must be impartial in their decisions. The principle of independence for contracting authorities is not mentioned.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Conflicts of interest are taken seriously within public procurement procedures. This principle is included in article 236 of the Bolivian Constitution, that provides that public officials are prohibited from:

- acting when their private interests conflict with those of the entity where they provide their services;
- entering into contracts or conduct business with the public administration directly, indirectly or on behalf of a third person; and
- appointing individuals in public positions with whom they are related up until the fourth degree of consanguinity and second of affinity.

This principle is, in turn, repeated in Supreme Decree 181, which provides that officers in charge of reviewing the bidding participants' documents may not delegate their responsibility 'except in cases of conflict of interest', and article 44, which specifically deals with conflicts of interest by providing that individuals or companies (whether associated or not) advising a public entity in a procurement process, may not participate in the process under any reason or circumstance. However, individuals or companies, and their corresponding subsidiaries, contracted by the convening entity to provide goods, perform works or provide general services, may provide consulting services in respect thereof.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

In accordance with article 44, any consultant participating during the drafting of the bidding may not take part in such process, under any circumstances. The prohibition is absolute.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure depends on the goods being bought or the service needed.

For example, and given the many restrictions on foreign bidders taking part in national bidding procedures, practice has shown that many specialised services or technological goods are often contracted by means of the direct contracting of goods and services process, which

bypasses the bidding phase completely. The reason for this is there are no minimum or maximum amounts to these types of contracting procedures and offices such as SEDEM, so strategic development sectors developed their own regulations that permit them to turn to foreign bidders whenever the specific services or goods that are needed cannot be found in Bolivia.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

There is no provision regarding an applicable procedure whenever related bidders submit bids during procurement processes. As a consequence, and given that it is not prohibited, the requirements and conditions applicable are the same as with any other bidder.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Supreme Decree 27328 of September 2015 provides for two types of situations when bidders may negotiate bidding terms with public officials:

- small bidding procedures (equal to or less than 160,000 bolivianos), in which case, public officers may use negotiation tables and inverse fairs, which consist of fairs organised by public entities and governmental authorities in order to offer their different programmes to possible bidders. In order to be applicable, these types of negotiations may only be for amounts that are less than 160,000 bolivianos and may be granted through direct contracting procedures or comparison of prices procedures; and
- calls for bids based on expressions of interest, which consist of bidding procedures for consulting firms and may only be applicable to amounts equal or more than 800,000 bolivianos. The only additional condition is included in article 105 of Supreme Decree 27328, which provides that under no conditions may the negotiations be carried out between the bidders, and the entity calling the bid modify the contract.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Given the difference in prices, each negotiation is applicable to different situations and, as such, they cannot be equally compared. However, and given recent advertising, we could conclude that the form of negotiation most regularly used in recent practice is that carried out by means of negotiation tables and inverse fairs.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

A framework agreement is called a 'basic document for contracting' (DBC) in Bolivia.

Supreme Decree 181 provides one draft DBC that may be adapted by the corresponding entity calling for bids, in accordance with the conditions issued by the maximum executive authority (MAE), and it must include the necessary technical conditions, evaluation methodology, procedures and conditions for the hiring process under which the public procurement procedure shall be based.

Given its importance for public procurement procedures, and with the intent of equalising and making such procedures more transparent, the current administration included a draft DBC to be included in every public procurement of more than 20,000 bolivianos. Any modification to this draft must be first informed and approved by the applicable MAE. In consequence, the strength of this document surpasses that of a mere contract, given that its terms are provided by a national regulation, and are very difficult to modify, if at all.

As was previously mentioned, and depending on each procurement process, some aspects of the contract contained in the DBC may be modified by the contracting entity and the adjudicated bidder, as long as such modifications do not exceed 10 per cent of the main contract's price and units.

24 | May a framework agreement with several suppliers be concluded?

Article 24 of Supreme Decree 181 provides that in cases of technical or economic advantage procurement processes, the contracting of goods and services may be adjudicated by items, lots, tranches or packages through one single call and framework agreement.

In order to be applicable, the DBC must list and refer to each item, lot, tranche or package individually.

Only in cases when one of the items, lots, tranches or packages is not awarded is an additional competitive procedure necessary.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There are no specific provisions regarding changes in consortia during the course of a procurement process. However, and given the provisions of Supreme Decree 181 with regard to the various forms that need to be filled by consortia in order to take part in procurement procedures, we believe that such a change would lead to the rejection of such a consortium.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The specific mechanism included to increase the participation of small and medium-sized enterprises in procurement processes is provided by article 31 of Supreme Decree 181, which provides that in the procurement of goods and services under the modalities of public biddings and national support for production and employment (ANPE), a margin of preference of 20 per cent shall be granted to the price offered for micro and small companies, associations of small urban and rural producers, and farmers.

Regarding the division of contracts into lots, as was previously pointed out, DBCs may be divided into items, lots, tranches or packages in cases when construction of services is required. There is no limit to the proponents who may bid, since each condition would be provided by the corresponding DBC.

With regard to the award of certain items or lots to single bidders, article 24 provides that when a bidder submits his or her proposal for more than one item, lot, tranche or package he or she must submit only one set of legal and administrative documentation, and one technical and economic proposal for each item, lot, tranche or package. As a consequence, there are no limits to the number of lots a single bidder may be awarded.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Typically variant bids are not acceptable, and the bidder must present only one bid. The only case in which variant bids may be presented is where there are different items or lots being bid simultaneously, in which case bidders may be allowed to provide as many as they can, provided the DBC allows for various lots and items within the procurement process.

In this regard, bidders must adjust their proposals to the DBCs published by the bidding authority at SICOES.

28 | Must a contracting authority take variant bids into account?

During the presentation stage of procurement procedures, article 27 of Supreme Decree 181 provides that public officials may declare a bid as void:

- if no proposal had been received;
- if all economic proposals exceed the reference price; or
- if no proposal complies with what was specified in the DBC, among others.

As a consequence, we can conclude that if a variant bid is filed that does not comply with the DBC, then such bid will be declared void.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The applicable regulation provides that whenever bids do not comply with the conditions of DBCs, where the tender specifications and technical standards are included, the procurement process must be declared void.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

Article 23 of Supreme Decree 181 provides that the following methods of selection and adjudication will be considered for procurement procedures of goods and services:

- quality, technical proposal and cost;
- fixed budget;
- lower cost; and
- lowest evaluated price, according to what is established in each DBC.

Each of these adjudication conditions is in turn supported by preference margins, which range from products and services created and provided in Bolivia to a preference margin for companies where less than 49 per cent is owned by foreign companies or individuals.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no definition in Bolivian law of what constitutes an 'abnormally low' bid. However, on looking into published DBCs, abnormally low bids do not have a specific amount but do include a verification procedure, which includes a comparison between the estimated price that was included in the framework agreement, and the price list provided by the bidder, in order to confirm consistency with the methods and proposed calendars.

32 | What is the required process for dealing with abnormally low bids?

As in question 31, bids containing abnormally low prices must be compared with the original price proposed by the framework agreement. If the price of the offer proves to be abnormally low, the offer may be rejected for lack of consistency. If adjudicated, and having evaluated the price, taking into consideration the terms of payment envisaged, the public entity may request that the amount of the bidder's compliance guarantee be increased to a sufficient level in order to protect the state from any loss in case of non-compliance with the terms of the contract.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The authorities that rule on review applications are ratings commissions.

Each member of a ratings commission is appointed by the person responsible for the recruitment process; who is, in turn, appointed by the MEA in charge of the procurement process.

It is possible to appeal against review decisions by means of an administrative challenge, which may only be filed against decisions regarding the content of the DBC, adjudication decisions and bids that were declared void.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The only authority in charge of ruling over administrative challenge recourses is the MEA in charge of the conflicted procurement process.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Article 97 of Supreme Decree 181 provides that these types of procedures should take up to 10 days. However, in practice, administrative proceedings for the review of procurement decisions take between two and four months.

36 | What are the admissibility requirements?

In order to be admissible, an administrative appeal must be accompanied by a renewable, irrevocable and immediate execution guarantee.

Regarding the standing capacity of bidders, article 11 of the Administrative Procedure Law provides that any individual or entity, public or private, whose subjective right or legitimate interest is affected by an administrative action, may appear before the competent authority (in this case the MEA) to assert their rights or interests, as appropriate, without having to prove personal and direct interest in relation to the act that motivates their intervention.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Article 97 of Supreme Decree 181 provides that the MEA must issue an express decision within a maximum of five days, counting from the filing of the administrative appeal.

The resolution that resolves the administrative appeal does not allow further administrative appeals, opening the way to judicial involvement.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Article 96 of Supreme Decree 181 provides that the filing of an application for review will suspend the contracting procedure, which may restart once the administrative recourse is exhausted.

There are no provisions regarding the lifting of such a suspension.

Based on administrative legislation applicable to administrative recourses, theoretically it would be possible for the suspension to be lifted if a bidder files and wins a constitutional claim (amparo) based on the grounds that the suspension has affected the bidder's constitutional right to work, or some other constitutional right.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

There are no provisions regarding the lifting of automatic suspensions, and none have taken place so far.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The analysis and adjudication of a procurement process is public information, and must be published at the SICOES.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

Article 22 of Supreme Decree 181 provides that once an adjudication has been made, the proposals that were not awarded will not be made public, and their subsequent use for other purposes will be prohibited, unless written authorisation of the bidder is received.

In public tenders, the proposals may be returned to the corresponding non-adjudicated bidders, at their request, as long as the contracting entity keeps a copy. This option is not available in public procurement processes related to national support for production and employment.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

Given that there is no public information available with regard to applications for review, it is very difficult to determine the exact number of filings, or the type of bidders who filed such recourses.

However, based on current practice, it is not customary for disadvantaged bidders to file review applications, given that such a procedure is very lengthy and expensive, and the outcome is almost always granted in favour of the contracting authority, given the way in which the procedure is created and given that it is the contracting entity itself that must resolve a decision of the officer appointed by it.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

As long as such violation of procurement law generated direct damages to disadvantaged bidders, it is possible for them to claim damages. In order to be able to prove this, the bidder would need to prove that the violation of such procurement laws generated loss of profit and damages that were a direct consequence of such violation.

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44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes, a decision regarding review proceedings can deal with the adjudication of the contract and declare such adjudication as invalid. If that is the case, the decision must specifically annul the adjudication 'down until the oldest vice in proceedings'.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

In case of fraudulent adjudications, without a proper procurement process, the legal protection for the party interested in the contract would be based on a criminal procedure against both the officer who granted the contract and the bidder.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

The costs of making an application for the review of a procurement procedure depend on the guarantee that needs to be provided at the beginning of the procedure, the lawyer who is overseeing the case, the amount of the contract and any other miscellaneous costs, such as legalisation, translation and notary costs in case of foreign bidders.

Bulgaria

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

In February 2016, the Bulgarian parliament approved an entirely new Public Procurement Act (PPA), replacing the previous PPA of 2004, which has been in force since 15 April 2016. The new PPA transposes Directive 2014/24/EU and Directive 2014/25/EU. It also includes provisions on public procurements in the fields of defence and security, in line with Directive 2009/81/EC, and on review procedures, in line with Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC.

The legislation is furthermore detailed in a Regulation for Implementation of the Public Procurement Act (RIPPA), adopted by Bulgaria's Council of Ministers, and has been in force since 15 April 2016 as well. There is further secondary legislation containing more detailed implementing provisions.

The key governmental authorities in charge of supervising the implementation of the PPA are:

- the Public Procurement Agency (the PP Agency), currently defined as a body under the minister of finance, implementing state policy in the area of public procurements and exercising ex-ante and ongoing control of public procurement procedures; and
- the National Audit Office and the State Financial Inspectorate Agency – two bodies responsible for carrying out the external ex-post control with respect to concluded public procurement contracts.

The authorities in charge of review procedures are presented in question 33.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

All provisions relating to sector-specific procurements have been incorporated in the 2016 PPA. Therefore, the PPA now encompasses both the general regime and the specific rules related to awarding of contracts by entities operating in different utilities sectors, as well as contracts relating to the fields of defence and security. The works and services concessions are regulated by the new Concessions Act, which came into force as of 2 January 2018.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The Bulgarian PPA regulates the award of procurement contracts with values below the thresholds set forth in the European Union (EU) directives listed above. It also includes specific provisions regarding performance or advance payment guarantees to be provided by the contractor upon signing a public procurement contract (article 111 PPA).

Proposed amendments

4 | Are there proposals to change the legislation?

A new set of legislation changes was introduced in the end of 2018, mainly aiming to facilitate the implementation of a centralised electronic web-based platform to provide a basis for 'e-Procurement' (see 'Update and trends').

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The PPA lists the entities that are contracting authorities. These entities are set out in article 5 of the PPA and are divided into two main categories – public and sectoral – each following the principles established in Directive 2014/24/EU and Directive 2014/25/EU respectively.

Pursuant to a specific exclusion, the PPA shall not apply to certain categories of contracts concluded by the National Health Insurance Fund and by the Road Infrastructure Agency (article 14, paragraphs 8 and 9) PPA). Also, according to paragraph 2, point 43 of the supplementary provisions of the PPA, certain healthcare institutions (meeting the criteria specified in the Law) are ruled to not constitute 'public law organisations' in the meaning of, and for the purposes of, the PPA, thus such institutions are excluded from the category of 'contracting authorities'.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The specific threshold values are defined in article 20 PPA within several categories, for most of which the Law establishes national levels that are lower than the ones set forth in the EU legislation.

Public procurements with values below the EU thresholds may be awarded under simplified national rules, as follows:

Public competition or direct negotiations

This is applicable in the following cases (article 20 paragraph 2 and articles 176 to 185 PPA). The thresholds per category are:

Works

- public: 270,000 to 10 million lev; and
- sectoral: 270,000 to 10 million lev.

Supplies and services (other than services under Annex 2 to the PPA)
- public: 70,000 to 280,000 lev; and
- sectoral: 70,000 to 860,000 lev.

Services under Annex 2 to the PPA
- public: 70,000 to 1 million lev; and
- sectoral: 70,000 to 1.5 million lev.

Collection of offers by advertisement or by invitation to specific persons

This is applicable in the cases under article 20 paragraph 3 and articles 186 to 195 PPA. The thresholds for public and sectoral authorities are:
- works: 50,000 to 270,000 lev; and
- supplies and services (excluding services under Annex 2 to PPA): 30,000 to 70,000 lev.

Contracts with lowest value

Finally, there is a category of contracts with lowest value, which may be directly awarded (article 20, paragraphs 4 and 6, PPA) – and are therefore deemed excluded from the scope of procurement law.

The thresholds for these categories, the contracting authorities and subject matter are as follows:

Works
- public: 50,000 lev;
- sectoral: 50,000 lev; and
- defence and security: 10 million lev.

Supplies and services (other than services under Annex 2 to the PPA)
- public: 30,000 lev;
- sectoral: 30,000 lev; and
- defence and security: 860,000 lev.

Services under Annex 2 to the PPA
- public: 70,000 lev;
- sectoral: 70,000 lev; and
- defence and security: 860,000 lev.

Design contests
- public: 70,000 lev;
- sectoral: 70,000 lev; and
- defence and security: not applicable.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The 2016 PPA contains detailed provisions on the possible amendments to an existing public procurement contract, without requiring a new procurement procedure (article 116 PPA), which follow the respective provisions of the EU directives (in particular, article 72 of Directive 2014/24/EU and article 89 of Directive 2014/25/EU).

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Under the revoked PPA of 2004, any amendments to signed public procurement contracts were prohibited, except in certain exhaustively listed cases (article 43 of the revoked PPA). There is extensive and consistent case law dealing with violations of this principle and application of the envisaged exclusions.

The 2016 PPA reinstated the principle that procurement contracts may be amended by exception only, but contains a wider list of exceptions in its article 116. The case law proves a rather strict and formalistic approach in the interpretation of the law on this aspect.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

The PPA does not cover privatisation as a process of transfer of public assets. The Privatisation and Post-privatisation Control Act (published 19 March 2002, as amended from time to time) regulates this process, including privatisation procedures.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Currently, there are no specific provisions requiring a procurement procedure under the PPA to set up a PPP. The new Concessions Act (published on 1 December 2017, in force as of 2 January 2018) repealed the special Public-Private Partnership Act, which was in force from 1 January 2013 and included such a requirement. According to article 22 of the Concessions Act, the grantor may decide that a concession contract can be awarded to a PPP, in which case the private partner shall be selected by conducting a procedure under the Concessions Act.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Respective information of public procurement procedures and concluded contracts has to be published in:
- the Official Journal of the EU – concerning procurements with value equal or above the thresholds set out in article 20(1) PPA (see question 6), in accordance with the requirements listed in article 35 of the PPA;
- the national Public Procurement Registry (a unified electronic database of information on all public procurement procedures in the country), pursuant to article 36 of the PPA; and
- the buyer profile of the relevant contracting authority, as required under article 36a(new) of the PPA; according to recent amendments to the PPA, with effect from 1 January 2021 the buyers' profiles shall be kept on a centralised electronic platform.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The contracting authority is obliged to set out all qualification requirements and selection criteria, including requested documents, in the first procurement notice. After that, the tender commission appointed by the contracting authority for review, assessment and ranking of the bids may only assess the compliance of the bidders with previously announced requirements and criteria. Chapter 7 of the PPA is entirely dedicated to the requirements to the bidders and contains detailed provisions with respect to the grounds for exclusion of bidders, the selection criteria and the acceptable proofs for economic and financial, as well as technical and professional, ability. Most of these provisions are mandatory and,

therefore, limit the discretion of contracting authorities in assessing the bidders.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

In a restricted procedure, competitive procedure with negotiation, competitive dialogue and partnership for innovation, the contracting authorities may reduce the number of candidates of those meeting the selection criteria that will be invited for submission of offers or for conducting dialogue. The contracting authorities may also set forth a maximum number of candidates to be invited. The law requires the number of invited candidates to be sufficient to ensure real competition. Therefore, the minimum number of invited candidates in a restricted procedure is five, and in a competitive procedure with negotiation, competitive dialogue and partnership for innovations the minimum number is three (article 105 PPA).

The contracting authority must set clear and non-discriminatory criteria for reducing the number of candidates.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

In general, the PPA establishes grounds for exclusion of a bidder from a tender procedure in line with the 2014 EU directives. The 2016 PPA introduces a set of measures for proving reliability, the application of which may result in a bidder regaining suitability and avoiding exclusion from the procedure. These measures are set out mainly in article 56 PPA, but there are also provisions relevant to this matter within articles 57 and 58 PPA.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Article 2(1) PPA declares explicitly that public procurements shall be awarded in accordance with the following principles:

- equal treatment and no discrimination;
- free competition;
- proportionality; and
- publicity and transparency.

These principles are further developed in the PPA and RIPPA by specific requirements for the contracting authorities and the candidates, as well as regarding the choice, preparation and conduct of different procedures.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PPA contains provisions requiring impartiality of the contracting authority upon awarding a public procurement contract. Firstly, the contracting authority is required to appoint an independent jury for assessing and ranking designs in design contests, and, with regard to other procurement procedures, a commission for the selection of bidders, assessment of bids and conducting of negotiations or dialogues.

To ensure impartiality, the Law prohibits members of juries and commissions from having a conflict of interest with respect to candidates or bidders (articles 80(7) and 103(2) PPA) and includes a specific definition of the term 'conflict of interests' (paragraph 2, point 21 of the supplementary provisions of PPA).

Conflicts of interest

17 | How are conflicts of interest dealt with?

From January 2018, the Anti-Corruption and Deprivation of Illegally Acquired Property Act (Anti-Corruption Act) was enacted, which deals with, among other things, conflicts of interest with regard to persons occupying high public positions. According to the PPA, 'conflict of interests' exists where the contracting authority, its staff or engaged external experts participating in the preparation or the award of a public procurement, or which may influence the result thereof, have an interest that may lead to a 'benefit' within the meaning of article 54 of the Anti-Corruption Act and which may be considered affecting their impartiality and independence in relation to the award of the public procurement.

Conflicts of interest are dealt with through the requirements that members of tender commissions, juries and their consultants have no private interest (in the meaning of the Anti-Corruption Act) in awarding the contract to a given candidate or bidder (articles 80(7) and 103(2) PPA, and articles 51(9)2, 51(10) and 86(2) RIPPA).

In addition, the existence of a conflict of interest of a candidate or bidder with respect to the contracting authority represents grounds for the exclusion of the candidate or bidder from participation in the procedure (article 54(1)7 and article 157(1)3 PPA).

The contracting authority is also allowed to not accept proof of technical and professional ability submitted by a candidate, if it originates from a person having an interest that may lead to an advantage in the meaning of article 54 of the Anti-Corruption Act (article 64(2) PPA).

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The 2016 PPA contains specific and detailed rules relating to the organisation and preparation of a public procurement procedure, as well as the communication of relevant information and documents to economic operators and the general public (Chapters 5 and 6 of the PPA). The contracting authorities are allowed to use external expert assistance in the preparation phase, in particular, for the preparation of technical specifications and standard forms of tender documents. Any possible prior involvement of a bidder is first of all dealt with through the provisions preventing conflict of interest (discussed in questions 16 and 17).

Furthermore, pursuant to article 44(3) PPA the contracting authority is required to undertake actions ensuring that persons that have participated in preliminary consultations or preparation of a public procurement procedure shall not have any priority over other bidders. Such actions should include, as a minimum, the publication of the entire information related to the preparation of the procedure, or links to relevant sources, in the 'buyer profile' (see question 41), and setting appropriate time limits for the receipt of bids and requests to participate.

The contracting authority is obliged to extend the deadlines if only one bid or request is filed by a person that participated in the consultations or preparation of the procedure (article 44(4) PPA).

Finally, if the said actions cannot ensure compliance with the principle of equal treatment, the bidder, having a prior involvement in the preparation of the procedure, may be excluded from participation (article 44(5) PPA).

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

According to the statistics provided by the PP Agency, during the past several years around 78 per cent of the public procurements under the PPA have been contracted following open type procedures. The PP Agency's 2017 annual report notes that 40 per cent out of a total 10,876 procedures were completed through open tenders. The rest were distributed as follows:

- 38 per cent public competitions;
- 12 per cent negotiated procedures without prior publication;
- 6 per cent direct negotiations; and
- 3 per cent negotiated procedures with or without prior call for competition (as per Directive 2014/25/EU).

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

There is an express provision (article 101(11) PPA), according to which related persons (as defined in the PPA) may not participate as separate candidates or bidders in one and the same procedure. If such circumstance occurs after the beginning of the procedure, the candidate or bidder is obliged to inform the contracting authority in writing within three days (article 46 of RIPPA).

Pursuant to another provision, the contracting authority must exclude candidates or bidders that are related parties (article 107, point 4 PPA) from participating in the procedure.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

The PPA regulates negotiated procedures without prior publication, competitive dialogue, competitive procedure with negotiation, and negotiated procedures with or without prior call for competition, in line with the respective provisions of Directive 2014/24/EU and Directive 2014/25/EU.

The use of these procedures is subject to special conditions as follows:

- the public contracting authorities may use competitive dialogue or competitive procedure with negotiation only under the conditions set out in article 73(2) PPA and negotiated procedure without prior publication – only in cases set out in article 79(1) PPA;
- the sectoral contracting authorities may use negotiated procedures without prior call for competition under the conditions set out in article 138(1) PPA; and
- in defence and security procurements – competitive dialogue may be used in particularly complex cases as defined in article 163 of the PPA, while negotiated procedure without prior publication may be used in cases set out in article 164(1) PPA.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

According to the latest statistics provided in the PP Agency's 2017 annual report, negotiated procedures without prior publication are used more regularly in practice than any other procedure involving negotiations with bidders. The largest part in this category consists of cases where the procurement is related to protected intellectual property rights or exclusive rights obtained by virtue of legal or administrative acts. Another important part includes cases where the contracting authority needs to take urgent actions in situations caused by unforeseeable events.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

A framework agreement can be concluded between one or more contracting authorities and one or more contractors with the purpose of setting out in advance the terms of the contracts that the parties intend to conclude within a given period, including pricing and, where appropriate, the quantity envisaged. The period of the framework agreement may be no longer than four years when signed with a public contracting authority, and no longer than eight years when signed with a sectoral contracting authority. Such periods can be longer only in exceptional cases, for which the contracting authority has to provide reasons in the notice.

The terms and requirements for conclusion of framework agreements are set out in articles 81 and 82 of the PPA. Specific rules are set forth in regard to framework agreements concluded in the field of defence and security (article 169 PPA and articles 77 to 78 RIPPA).

24 May a framework agreement with several suppliers be concluded?

A contracting authority may conclude a framework agreement with several suppliers (article 81(2) PPA). If the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned, the contracts shall be concluded in accordance with these terms. Where such framework agreement is concluded with more than one supplier, it must also set out the conditions for determining to which of the suppliers any particular contract shall be awarded (article 82(1) PPA).

Where the framework agreement is concluded with several suppliers and does not set out all the terms governing the provision of the works, services and supplies, the award of each particular contract shall be made following an internal competition among the suppliers that are parties to the framework agreement. A procedure for conducting such internal competition is set out in article 82, paragraphs 3 to 8 of the PPA.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

In principle, the members of a bidding consortium may not be changed in the course of a procurement procedure. Despite the lack of an explicit prohibition, this is based on the understanding that a contract may only be awarded to a bidder that does not change once the bid is submitted.

The only exception is related to the possibility for the contracting authority to require the establishment of a new legal entity where the winning bidder is a consortium of natural or legal entities (or a mixture of both). This is allowed only if it is considered necessary for the performance of the procurement contract and such need has to be justified in the decision of the contracting authority for opening of the procurement procedure.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The PPA does not provide expressly for any preferential terms for the participation of small and medium-sized enterprises (SMEs) in public procurement procedures. By virtue of article 46(3) PPA, the Council of Ministers is entitled to designate areas in which contracting authorities will be obliged to divide public procurements into lots according to specialised sectors of activity of SMEs and their capacities.

A specific preference is given to specialised enterprises or cooperatives of disabled people (article 12 PPA in accordance with Article 20 of Directive 2014/24/EU): they have a preserved right to participate in procedures included in a list scheduled to the Integration of Persons with Disabilities Act. The contracting authority must specify this condition in the procurement notice and include a separate lot for each product or service included in that list.

As a general rule, a contracting authority is allowed to decide whether to divide the procurement into lots (article 46(1) PPA). In the procurement notice, the contracting authority must specify whether bids can be submitted for one, more or all lots. Where bids can be submitted for more than one lot, the contracting authority may limit the number of lots a single bidder can be awarded (article 46(5) PPA). This possibility, together with the requirement to define the selection criteria in accordance with the principle of proportionality, facilitates the participation of SMEs.

Another option for SMEs is to participate in public procurement procedures as subcontractors (article 66 PPA).

Variant bids

27 | What are the requirements for the admissibility of variant bids?

A contracting authority may allow or request a submission of alternatives in a bids. This has to be specified in the notice or invitation for a given procurement (article 53 PPA). In such cases, the contracting authorities must specify in the tender documentation the minimum requirements that the alternative bids must comply with, as well as the specific requirements for their submission. The selection and assessment criteria should be able to be applied in a uniform way both to bids containing alternatives and to ones that do not contain alternatives.

28 | Must a contracting authority take variant bids into account?

If the contracting authority has allowed or requested submission of alternative bids and such bids are submitted, they have to be assessed; in such cases, only those alternative bids meeting the established minimum requirements are taken into consideration.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The PPA stipulates that the bidders must adhere exactly to the tender specifications announced by the contracting authority (article 101(5) PPA). The contracting authority shall exclude from the procedure bidders who make offers that do not comply with the announced tender specifications (article 107, item 2(a) PPA). However, there is also a rule that any requirement referring to a specific standard, specification, technical approval or other technical reference must also refer to their equivalents (articles 48 to 49 PPA).

Where the tender documentation contains references to specific standards, the contracting authority may not reject a bid only on the basis that works, supplies or services proposed do not comply with the referred standard, specification or assessment etc, provided that the bidder proves that proposed solutions satisfy in an equivalent manner the requirements defined by the technical specifications (article 50, paragraphs (1) and (2) PPA). A similar principle applies with respect to required certificates of registration in official lists of approved economic operators or certificates issued by a certification bodies (article 68 PPA).

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

In accordance with article 67 of Directive 2014/24/EU and article 82 of Directive 2014/25/EU, Bulgarian law established as main rule that the contracting authorities shall base the award of public contracts on the most economically advantageous tender (article 70(1) PPA). Pursuant to article 70(2) PPA, such a tender shall be identified on the basis of one of the following award criteria:

- lowest price;
- level of costs, considering cost effectiveness over the life cycle of the product, service or works concerned; or
- best price-quality ratio, which shall be assessed on the basis of criteria including the level of price or costs proposed, and qualitative, environmental and social aspects.

Where the award criterion is level of costs or best price-quality ratio, the assessment indicators have to be linked to the subject matter of the public contract in question. They should not confer an unrestricted freedom of choice to contracting authorities and must ensure real competition (article 70(5) PPA).

The criterion chosen by the contracting authority has to be specified in the procurement notice or invitation and in the tender documentation, together with an evaluation methodology.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

A bid is considered 'abnormally low' when it contains a proposal that is related to the price or costs, is subject to evaluation and is more than 20 per cent more favourable than the average value of the proposals in the other bids on the same evaluation indicator (article 72(1) PPA). As from 1 March 2019, the rules and procedure for dealing with abnormally low bids (see question 32) shall also apply to negotiated procedures involving more than one bidder and to electronic tenders.

32 | What is the required process for dealing with abnormally low bids?

In accordance with article 72 PPA, in the case of an abnormally low bid, the contracting authority must request a detailed written justification of the mode of formation of the excessively favourable proposal. The circumstances on which the justification may be based and the other requirements to be considered when dealing with abnormally low bids are set out entirely in accordance with the provisions of Article 69 of Directive 2014/24/EU and article 84 of Directive 2014/25/EU.

It is important to note that the deadline for submission of justification is set forth in the PPA: five days from the receipt of the request of the contracting authority (article 72(1)).

The justification may be rejected and the bidder excluded from the procedure where the submitted justification is not supported by sufficient proof (article 72(3) PPA).

Pursuant to articles 72(4) and 72(5) PPA, the bid shall be rejected where the contracting entity establishes that:

- the abnormally low price or costs are proposed because of non-compliance with applicable environmental, social and labour law, collective agreements or international environmental, social and labour law provisions listed in Annex 10 to PPA; or
- the bid is abnormally low because the bidder has obtained state aid, where the bidder is unable to prove that the aid in question was compatible with the internal market within the meaning of article 107 Treaty on the Functioning of the EU.

In the above cases, and if the bidder does not provide the requested written justification in the specified period, the contracting authority shall exclude such bidder from the procedure (article 107, item 3 PPA).

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Any person having a legitimate interest can submit an appeal against any decision, act or inaction of a contracting authority relating to public procurement procedures set out in the PPA (article 196). The appeals are submitted before an administrative body, the Commission for Protection of Competition (CPC), with a copy to the respective contracting authority (article 199(1) PPA). According to article 216 PPA, the decisions of the CPC are subject to appeal before a three-member panel of the Supreme Administrative Court (SAC). The judgment of the latter is final (article 216(5) PPA). According to the new paragraph 7 in article 216 PPA in force from 1 March 2019, the judgments having entered into force shall not be subject to revocation pursuant to the Administrative Procedure Code.

A specific case of appeal is set out in article 221 PPA. It refers to situation where a notification is received from the European Commission pointing out violations of a contracting authority in the conduct of a procurement procedure prior to the conclusion of a contract. Where the contracting authority concerned maintains that there is no violation, the PP Agency, if it considers that the alleged violation results from an act of the contracting authority, is entitled to file an appeal with the CPC (article 221(6) PPA).

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

In review proceedings, the CPC is the first instance body for reviewing the case on the merits and granting or refusing to grant the remedies provided for in the law. The SAC acts as a cassation instance on appeals against rulings or decisions of the CPC. As such, it may only review the defects or errors of law of the appealed act of the CPC that are indicated in the appeal, without investigating the facts or collecting new evidence. However, the court is obliged to assess ex officio the validity and admissibility of the appealed act, as well as its compliance with the substantive law.

It is only the courts that may judge on claims for damages, as provided for in article 218 PPA (see question 43).

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The PPA establishes short deadlines with regard to the administrative and judicial proceedings for review. Thus a dispute may be finally resolved within about three months. The CPC must make a decision within 15 days from the institution of the proceedings, except for the cases related to procurements with values above the thresholds established in the EU directives, for which the deadline is one month. The decision, together with its motivation, must be prepared and announced within seven days after it has been made (article 212 PPA).

The decision of the CPC can be further appealed before the SAC within 14 days after its notification to the parties. The proceeding at the SAC is one-instance and is governed by chapter 12 of the Bulgarian Administrative Procedure Code (Cassation Proceedings). The SAC has to issue its ruling within one month, and it is final.

36 | What are the admissibility requirements?

The appeal must meet the following requirements:

- it must be submitted within 10 days, which runs from different moments depending on the specific action or decision appealed;
- the appellant must have a legitimate interest in the appealed matter; and
- the appeal must be written in Bulgarian and include all details specified in article 199(2) PPA.

If the appeal does not meet the formality requirements, the CPC notifies the appellant and gives it three days to fix the irregularities.

The CPC will not institute a proceeding if:

- the appeal is submitted after the expiry of the 10-day period;
- the irregularities with regards to formality requirements are not fixed within the three-day period;
- the appeal was filed prematurely – with respect to certain acts of the contracting authority;
- the appeal is withdrawn before the institution of the case; or
- the act is not subject to appeal.

In the above cases the CPC sends the appeal back to the appellant by a ruling.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The deadlines relating to the review of appeals are as specified in questions 35 and 36.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

According to article 203(4) PPA, an appeal against the decision declaring the winning bidder shall have an automatic suspensive effect, unless its provisional enforcement is allowed by the CPC or with respect to certain specific cases listed in the same provision.

In all other cases, the appeal does not have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract (article 203(1) PPA). However, a suspension may be declared by the CPC as an interim measure. To this effect, the appellant must make an explicit motivated request together with

the appeal. There are certain cases listed in article 203(2) PPA, in which a request for suspension is not allowed.

The interim measure is only an option and depends on the CPC decision in each particular case. Upon deciding, the CPC should estimate the unfavourable consequences of the delay and the risk of damaging both the public interest and the interests of the parties involved. The CPC must decide on the interim measure request within seven days from the institution of the proceeding. Appealing the CPC ruling on the interim measure does not suspend the proceedings before the CPC.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

In cases where the appeal has automatic suspensive effect (see question 38), the CPC may allow provisional enforcement of the appealed decision of the contracting authority – which has the effect of lifting the automatic suspension. According to statistics provided in the 2017 annual report of the CPC, in 2017 the CPC has ruled on 103 requests for provisional enforcement and has allowed such in 43 cases (ie, for 42 per cent the suspensive effect has been lifted).

The rulings of the CPC are subject to appeal before the SAC – usually, the court confirms approximately 90 per cent of the CPC rulings on provisional enforcement.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders, including the unsuccessful ones, must be notified of the decision of the contracting authority for awarding the contract within three days of its approval (article 43 in relation to article 22(1)6 PPA). The contracting authority is also obliged to publish all its decisions (as well as all other documents) relating to the procurement procedure on its buyer profile (article 42 PPA). With effect from 1 November 2019, articles 42 and 43 PPA are revoked; from that date onward, the new article 36a paragraph 4 PPA will apply, according to which all interested parties, candidates and bidders will be deemed duly informed by the publication of respective documents on the buyer profile, unless otherwise provided for in PPA. Pursuant to article 112(6) PPA, the contracting authority shall sign the contract within one month of entry into force of the award decision or of the ruling allowing its provisional enforcement, but not before the expiry of 14 days of the notification to all bidders of the same decision. The public procurement contract may not be concluded before all procedural decisions of the contracting authority come into effect, unless its provisional enforcement is allowed or in few specific cases listed in the PPA (article 112(8)).

Access to procurement file

41 Is access to the procurement file granted to an applicant?

Pursuant to article 36a PPA, each contracting authority is obliged to maintain a buyer profile and to publish information on the progress and results of procedures (without prejudice to the applicable restrictions in connection with preserving commercially sensitive information and competition rules). In particular, all decisions, notices and invitations relating to opening a procurement procedure, the tender specifications, the contract award decision, the records of the tender commission, as well as the signed procurement contracts and framework agreements have to be published on the buyer profile.

Access to another bidder's offer may only be granted in case of appeal of the awarding decision, in which case the contracting authority is obliged to submit the entire documentation to the appeal body and the appellants can review the file. However, even within the review procedures, there are provisions limiting the access to any commercial or other secrets protected by law (eg, article 208(4) PPA).

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

The CPC publishes regular statistics on its website about the appeals submitted under the PPA. For the period 2016 to 2018, the number of submitted appeals was as follows: 1,235 in 2016, 1,322 in 2017 and 1,420 in 2018.

At the same time, based on statistics published by the PP Agency, the total number of announced procurement procedures in 2016 was 10,235, 10,876 in 2017 and 11,897 in 2018. The statistics show that appeals vary between 10 and 15 per cent of the total number of procurement procedures in a year.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

In accordance with article 218 PPA, any person having a legitimate interest may claim damages as result of violations in the course of a procurement procedure and conclusion of a procurement contract. The claims are to be submitted in accordance with the provisions of articles 203(1), 204, paragraphs 1, 3 and 4 and article 205 of the Administrative Procedure Code.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

In view of the suspensive effect of appeals against the decision declaring the winning bidder (as mentioned in question 38) and the provisions of article 112, paragraphs 6 and 8 PPA (see question 40), a public procurement contract may not as a rule be concluded until the review procedure is finished with a final act of the CPC or SAC respectively. If a contract is concluded in violation of the law, such contract is voidable (article 224(1) in relation to article 119(1) PPA).

A claim seeking the voiding of a procurement contract may be submitted by any person having a legitimate interest (as specified in article 119(1)3 PPA), in accordance with the general civil procedure rules, within two months of the announcement of the contract in the Public Procurements Register or of becoming aware thereof, but in any case not later than one year after its conclusion (article 225(1) PPA).

When the contract is concluded before the completion of the review procedure, the two-month period starts from the date of entry into force of the repealing decision (article 225(2) PPA). If the contract is declared void, each of the parties must return to the other party everything received from that party or, if this is impossible, its money equivalent.

However, the contract may remain in effect in certain cases, where there is an enforceable decision of the CPC imposing a sanction of 10 per cent or 3 per cent of the contract value on the contracting authority, depending on the type of violation (article 224(2)1 in relation to article 215(5) or (6) PPA).

The sanction of 10 per cent is applicable in cases where the CPC allows provisional enforcement of an appealed decision of a contracting authority (see question 39) and the CPC rules that the appealed decision is unlawful (ie, it was made in violation of the law affecting the possibility for the appellant to participate in the procedure or to be awarded the contract) (article 215(5) PPA).

The sanction of 3 per cent applies where the procurement contract was signed in breach of article 112, paragraphs 6 or 8 of PPA (ie, before having all formal conditions in place, as required by law – see question 40), but the CPC did not establish a violation of the law that would affect the possibility of the appellant participating in the procedure or to be awarded the contract (article 215(6) PPA).

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

The PPA provides for legal protection in cases where a contract has been awarded without any procurement procedure (if such was mandatory) or in breach of certain key provisions of the Law on the grounds of article 224(1)1 in relation to article 119(1) points 1 and 2, PPA. In this case, any person having a legitimate interest may claim voidance of the contract, as described in question 44.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

According to a special tariff approved by the Council of Ministers on the grounds of article 220(1) PPA (effective from 15 April 2016), the fees in review proceedings under the PPA are determined on the basis of the estimated value of the procurement. The fees for filing appeals with CPC are as follows: for procurements with value up to 1 million lev – 850 lev, for procurements with value from 1 million to 5 million lev – 1,700 lev, and for procurements with value more than 5 million lev – 4,500 lev. Further to recent amendments effective from 1 January 2019, the same amounts of fees shall apply for cassation proceedings before the Supreme Administrative Court.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

In 2018, the Bulgarian PP Agency completed the first phase of a project related to the development, implementation and maintenance of a unified national electronic web-based platform called Centralised Automated Information System 'e-Procurement' (CAIS), financed under the Operational Programme 'Good Governance' and the European Social Fund. The changes introduced in the legislation as of 1 March 2019 are aimed at a phased transition to fully electronic procurement. From 1 November 2019, it will be mandatory to use the platform for any actions from the start of a PP award procedure through the submission and opening of bids, as well as for electronic communication throughout the procedure. The platform is planned to become fully operational by the end of 2020.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

Public procurement is governed by legislative, regulatory and policy measures, as well as contract law.

The legal measures that govern public procurement depend on the identity of the public body conducting the procurement, the type of goods or services being procured and the value of the goods and services being procured. This is because of two factors.

First, Canada is a federation made up of separate governments – the federal government, provincial governments and territorial governments – all of which are subject to different legislative, regulatory and policy requirements. Public procurement is also conducted by municipalities and sub-provincial governmental entities, such as hospitals, universities, colleges and social service organisations.

Second, even within the jurisdiction of a particular level of government, procurement obligations are often imposed on the basis of the subject matter of the goods or services being procured, the monetary value of the goods or services being procured, and the identity of the procuring entity.

This chapter focuses on procurements conducted by entities associated with the government of Canada, as this accounts for the vast majority of government purchasing in Canada. Where appropriate, responses are supplemented with information regarding procurements conducted by subnational entities, such as entities associated with provincial and territorial governments. In this regard, we note that the World Trade Organization's Agreement on Government Procurement (GPA), as revised in 2014, includes provincial-level procurement obligations; the Comprehensive Economic Trade Agreement (CETA) with the European Union (EU) includes subnational procurement obligations at both the provincial and municipal level; and the Canada Free Trade Agreement (which replaces the Agreement on Internal Trade) has enhanced subnational procurement obligations at both the provincial and municipal level.

At the federal level, public procurement is primarily governed by procurement disciplines and chapters in trade agreements to which Canada is a party. These trade agreements include:

- the Canadian Free Trade Agreement (FTA);
- the North American Free Trade Agreement (NAFTA);
- the GPA;
- the CETA;
- the FTA between Canada and the Republic of Colombia;
- the FTA between Canada and the Republic of Chile;
- the FTA between Canada and the Republic of Panama; and
- the FTA between Canada and the Republic of Peru.

The trade agreements identify the government of Canada entities that are subject to procurement disciplines and also describe monetary thresholds and subject matter exemptions. The terms of the procurement disciplines that are included in a particular trade agreement are enforced by the Canadian International Trade Tribunal (the Tribunal), pursuant to the terms of the Canadian International Trade Tribunal Act and the Canadian International Trade Tribunal Procurement Inquiry Regulations.

In addition, procurement processes may, in some instances, be characterised as 'government decisions' that are subject to judicial review before the Federal Court of Canada. Decisions made by entities associated with the government of Canada must meet certain public law requirements of general application, such as being free from bias, being reasonable and only taking into account relevant considerations.

Procurement conducted by a province or sub-provincial governmental organisation are subject to obligations set out in intra-national and international trade agreements, including:

- the Canadian FTA;
- the New West Partnership Trade Agreement;
- the Trade and Cooperation Agreement between Ontario and Quebec;
- the GPA; and
- CETA.

Public procurement in Canada is also governed by laws passed by legislatures and regulations enacted under the authority of laws passed by legislatures. For example, the Government Contracts Regulations apply to the procurement of goods and services by the Canadian government.

Public procurement in Canada is also governed by contract law. As such, participants in a procurement process may be able to commence proceedings before a Superior Court of Justice of a province (or, if the procurement was conducted by a federal government entity, the Federal Court). Such proceedings normally proceed on contract law principles that are developed in common law for the purpose of claiming monetary damages on the basis of an alleged breach of contract.

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

The Defence Production Act is sector-specific legislation associated with the purchase of military equipment by the federal government. In practice, the Defence Production Act may apply, exempting from production documents associated with military procurement in the context of procurement complaint processes.

The Department of Public Works and Government Services Act provides for the establishment of the department with the function of acquiring goods and services for other government departments. Also, pursuant to the Shared Services Canada Act, Shared Services Canada

is having an increased role with respect to the procurement of information technology services and equipment.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The various trade agreements applicable in Canada are consistent with the GPA.

In addition to the trade agreements, procurements conducted by government entities are subject to the requirements of the Government Contracts Regulations. The Regulations (made under the Financial Administration Act) provide that, as a minimum requirement, federal government entities are required to solicit bids by giving public notice in a manner that is consistent with generally accepted trade practices or inviting bids from suppliers on a suppliers' list with respect to procurements that involve expenditures greater than C$25,000 (or C$100,000 in respect of contracts that involve architectural and engineering services). The Regulations also include requirements relating to industrial security and ethical requirements.

Also, the principles applied in the context of judicial review and contract proceedings are similar to the GPA in that procurement decisions are to be made in accordance with the requirements expressed in the solicitation documents as opposed to undisclosed criteria.

Proposed amendments

4 | Are there proposals to change the legislation?

Changes to Canadian legislation have resulted from the implementation of the Canadian FTA (which replaces and expands on the Agreement on Internal Trade) and from the implementation of CETA, both of which are consistent with the procurement obligations set out in the GPA and also expand coverage to government entities that were not previously covered by the other trade agreements. Also, the government of Canada recently signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (a multilateral trade agreement between Pacific Rim countries that includes procurement disciplines) that are also consistent with the obligations set out in the GPA.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Only entities listed in a particular trade agreement are subject to the obligations of that trade agreement. Put another way, the obligations set out in a trade agreement do not apply at large. Rather, the trade agreements list subject entities.

An issue can arise where a listed entity procures goods or services through an unlisted entity. In such a situation, the Tribunal will analyse the circumstances to determine whether the procurement is being conducted on behalf of a listed entity or whether the procurement is being conducted independently of a listed entity. If the Tribunal determines that the procurement is being conducted on behalf of a listed entity, the Tribunal will apply the requirements of the applicable trade agreement to the procurement. This is, in part, a function of the anti-avoidance provisions in the trade agreements.

To the extent that a trade agreement does not apply, the procurement may nonetheless be subject to contract law requirements, regulations, or public law obligations through a proceeding in contract or judicial review, as the case may be.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The rules relating to the calculation of the threshold value of contracts are set out in the trade agreements. These rules are used to determine the minimum contract value required to trigger obligations under a trade agreement. The government publishes the monetary thresholds on the Treasury Board of Canada Secretariat website. There are sectoral specific monetary thresholds for goods, services and construction.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

A concluded contract may be amended without a new procurement process. The trade agreements and other laws associated with government procurement primarily address the process by which goods and service are procured.

Contract amendments are generally permitted insofar as they do not amount to a new procurement that was not contemplated by the procurement that resulted in the contract that is being amended. This requires a balancing between contract administration that occurs in the normal course of business and circumvention of procurement obligations.

For example, amendments to delivery dates and changes to the commercial terms on which the goods or services are to be delivered are generally treated as matters of 'contract administration' that do not require a new procurement.

Also, for example, a new procurement is not required to exercise options to extend or increase quantities under an existing contract, so long as those options were identified in the procurement process that gave rise to the contract. To the extent that the options are exhausted or were not included in the procurement that resulted in the contract at issue, a new procurement is generally required.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The most significant case that deals with amendments to a concluded contract is the Supreme Court of Canada's decision in *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116. In that case, the Court was required to consider a situation where a bid was selected for a contract award that, on its face, was compliant with the requirements of the procurement process. However, subsequent to the contract award, the procuring authority learned that the selected bidder did not meet certain technical requirements. The procuring authority, despite this issue, nonetheless continued with the contract. This was challenged by another bidder. The majority of the Court (in a rare five-to-four split decision) determined that the procuring entity was allowed to continue with a contract that did not conform with the requirements stipulated in the procurement process.

This case stands for the proposition that, where the procurement process was conducted in a fair manner that was consistent with applicable legal obligations, a procuring entity may ultimately accept goods or services under the resulting contract that do not conform with the requirements stipulated in the procuring documents. This has resulted in procuring entities having wide discretion with respect to 'contract administration'. However, this decision has been criticised on the basis that it may operate to reward deceitfulness on the part of bidders and encourage a lack of effort by procuring entities in conducting evaluations.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Privatisation of various Canadian federal corporations took place in the 1980s and 1990s, either through public share offerings or a competitive bidding process. While some federal corporations continue to exist, the privatisation of an existing federal corporation has not occurred in some time and no further privatisations are expected in the foreseeable future.

Presently, there is no legal requirement that the privatisation of a federal corporation proceed according to a procurement-like procedure.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Canada does utilise PPPs, whereby a private enterprise and a government entity partner on the delivery of a public good. For example, an enterprise may be selected to finance, design, construct, build and maintain a building that is leased back to a government.

A procurement process is followed when a PPP is selected as the method to deliver a public good. Trade agreements will govern selection of the private partner, insofar as the private partner is delivering a good or service otherwise covered by an applicable trade agreement.

While this has not been judicially considered, the Canadian FTA suggests that PPP are subject to certain obligations set out in the Canadian FTA.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

The government advertises opportunities on the Public Works and Government Services Canada's Buyandsell and MERX websites.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Yes, the procurement obligations in trade agreements generally include national treatment and non-discrimination provisions, and require that any conditions for participation are limited to those required to ensure that suppliers have the legal and financial capacities and the commercial and technical abilities to undertake the procurement.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

It is possible to limit the number of bidders that can participate in a tender procedure. This is often done on the basis that participation in the tender procedure requires bidders to undergo a pre-qualification process. Also, this may happen in the context of creating supplier lists whereby potential suppliers are qualified to be on the list to provide goods or services to a government entity. The actual decision to purchase a good or service is made on the basis of a further process that is limited to those suppliers on the list.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The rules adopted by Canada relating to debarment are twofold. First, the government of Canada has adopted policies relating to a supplier's past performance, and, where the supplier failed to perform in accordance with applicable contract, it may be barred from participating in future procurements.

Second, the government of Canada has adopted policies relating to the ethical behaviour of suppliers. These policies are known as the 'Integrity Regime', which requires bidders to certify that they and their affiliates have not been charged with, or convicted of, specified offences in Canada or abroad. The specified offences include such things as competition law offences, bribery of government officials and tax evasion.

Under the current policy, where a bidder or an affiliate of the bidder has been convicted of a listed Canadian offence, there is little opportunity for 'self-cleaning'. Where a supplier has been convicted of a foreign offence, the government of Canada will assess whether the foreign offence and the process by which it was prosecuted are consistent with applicable Canadian law. Where an affiliate of the bidder has been convicted of a foreign offence, the government of Canada will assess the bidder's apparent involvement in the acts that led to the conviction and assess whether the process by which it was prosecuted are consistent with applicable Canadian law. If the government of Canada determines that the foreign offence or the involvement of the bidder, or both, meet the applicable criteria, the bidder will be debarred.

The standard period of debarment is 10 years. However, a bidder may be able to reduce that period by entering into an administrative agreement, which involves reporting on ethical issues, the adoption of anti-corruption procedures and third-party oversight. An administrative agreement may also be considered when a supplier faces a suspension as a result of being charged with a listed offence.

The status of these policies is in flux as Canada recently completed a consultation process with respect to changes. At the time writing the policy had not been changed, but changes appear to be under consideration.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes, in the sense that the contracting authority is required to assess bids on the basis of the published evaluation criteria and not on the basis of unstated criteria or any other bias.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Conflicts of interest are dealt with internally by the contracting authority pursuant to government conflict of interest policies. Government conflict of interest policies generally prohibit a government representative from participating in a decision-making process in which he or she has an interest. The results of a procurement or the awarding of damages have been overturned on the basis of bias, conflict of interest or both.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Private sector entities that are involved in the preparation of tender procedures are generally precluded from participating in the resulting solicitation and contracting processes. This is done as a matter of government policy, and, depending on the circumstances, the prohibition may be absolute or qualified. It is the normal practice for contracting authorities to disclose the names of outside service providers who have been involved in the development of the requirement or tender procedures.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing types of procurement procedures are requests for proposals for goods and services and requests for standing offers for goods and services. Goods and services that are of a less complex nature and where price is the primary consideration are often procured by requests for quotations.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Whether or not bidders may submit separate bids in one procurement is normally a matter that is determined in the context of a particular procurement process. Depending on the requirement, the contracting authority may expressly permit or prohibit the submission of multiple bids. If this is not expressly permitted by the procuring authority, bidders should be wary of Competition Act requirements that pertain to bid rigging (ie, coordination among bidders that is not disclosed to the procuring entity). When bidders are contemplating the submission of multiple bids, it is worthwhile for the bidder to consider seeking confirmation as to whether such an approach is permitted.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The government primarily procures goods and services through competitive solicitation processes. While Canada's standard solicitation and contracting documents indicate that the government of Canada reserves the right to conduct negotiations as part of the competitive solicitation process, this tends not to occur to any significant extent in practice.

Trade agreements to which Canada is a party include negotiation disciplines. In general, these agreements provide that the primary use of negotiations is to identify weaknesses and strengths among bids, that the purchasing authority shall treat bids in confidence, that the purchasing authority shall not discriminate between suppliers and that the elimination of a supplier from the process must proceed according to criteria set out in tender documentation.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

This is not applicable in Canada.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

In Canada, a 'framework agreement' is often referred to as a 'supplier list' or 'supply arrangement', which creates a list of suppliers that may be called upon to provide goods or services throughout the term of the framework agreement. The goods and services are then procured from the suppliers that were qualified to participate in the framework agreement. The choice of supplier to provide the goods or services under the framework agreement may be subject to a further competitive procurement process (such as providing quotes) or opportunities to supply goods or services may be divided among suppliers pursuant to a formula.

Framework agreements are concluded in accordance with standard procurement requirements set out in the trade agreements (ie, suppliers are chosen through a competitive solicitation process for which public notice has been given). Subject to the specific terms used, framework agreements are enforceable contracts.

24 | May a framework agreement with several suppliers be concluded?

Framework agreements are normally concluded with several suppliers.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

This is normally not permitted. Changes to a bid are normally prohibited once a bid is submitted to the contracting authority and the solicitation process has closed.

This would include changes due to a merger or spin-off that occur after a bid's submittal. Whether a bidder that has undergone a change due to a merger or spin-off would be disqualified from a bid would have to be determined in the context of a specific procurement and also with reference to the bidder's ability to meet the requirements of the solicitation after the merger or spin-off.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Canada has policies and mechanisms to support the participation of small and medium-sized enterprises (SMEs) in procurement processes. The Office of Small and Medium Enterprises supports the participation of SMEs in procurement activities and advises government purchasers on SME concerns.

Most trade agreements provide that set-asides for 'small' businesses are excluded from the government procurement obligation set out therein.

The division of a contract into 'lots' or several small contracts is only prohibited if it is done to avoid the obligations of a trade agreement.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Whether bidders may submit separate bids in one procurement is normally a matter that is determined in the context of a particular procurement process. Depending on the requirement, the contracting authority may expressly permit or prohibit the submission of multiple bids.

This does not usually occur in the context of procurements conducted by the government of Canada. Unless expressly authorised by the procuring documents, a bidder should seek clarification from the procuring authority before submitting two or more bids.

28 | Must a contracting authority take variant bids into account?

This is dependent upon the requirements expressed in the procuring documents.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

There is a very high risk that a bidder that changes the tender specifications or submits its own standard terms of business will be found to be non-compliant with the terms of the solicitation. Sometimes (particularly at the provincial level), the bidding process for the purchase of complex goods or services may allow bidders to provide comments on commercial terms that would be considered by the procuring entity. At the federal level, Canada may engage in a consultation process prior to the commencement of the formal procurement process.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

Trade agreements require that contracting authorities prescribe the criteria that bidders must meet in order to submit a compliant bid that is capable of being accepted.

In Canada, contracts are awarded on the basis of technical requirements and price. The technical requirements will change significantly based on the nature of the goods and services being procured. For example, service contracts will include technical requirements that are focused on the experience of the bidders in providing the service being sought and the proposed manner of delivery. Contracts for the supply of goods may include requirements relating to the quality or nature of the goods being supplied. Price is often evaluated on the basis of a formula that compares the price of the lowest-priced bid to that of higher-priced bids. The relative value of price to technical requirements for the purposes identifying the top-ranked bid will vary from procurement to procurement.

In addition, Canada has recently adopted the 'Integrity Regime', which requires bidders to certify that they and their affiliates have not been charged with, or convicted of, specified offences in Canada or abroad. (See question 14.)

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

Canada's laws and its trade agreements do not specify what constitutes an 'abnormally low' bid. Bid solicitation documents may specify what constitutes an abnormally low bid within the context of the particular solicitation.

32 | What is the required process for dealing with abnormally low bids?

Some trade agreements provide that a government entity may inquire with the supplier of an abnormally low bid as to whether it can comply with the conditions of procurement and whether it is capable of fulfilling the terms of the contract.

The bid solicitation documentation for a particular procurement may specify an additional process to address abnormally low bids. The government has asked for price certification or verification in the context of service contracts of a significant value. This is to confirm that bidders are able to perform work at the prices proposed.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Yes, it is possible to appeal against review decisions.

Procurement decisions made by entities associated with the government of Canada that are subject to a trade agreement may be reviewed by submitting a procurement complaint to the Tribunal. Also, procurement decisions by entities associated with the government of Canada that are not subject to a trade agreement may be reviewed by commencing an application for judicial review before the Federal Court on the basis of public law obligations.

Procurement decisions made by entities associated with provincial and territorial governments that are subject to a trade agreement may be reviewed by submitting a procurement complaint to the provincial or territorial government authority. Also, procurement decisions by entities associated with provincial and territorial governments that are not subject to a trade agreement may be reviewed by commencing an application for judicial review before the Superior Court of the province or territory.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes. The Tribunal, which determines reviews that are brought pursuant to an alleged violation of a trade agreement, may award compensatory damages for lost profit, lost opportunity or bid preparation costs. The Tribunal may also require that a contract be cancelled (if already awarded) and that the contract be subject to a new procurement process or be awarded to the supplier that brought the review.

On judicial review, the Federal Court has the ability to make mandatory orders against the government of Canada with respect to procurements and, as such, may require the government of Canada to do something that it did not do, refrain from doing something that it ought not to have done or rectify or nullify something that it ought not to have done. However, the Federal Court does not have the ability to award damages on judicial review.

In the context of a civil action, the Superior Court of a Province or the Federal Court may require the government of Canada to pay damages, but does not have the power to order mandatory or injunctive relief.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Proceedings before the Tribunal take 135 days from commencement to determination. This time period is provided for by way of statute.

Judicial review proceedings are not time-limited but generally take between six to 12 months depending on the court's schedule and the ability of the parties to move the matter forward. Judicial review proceedings that are more complex may take longer.

Proceedings on based on a civil law claim (ie, breach of contract) that proceed before the Federal Court or a Superior Court of a province are lengthy and can take two or more years. This is owing to the discovery process that involves the pretrial examination of opposing parties and extensive documentary disclosure process. These processes are generally not available in judicial review or Tribunal proceedings.

36 | What are the admissibility requirements?

The Tribunal has jurisdiction to inquire into procurement complaints that are subject to a trade agreement (ie, procurements conducted by Canadian entities that are listed in a trade agreement that applies to the procurement on the basis of specified monetary thresholds and whose subject matter is not exempt from the applicable trade agreement).

In the case of procurements conducted by entities associated with the government of Canada to which a trade agreement does not apply, a bidder may commence an application for judicial review with the Federal Court within 30 days of when the decision giving rise to the judicial review became known. Judicial review proceedings are concerned with public law (as opposed to commercial) obligations. As such, the Federal Court retains jurisdiction to determine whether the proceeding before it involves a sufficient public law component to justify a remedy. Owing to the commercial nature of procurement, suppliers seeking a remedy in the context of a judicial review must invoke public law, as opposed to commercial law, considerations.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Complaints to the Tribunal must be made within 10 business days of when the complainant knew, or ought to have known, the basis for the complaint.

Also, a bidder may file an objection with a contracting entity objecting to conduct that is inconsistent with an applicable trade agreement. In order to be effective, an objection must be filed within 10 business days of when the basis of the objection became, or ought to have been, known to the bidder. If a bidder files an objection, the bidder must file a complaint with the Tribunal within 10 business days of the objection being rejected by the contracting authority.

Decisions of the Tribunal are subject to judicial review by the Federal Court of Appeal. An application for judicial review of a determination of the Tribunal must be commenced within 30 days of when the Tribunal releases its determination.

In the case of procurements conducted by entities associated with the government of Canada to which a trade agreement does not apply, a bidder may commence an application for judicial review with the Federal Court within 30 days of when the decision giving rise to the judicial review became known. Decisions of the Federal Court may be appealed to the Federal Court of Appeal.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No. In the case of a proceeding before the Tribunal, a bidder may request that the contract award be postponed until after the complaint is determined. Should the Tribunal issue such an order, the contracting authority may override the order by issuing a declaration certifying that procurement is urgent and that a delay in awarding the contract would be contrary to the public interest.

In the context of bid challenges taking place by judicial review, an unsuccessful bidder may seek an injunction to prevent the contracting authority from taking further steps in the procurement or contract. An injunction may be granted where the bidder is able to establish that it has a prima facie case, that it will suffer irreparable harm in the event that an injunction is not issued, and that the balance of convenience favours the issuance of an injunction.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

This is not applicable in Canada.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

No, unsuccessful bidders are not required to be notified prior to the contract with the successful bidder being concluded. Normally, unsuccessful bidders are notified of the results of the solicitation immediately after the contract with the successful bidder has been concluded.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

A bidder is normally entitled to a debriefing after the conclusion of a solicitation process. The information disclosed during a debriefing process is usually limited to the manner in which the unsuccessful bidder was evaluated (ie, points awarded for various criteria) and the total points awarded to, and price of, the successful bidder. An unsuccessful bidder is not granted unfettered access to the procurement file.

Should an unsuccessful bidder seek review of a procurement decision, the bidder (or its counsel) may be granted greater access to the procurement file through the adjudicative process.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Bidders will file review applications if they perceive that there has been a breach of an applicable trade agreement, public law requirement or the terms of the solicitation.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes. As noted above, the Tribunal has the ability to award monetary compensation. Monetary compensation will be awarded where the supplier can demonstrate that a trade agreement has been breached and that the violation justifies an award of compensation in the circumstances. Where a breach has been established, the Tribunal may also require cancellation of the contract and the resolicitation of the procurement. The choice of remedy will be dependent upon the circumstances of the case and the status of the underlying procurement process. For example, if the challenge relates to requirements in the solicitation documents and the challenge is brought before bid submittal, the Tribunal may require that the impugned requirements of the solicitation be amended to comply with the trade agreements.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The Tribunal may recommend that a concluded contract be cancelled on the basis of it finding that the procurement process was compromised by a breach of an applicable trade agreement. Contracting authorities generally follow recommendations made by the Canadian International Trade Tribunal. In the event that a contracting authority refuses to implement a recommendation to cancel a concluded contract, the Tribunal will normally recommend, as an alternative, that the unsuccessful bidder receive monetary compensation.

The Federal Court has the jurisdiction necessary to order the termination or cancellation of a contract where the procurement procedure that led to the contract violated public law requirements. The Federal Court is reluctant to exercise this power. As a result, unsuccessful bidders will also request a declaration confirming the breach of procurement law and then seek damages on the basis of the declaration.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes, parties interested in a contract may seek a remedy where the contract was awarded without any procurement procedure.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

The costs of seeking a remedy in the context of a procurement decision are dependent upon the complexity of the case and the chosen forum. For example, a court proceeding in the form of a civil action may take two to five years from beginning to end. In contrast, a procurement complaint process before the Tribunal will be completed within 135 days of commencement.

Most challenges to procurements conducted by the government of Canada are brought pursuant to the Tribunal's procurement complaint process. Again, the costs of this process are dependent upon the complexity of the case and can range from C$50,000 to in excess of C$300,000 in legal fees.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a free trade agreement between Canada and 10 other countries in the Asia-Pacific region: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The CPTPP came into force in Canada on 30 December 2018. The CPTPP includes a chapter on government procurement. In this regard, Canada commitments under the CPTPP cover procurements conducted by federal entities (eg, departments and agencies) and a number of federal Crown corporations, as well as specified sub-central (ie, provincial and territorial) entities. The commitments are subject to certain monetary thresholds depending on the procuring entity and the type of procurement (goods, services or construction). The monetary thresholds are the same as those adopted by Canada under the WTO GPA. Also, certain exclusions apply.

Amendments to the Criminal Code have come into place that provide for 'deferred prosecution agreements'. Such agreements allow a company to avoid criminal prosecution for certain offences on conditions that include the payment of a penalty, a relinquishment of benefits, acceptance of responsibility and putting in place enhanced compliance measures. At present, controversy has resulted from the consideration of a deferred prosecution agreement with respect to SNC-Lavalin. At its core, the controversy does not pertain to the use of deferred prosecution agreements in and of themselves. Rather, the controversy relates to government decision-making regarding the use of such agreements and the alleged pressure that was put on the Attorney General with respect to the decision not to use such an agreement with respect to SNC-Lavalin.

As a related issue, Canada has published a consultation document that proposes changes to its Ethics Regime. The most significant change is that Canada has more discretion with respect to the application of a ban on suppliers owing to ethical violations.

Also, Canada, the USA and Mexico have negotiated the Canada-United States-Mexico Agreement, which is intended to replace the North American Free Trade Agreement. The parties are to undertake the necessary domestic processes to implement the agreement, but this has not yet occurred. There has been a significant legal change with respect to procurement, as the relationship between Canada and the USA will be determined by the WTO GPA and the relationship between Canada and Mexico will be determined by the CPTPP. It would appear that instead of updating each party's respective commitments under NAFTA, the parties have decided to simply proceed on the basis of multilateral agreements that post-date the NAFTA.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

There are two main legal instruments regarding the award of public contracts: the Public Procurement Code (PPC), approved by Law No. 88/VIII/2015, of 14 April 2015, amended by Law 44/IX/2018, of 31 December 2018, and the Legal Regime of Administrative Contracts, approved by Decree-Law No. 50/2015, of 23 September 2015 (LRAC). On one hand, the PPC sets out the rules for the public procurement procedures initiated by a public contracting authority after the date of its entry into force (which took place on 14 October 2015). On the other hand, the LRAC establishes the general rules applicable to the substantive regime of all administrative contracts, concerning the execution, modification and breach of contract, and specific rules regarding certain types of administrative contracts (for example, concessions of public works and public services).

There are other relevant legal regimes, namely Legislative-Decree No. 2/95, of 30 June 1995, Legislative-Decree No. 15/97, of 10 November 1997, and Legislative-Decree No. 16/97, of 10 November 1997, which provide the general framework for administrative procedure and for the organization of the Public Central Administration, as well as a set of rules regarding the substantive regime for administrative acts and regulations and for administrative complaints and administrative appeals.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

No sector-specific procurement legislation supplements the general regime (PPC and LRAC).

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Cape Verde is not a European Union (EU) member, nor is it a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), which has the fundamental aim of mutually opening its parties respective internal public procurement markets.

Although Cape Verde is not an EU member, nor a signatory to the GPA, the Portuguese legal framework has had a major influence on the drafting and implementing processes of the PPC and the LRAC, as well as on the other relevant legislation regarding this matter. For that reason, the PPC and the LRAC end up closely following and determining a framework similar to those of the EU or the WTO.

Proposed amendments

4 | Are there proposals to change the legislation?

With regard to the main legal regimes for the award of public contracts, the PPC was recently amended by Law 44/IX/2018, of 31 December 2018. The LRAC has not had any changes since it was approved in 2015. To the best of our knowledge, no proposals to change these and the rest of the above-mentioned legislation currently exist.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

From a positive perspective, we can state that the contracting authorities under PPC (pursuant article 5) are the following:

- the state and the services of the direct administration;
- municipalities;
- public institutes, including public foundations and regulatory authorities;
- public associations, associations of public entities and associations of public and private entities that are financed for the most part or subject to management control of the public entities referred to above; and
- concessionaries of public works or services, within the concession's scope.

Therefore, all entities that are not included in this list are not considered to be a contracting authority.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Article 30 of the PPC determines the thresholds under which contracts are excluded from the scope of procurement law.

Public tenders must be launched for public works contracts whose value is equal to or exceeds 10 million escudos, and for lease or purchase of goods or services contracts the value is equal to or exceeds 5 million escudos.

Restricted tenders must be launched for public works whose contracts value is between 3.5 million and 10 million escudos, and for lease or purchase of goods or services contracts value between 2 million and 5 million escudos.

The direct award procedure may only be adopted if the contract value is lower than the restricted tender thresholds for each of the relevant contracts (lower than 3.5 million escudos for a public works

contract, and lower than 2 million escudos for a lease or purchase of goods or services contract).

Notwithstanding the above, certain procedures – such as the public tender with two phases, the limited tender with prior qualification, the restricted tender or the direct award – may be adopted regardless of contract value, based on certain material criteria, according to articles 34, 35, 36, 37, 38 and 39 of the PPC.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

In light of the LRAC, the contract may be amended:

- by mutual agreement of the contracting parties;
- by means of a judicial or arbitral decision; or
- by means of an administrative act to be issued by the contracting authority based upon grounds of public interest.

The amendment of the contract may occur as a result of an abnormal change of the circumstances under which the contract was signed, provided that such a change is not covered by the private party's contractual risk, or on the grounds of public interest, due to the emergence of new needs, or due to a different assessment of the existing circumstances.

The amendment of the contract cannot be carried out in such a way as to prevent or distort competition, or to change the overall nature of the contract.

Whenever the amendment does not result from a change in the existing circumstances, it can only occur if the ordering of the tenders evaluated during the procurement procedure would not suffer any change due to the modification of the specifications or tender dossier.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There has been no case law clarifying the application of the legislation in relation to amending concluded contracts.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Privatisations are not subject to the PPC or the LRAC. They are governed by Law No. 47/IV/92, of 6 July 1992, amended by Law No. 41/V/97 of 17 November 1997, and by Law No. 1/VII/2006, of 3 August 2006 (Privatisation Law). Nonetheless, in accordance with the Privatisation Law, the privatisation processes are generally to be held through a public tender or a public offering, although they can also be held through a limited procedure or a direct sale procedure, in certain cases (for example, if it is a strategic company belonging to a strategic sector for the contracting authority or due to the financial situation of the company).

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Decree-Law No. 63/2015, of 13 November 2015, establishes the Cape Verdean rules regarding the procedure and award of PPPs. The main issues concerning PPPs are related to their possible financial impact on public accounts and the model to be adopted for risk-sharing between the public and private parties.

Launching and awarding a PPP depends on compliance with certain legal requirements, such as (pursuant to article 9):

- budget rules and regulations;
- clear proclamation of the partnership's purposes and the private partnership's expected results, allowing adequate sharing of burdens among parties;
- a partnership model that allows a fair trade-off between private and public party risk and consideration;
- previous assessment and compliance with the applicable rules and formalities, allowing full transmission of the performance risk to the private party;
- avoidance of models assuming long-term compensation clauses in favour of private parties; and
- identification of the public entity responsible for monitoring the execution of the contract.

The PPC has a subsidiary role in the setting up of a PPP, especially regarding the selection of the procedure that shall be launched for the award of a PPP contract.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised on the Public Acquisition Regulatory Authority's (ARAP) public procurement website.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PPC (article 70 of the PPC), contracting authorities are only allowed to assess whether private contracting entities are qualified to participate in a tender procedure if they launch a public tender or a limited tender with prior qualification and if the rules of the specific procedure allow the evaluation of the bidder's technical and financial capacities (articles 74, 75, 76, 77 and 78 of the PPC).

The public tender has only one phase, but the contracting authority must analyse the bidder's technical and financial capacities before evaluating the bids. Bids will not be evaluated if a bidder does not comply with the established technical and financial requirements.

The limited tender with prior qualification has two phases: the phase in which candidates' capacity is evaluated and the following phase, in which bids are evaluated.

In the second phase of the limited tender with prior qualification, pre-qualified bidders are invited to submit bids. The evaluation and award of the contract follow the rules stipulated for the public tender – with some specificities – set forth in the PPC.

In the procedure to award contracts for consultancy services that have an estimated value exceeding 4 million escudos, similar rules apply to the pre-qualification of the bidders. In said situations, the procedure is initiated by publication of a notice, after which there follows the bidders' pre-qualification phase, in which their technical and financial capacities are judged based upon the conditions set forth by the contracting authority in the terms of reference. Then, only pre-qualified bidders are invited to submit bids.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

There are two ways to limit the number of bidders that can participate in a tender procedure.

It is possible to impose certain economic and financial standings in public tenders in which the contracting authority has stipulated this kind of criterion, in limited tenders with prior qualification and in procedures for the award of consulting services the value of which is above a specific threshold. This will, consequently, limit (in theory) the number of bidders that are able to participate in the procedure.

It is also possible for a contracting authority to launch a restricted tender or a direct award. In both procedures, the selection of bidders that can participate in it depends on the discretionary decision of the contracting authority.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not yet established. Economic operators that fall within any of the exclusion situations foreseen in the PPC have to wait for the lifting of the respective sanctions.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The PPC and the LRAC provide for basic underlying principles, such as public interest, good faith, competition, equality, proportionality, transparency, impartiality, economy and efficiency, protection of the environment, stability, responsibility, annual programming and confidentiality. These principles are relevant since they provide guidelines to interpret rules and, consequently, identify possible obligations or limits to the activity of the contracting authorities.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PPC does not have a specific provision referring to the independence and impartiality of contracting authorities; however, the independence and impartiality of said authority result from the fundamental principles referred to in question 15.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Members or staff of contracting authorities, members of juries or any other entities involved in a procurement procedure must comply with the general rules regarding conflicts of interest of holders and agents of the public administration.

In addition, the members and staff of entities involved in a procurement procedure should disclose any personal interest towards a bidder or potential bidder and, if that is the case, request the suspension of their involvement in the procedure.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Anyone who has participated in the preparation of a public procurement procedure is not allowed to participate as a bidder in said procedure.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of competitive procurement procedure used by contracting authorities is the public tender.

However, contracting authorities often choose to award contracts on a direct award basis, as it is the most time-saving procedure available.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The PPC has specific provisions under which a group of economic operators participating in a procurement procedure as a group are not entitled to participate in the same procedure, either solely or as members of other groups (article 69 of the PPC) Violation of such rule shall lead to the exclusion of both bidders.

There is no specific provision for related bidders (for example, different companies within the same group) submitting separate bids in the same procedure. Nonetheless, in most cases this situation could lead to the exclusion of both bidders. In fact, if certain companies belong to the same economic group, it would be very hard for them to demonstrate that they are independent and are not distorting competition, which constitutes another ground for exclusion.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Only the procurement procedure for the award of consultancy services foresees a negotiation phase (article 170 of the PPC). Such negotiations may only occur between the contracting authority and the bidder whose proposal was the best qualified among the proposals submitted by all the other bidders. The rules for the negotiation phase must be set out at the beginning of the procedure, in the terms of reference.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Only the procurement procedure for the award of consultancy services foresees a negotiation phase.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Under a framework agreement, the choice of the procurement procedure determines the total value of the contracts that will be awarded under the mentioned framework agreement. In fact, the signature of contracts under a specific framework agreement will only be accepted if the sum of the contractual prices of all contracts to be executed under the agreement is less than the thresholds applicable to the choice of each procedure.

Framework agreements cannot last for more than four years, except under specific circumstances that need to be grounded.

In some cases, the contracting authority may update the characteristics of the goods or services to be acquired under the framework agreement, modifying them or replacing them with others, provided that the type of supply and the objectives of the specifications are laid down in the framework agreement procedure and are justified by the occurrence of technological innovations.

When a framework agreement is entered into with only one entity, the PPC states that all future contracts to be executed shall be awarded through a direct award.

24 | May a framework agreement with several suppliers be concluded?

Yes. When a framework agreement is entered into with more than one entity, the contracting authority must invite all of them to submit a proposal before awarding said contract.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The PPC states that all consortia must be composed of the same members throughout the procedure. However, it would be difficult not to accept a change in the members in case of a merger or a spin-off of a consortium member.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Recent improvements in the openness and transparency of public procurement procedures are expected to generate this outcome.

In addition, the PPC sets out specific rules in order to preferentially assign contracts to national companies or to favour goods extracted from Cape Verde, as well as services provided by Cape Verdean companies. The PPC's provision of national tenders (ie, tenders restricted to tenderers, or candidates registered or headquartered in Cape Verde) is also likely to bring about the same effect, increasing access of national companies (normally small and medium-sized enterprises (SMEs)) to public procurement.

Additionally, some rules may ease the increase of the participation of SMEs in procurement procedures, such as:

- the possibility of awarding contracts divided into lots;
- the possibility that, when a consortium or group of companies bid together, the criteria of technical or financial capacity may be fulfilled by only one or only two members of the consortium; and
- the obligation to submit a bond in cases of contracts of high values.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids may be submitted only if duly authorised by the procedure notice or by the tender specifications.

28 | Must a contracting authority take variant bids into account?

Whenever the submission of variant bids is allowed by the procedure notice or by the tender specifications, contracting authorities must take them into account. In that case, said bids will only be excluded if the specific conditions for the submission of such bids are not fulfilled.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Any violation of the tender specifications leads to the exclusion of the offer.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The PPC determines two different award criteria for the evaluation of the proposals: the lowest price and the most economically advantageous tender. At each procurement procedure, the criteria to be used must be disclosed in advance.

Regarding the latter (the most economically advantageous tender), many factors can be taken into consideration when evaluating the proposals, such as:

- quality;
- price;
- technical merit;
- aesthetic and functional characteristics;
- environmental characteristics;
- running costs;
- cost-effectiveness;
- after-sales service and technical assistance;
- delivery date; and
- delivery period or period of completion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

An 'abnormally low' bid is a proposal whose value appears to be abnormally low when referring to the object of the contract at stake.

Provided that the contracting authority has determined (in the tender specifications) any estimated value for the contract, the PPC establishes that a bid will be considered as an 'abnormally low bid' if the proposed price is 40 per cent lower than the estimated price in the case of public works contracts, or 50 per cent lower than the estimated price for any other contract.

If there is no estimated value of the contract in the tender specifications, the decision to exclude a bid for being considered abnormally low must be very well grounded.

32 | What is the required process for dealing with abnormally low bids?

Abnormally low bids usually lead to the exclusion of the offer, except when the bidder is capable of justifying the price proposed.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In Cape Verde, administrative challenges can be either a claim to the author of the challenged act (ie, the jury or awarding entities), or an appeal to either the Conflict Resolution Committee or ARAP. It is also possible to appeal to the courts.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes, depending on the powers and tasks of the author of the challenged act (in case of a claim). The remedies granted by ARAP or by the courts are also different, considering that the first is an administrative entity and the latter are judicial entities, specially with regard to the effects of their decisions.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The timescale may vary according to the complexity of the case, or the court of submission itself, but usually decisions are taken within one year.

36 | What are the admissibility requirements?

All procurement decisions, documents and contracts are justiciable, as long as the unsuccessful bidder proves that the procurement caused it some type of damage.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Claims against the jury's decisions during the public act are submitted during said act. Other claims are submitted within five working days upon notification. Appeals to ARAP are submitted within 10 working days upon notification, except appeals against the jury's decisions during the bid that opens the public act, which are submitted within five working days.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Administrative challenges suspend the procurement procedure if that challenge occurs in one of the following phases: negotiation of the contract, award decision and execution of the contract.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

The PPC does not provide for the possibility to lift an automatic suspension.

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Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders are notified at the same time of the award decision.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

During the procurement procedure, all bidders have access at all time to the documents submitted by the parties and issued by the jury, as well as by the contracting authority.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Disadvantaged bidders will most likely file review applications if they finish second in a competitive tender and whenever the value of the contract is high enough (whether in financial or strategic terms).

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be cancelled or terminated following a review application by an unsuccessful bidder. Nonetheless, those situations are uncommon and usually have no practical effect, due to the fact that in cases in which judicial decisions determine that a concluded contract should be cancelled, the contracting authorities usually appeal such decisions. When final and non-appealable decisions are finally issued, the execution of the contracts is almost completed.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Appeals to the ARAP are free.

Chile

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Act No. 19,886 of 30 July 2003 about the Administrative Contracts Bases for Supply and Provision of Services (Act No. 19,886/2003) (the Act), and its regulation, Decree No. 250 of 24 September 2004, set the basic rules for the procurement of goods and services by public entities.

The Act establishes, as a general procurement rule, the public bidding system, but in exceptional cases a public entity may contract through a private bidding process or through a direct deal.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

In the construction field, Decree No. 75 dated 1 December 2004 (Decree No. 75/2004) and Decree No. 48 dated 9 September 1994 (Decree No. 48/1994), both issued by the Ministry of Public Works, establish special procurement rules that apply to the construction of public works and public works advisories.

The energy supply services executed by the public distribution service's concession companies are also governed by a specific statute, regulated in the General Act for Electric Services (Force of Law Decree No. 4, dated 5 February 2007) and its regulation, approved through Supreme Decree No. 106 of 2005.

Additionally, the assignment of concessions by public bodies is subject to special statutes, regulated among others by the following acts:

- concession for use of exclusive ways to perform public transport (Act No. 18,696, dated 31 March 1988);
- public works concession (Decree No. 900, dated 18 December 1996 and Decree No. 956, dated 20 March 1999);
- concession for the use of municipal property (Force of law Decree No. 1, dated 26 July 2006); and
- concession for the establishment, construction and exploitation of sanitary services (Force of Law Decree No. 382, dated June 21 1989).

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Chilean public procurement legislation shares principles similar to those governing the public procurement system of the European Union (EU), and which are advocated by the World Trade Organization.

The public procurement system establishes that, as a general rule, state entities shall purchase goods and contract services through public bidding processes, in which all natural and legal persons, local or foreign, that are interested may participate. The procurement through private biddings or direct deals is allowed only exceptionally.

Also, this regulation prevents any type of arbitrary discrimination between providers, so request-for-bids documents must establish impartial participation conditions and objective evaluation criteria, which may not give any advantage to certain competitors.

Additionally, the technical description of the goods and services to be contracted cannot refer to specific brands nor to requirements that exclude certain competitors.

To promote the transparency of these processes, all requests for bids and the resolution of the procurement processes are published on the website Mercado Público.

Proposed amendments

4 | Are there proposals to change the legislation?

Currently, some amendments to the Act are being processed, which, among other things, aim to promote the participation of small and medium-sized enterprises (SMEs); encourage sustainable public purchases, strengthen the prohibition on dividing contracts in order to qualify for the procurement procedure; introduce improvements to the procurement system through framework agreements; establish additional prohibitions to contract with the state administration; and ensure that companies that contract with the state comply with labour obligations to workers.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The Act expressly excludes purchases made by the Army and the Forces of Order and Public Security from this procurement system, including war material, military and police vehicles, equipment and advanced information technology systems.

Finally, state-owned companies, which are created by law, are not subject to this system.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The procurement of goods or services the value of which is less than three monthly tax units (UTM) – approximately US$215 – are excluded from the public procurement system, and can be directly contracted by public bodies.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Public procurement regulations, as a general rule, allow the amendments of contracts, especially when this modification is based on the well-founded public interest, in which case they must be justified.

Thus, the Act expressly recognises the power to modify a contract based on certain causes that may be set in the request-for-bids documents and in the contract signed between the parties.

For its part, on infrastructure matters, Decree No. 75/2004 establishes that contracts for public works construction may be modified, providing an increase or decrease of works, if it respects certain limits. The same applies to public works concessions, which recognise the power of the Ministry of Public Works to require the modification of the characteristics of the works and services contracted. In both cases the public body must pay the respective compensation.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The General Comptroller of the Republic, with respect to the contracts governed by the Act, has declared that the modification of a contract cannot include new goods and services, except those necessary to fulfil the original agreement. Doing otherwise requires a new deal (Opinion No. 12,473/2009).

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Privatisations will generally be preceded by a public tender procedure if there are two or more interested persons involved in the service that will be privatised. A technical evaluation of the submitted projects is carried out in order to verify that they fulfil the minimum required conditions. The adjudication shall be based on different factors depending on the service (eg, lower rates for users, better technical conditions and higher offer prices).

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

As a general rule, projects subject to the PPP system are awarded through a public tender procedure. One of the most successful systems in this area corresponds to the public works concessions system, governed by Decree No. 900/1996, which states that procurements shall be regularly subject to a local or international public bidding process, in which natural or legal persons, local or foreign, may participate.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

The calls for public bids governed by the Act are published in the Public Market Portal, which can be accessed through the Mercado Público website.

In addition, there are other web portals where calls for bids are published, such as the Licitación Eléctricas, for contracting electricity supply services from energy distribution concessionaires, and Transantiago, for public transport concessions.

Without prejudice to the existence of websites, calls for bidding processes must be published in newspapers of national circulation.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

As a general rule, there are no limitations in this matter. However, some procurement systems include the possibility of prequalifying bidders, especially in the infrastructure field, when the size and complexity of the works make necessary to ensure the technical and financial capacity of the bidders.

For example, Decree No. 900/1996, on public works concessions, establishes a prequalification process, to which all interested persons are subject. Only the bidders that have approved this stage may be able to apply for the public bidding process.

On the other hand, Decree No. 75/2004, issued by the Ministry of Public Works, on public works' construction, includes a pre-selection process, according to which only providers who are registered in the Contractor's Registry (administered by the Ministry) may be able to participate in the biddings called.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

In Chile, public procurement systems do not include the possibility of establishing a maximum or minimum numbers of providers for the purposes of awarding a contract through a public bidding process.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

As a general rule, interested people who are prohibited from participating in bidding processes may do so once the legal terms of the prohibition elapse. There are several public entities that administer the records of prohibited providers, which must prove they meet the requirements to be reintegrated into the system.

If the registration of a provider has been suspended due to minor offenses, it will be automatically activated when the suspension term has elapsed.

In serious and exceptional cases related to fraud in procurement processes, Law No. 19,886/2003 establishes that the Director of Purchasing and Public Procurement may permanently remove registered providers from the registry.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The public procurement legislation expressly establishes that bidding processes shall be based on the principles of free competition among bidders, equal treatment and non-arbitrary discrimination, strict adherence to request-for-bids documents and transparency, among other principles.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Chile does not have a centralised public procurement body, so each public entity conducts its own contracting. Regarding these, the Act provides that public officials who, for any reason, do not have sufficient impartiality must abstain from intervening in the procurement processes.

Also, to safeguard the impartiality during the offers' evaluation stage, all procurements exceeding 1,000 UTM (approximately US$72,305), are evaluated by a commission of at least three members.

Conflicts of interest

17 | How are conflicts of interest dealt with?

As indicated above, the Act establishes that public officials of bidding entities are subject to conditions that reduce their impartiality, must abstain from participating in procurement processes. Additionally, this regulation states that the evaluation commission's members cannot have any conflict of interest with bidders at the time of the evaluation. Their appointment is published in the Mercado Público system, for purposes of transparency.

The above-mentioned norm is complemented by Public Procurement Directive No. 14, on recommendations for the functioning of the Evaluation Commissions, in which it is suggested that all of a commission's members shall be requested to make affidavits in which they express that they have no conflicts of interest with bidders. It also indicates that, in the case of a conflict of interest arising after the commission's members' appointment, the member involved must refrain from participating in the evaluation, and shall inform his or her superior in this circumstance, so that he or she can be replaced.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The Act considers the possibility that, prior to the elaboration of request-for-bids documents, bidding entities may carry out formal consultation procedures with suppliers, in order to obtain information on the prices, characteristics of goods and services, and an offer's preparation time. These consultation processes are convened through public and open calls via Mercado Público and newspapers of national circulation.

The Concessions Act, for its part, provides that if the prequalification bases requires, prequalified bidders may propose improvements, additions or adjustments to the definitive project's design to the Ministry of Public Works, through filings that will be public. The Ministry, after requesting additional necessary studies from independent entities, shall communicate the additional contents and adjustments that will be incorporated in the request-for-bids documents.

In both cases, potential bidders do not directly participate in the preparation of the request-for-bids documents nor do they make decisions in relation to their content; they provide information that could be relevant to define certain conditions of a proposal.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The general procedure of contracting is public bidding. In the event that no bidders are interested in the public bidding process (or the private bidding process if the type of procurement makes using it advisable), it may be contracted by direct deal if is appropriate, in which case the decision must be duly justified.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The public procurement regulations do not expressly prohibit the filing of offers by related proponents or by those who belong to the same business group. However, the request-for-bids documents may establish restrictions in this regard, which is something that happens in practice. Also, certain publicity measures are established that allow the participation of related proponents to be transparent.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The procedures in which negotiation with bidders occurs correspond to the mechanism of private bidding and direct contracting, whose use is subject to certain conditions. In the first place, these are procurement mechanisms that can be exceptionally used, and their use shall be duly founded.

Causes and facts argued to access to this procurement mechanism shall be included in a duly founded resolution issued by the contracting entity and published through the Mercado Público system, as well as the administrative acts where the purchase appears.

The occasions where this mechanism may be used include:

- when there are no bidders in a public bidding process;
- in case of emergency, urgency or unforeseen circumstances;
- when there is only a single supplier of a good or service;
- when the service to be contracted has a confidential nature or if its diffusion affects national security or national interests; and
- when the purchases made are less than 3 UTM.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Except for the cases mentioned in question 21, where a negotiation with bidders is carried out owing to the nature of the contracting that is being performed, our legislation does not expressly consider other negotiation mechanisms, such as the competitive dialogue system established by the EU.

Notwithstanding the foregoing, a similar system can be found in Decree No. 900/1996 on public works concessions, which establishes that the Ministry of Public Works may receive, from prequalified bidders, suggestions and filings for complementing or adjusting the request-for-bids documents that will be published later.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

According to the Act, the framework agreements are preceded by public bidding processes required by the Director of Purchasing and Public Procurement.

Bidding entities are obliged to contract through framework agreements if the required good or service is available through such a system, unless they are able to obtain more advantageous conditions on their own, which shall be objective and demonstrable, and in which case they may contract outside the framework agreement.

24 | May a framework agreement with several suppliers be concluded?

Framework agreements are generally awarded to various suppliers, which are classified by categories of goods and services in a public catalogue.

Public entities can directly contract with any supplier that is in the catalogue through the issuance of a purchase order, unless it is concerns contracts of more than 1,000 UTM (approximately US$72,305), in which case the bidding entity shall communicate its intention to purchase to all the suppliers awarded in the appropriate category of goods or services required. In this case, as general rule, the public bid is awarded to the tenderer offering the best conditions at the lowest price.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

As a general rule, suppliers' temporary unions or consortia may make changes in their composition when one of their members is affected or is unable to participate in the procurement processes. In this case, consortia are allowed to exclude the affected member or to withdraw their offer.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

In recent times, measures to encourage the participation of SMEs in the procurements governed by the Act have been adopted. One of the most important is the possibility of applying through a 'suppliers temporary union', which allows these companies access to procurement processes that, due to their size and guarantee requirements, were previously reserved for larger companies.

Likewise, bidding entities were granted greater flexibility to require guarantees of the seriousness of the offers in processes with amounts less than 2,000 UTM, depending on the risk involved in the operation.

Additionally, this regulation allows a contract to be awarded to various bidders.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

The Act does not prevent the filing of more than one offer per bidder. However, in accordance to the principle of equal treatment, this possibility shall be expressly included in the request-for-bids documents, which occurs in practice. If the filing of multiple offers is prevented, as general rule it is established that the first offer entered into the system will be accepted, and the rest of them will be excluded.

28 | Must a contracting authority take variant bids into account?

The bidding entity shall take variant proposals into account unless the possibility of filing multiple offers has been expressly prohibited in the request-for-bids documents.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders that do not comply with the specification of the bidding basis will be disqualified from the tendering process. Additionally, offerors that change the proposed conditions after filing their offers, or who withdraw from the contract after being awarded, may be sanctioned by the execution of the guarantee of seriousness of the offer if it was required at the time of application.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

Public procurement legislation establishes that the request-for-bids documents shall consider objective technical and economic evaluation criteria. These can include:

- the price;
- experience;
- technical quality and after-sales support;
- delivery time;
- environmental considerations;
- previous contractual compliance; and
- any factors that are relevant to the characteristics of the goods of services tendered.

The criteria must be defined by the bidding entity, considering the characteristics of the acquisition required. Cost can never be the only criterion.

It is important to note that when the contracting customary services, such as a cleaning service, are tendered, the request-for-bids documents shall include the employment and remuneration conditions as a technical criterion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The Act considers an abnormally low offer as one that is 50 per cent lower than the price offered by the precedent offerer, if the costs of the offer are economically inconsistent.

In turn, Decree No. 75/2004 on public works contracts establishes that an abnormally low offer will be more than a 15 per cent lower than the official budget of the project, or more than 20 per cent lower than a variant offer, unless the request-for-bids documents establish a different percentage for this purpose.

32 | What is the required process for dealing with abnormally low bids?

The aforementioned offers can be awarded by the bidding entities through the issuance of a founded resolution, and requesting an increase in the amount of the guarantee of faithful compliance, for the price difference.

Also, according to Decree No. 75/2004, if the price of the accepted offer is low in the ranges set, an additional guarantee for faithful compliance of the contract will be required. Its amount shall be the price difference reduced by 15 per cent or 20 per cent, depending on the cause invoked, or by the percentage indicated in the request-for-bids documents.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In general, the same contracting entity decides on the review applications. In the event that the interested party is not satisfied with the administrative decision, it may appeal before the Ordinary Courts or the Public Procurement Court (a specialised body in procurement matters), depending on what stage the procurement process is at. In both cases, the first-instance decision can be reviewed by a court of appeal.

Also, aside from the judicial system, the General Comptroller of the Republic may be required to review the decisions adopted by the bidding entity, in its role of supervisor of public bodies.

It is important to note that there are special dispute resolution systems, such as the Technical Concessions Panel, which must decide in a non-binding manner on any discrepancies that may arise between the parties during the execution of a concession contract. The Panel's decision may be submitted to arbitration review.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The recourses filed before the mentioned authorities are different, and each one is processed based on a special procedure that includes various stages.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

In general, these procedures are meant to be brief, due to the nature of the disputes. According to the legislation on the matter, procedures before the public entities shall take a maximum of six months to be resolved; however, in practice, they commonly take longer.

In turn, before the Public Procurement Court, the term between the filing of the lawsuit and the issuance of the judgment may be approximately one year. If appeals are filed against the first-instance judgment, it may take approximately another six months until the judgment of the Court of Appeals.

36 | What are the admissibility requirements?

Various administrative recourses may be filed before the bidding entities, which must be done within terms of five days, one year or up to two years. The first recourse only requires demonstrating that the administrative decision affects a right or legitimate interest of the claimant. In turn, recourses that must be filed within one or two years require the concurrence of additional elements, mainly related to certain administrative irregularities that must be proven when filing the claim.

Chilean legislation contemplates a broad definition of 'interested party', so claiming legitimacy to a claim is not a problem.

The filing of administrative recourses does not suspend the term in which to file judicial appeals. This may cause a problem if the administrative recourses are not solved before the expiration of the judicial term. Also, the cases under review before administrative authorities cannot in turn be filed before tribunals.

A problem in relation to administrative and judicial recourses is that their filing does not suspend the contested administrative act, so this action could have produced all its effects at the time of solving the claim ordering the cease of effects.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Administrative recourses must be filed within a period of five days, one year and up to two years, from the notification of the administrative act. Lawsuits before the Tribunal of Public Procurement must be filed within 10 business days. The time limit for making a claim before Ordinary Tribunals is five years.

Also, there is a special Protection Action, which can be filed before the Court of Appeals within 20 business days.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No, it does not, but when filing the application for review the claimant may expressly request the suspension of the procurement process. Furthermore, before ordering the suspension, the relevant entity hears both parties involved, owing to the principle of impartiality.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Given that the procurement processes are public, all information regarding them is available on the Mercado Público website for all offerors and interested parties.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

The bidding processes governed by the Act are published in the Mercado Público online portal, where request-for-bids documents and all the resolutions issued in the process can be found.

For its part, the special procurement processes (ie, those for construction and public works concessions and energy supply) are published in specific web portals where the relevant information about them can be found. In these processes, as a general rule, only the bidders that have formally received request-for-bids documents may submit offers.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

It is common, in procurement processes that involve large amounts of money, for bidders that are not awarded a contract to file applications for review. There is no official data on the recourses filed before the public administration; however, during 2018 more than 300 lawsuits were filed before the Public Procurement Court.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Disadvantaged bidders can claim compensation for damages before Ordinary Courts by filing a civil lawsuit within five years after the event claimed.

Such filings are not subject to greater requirements, apart from having to be submitted within the legal term and having to specify the claimed damage.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

It is possible for a contract to be terminated after a review is requested by an interested person if irregularities in the award are detected. The imposition of this penalty is not common, but it has occurred when manifest and serious irregularities have been detected.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Interested parties who contract with the public administration through direct deals can file the same administrative recourses as those that have contracted through a public bidding process. Additionally, they may file recourses before Ordinary Courts and the Court of Appeals, and before the General Comptroller of the Republic.

The only difference in this matter with respect to public bidding is that parties that have contracted through a direct deal cannot file lawsuits before the Public Procurement Court, as this entity has no competence to review procurements of that nature.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

The affected persons can file administrative recourses without needing to be represented by an attorney. In this sense, the cost will be associated with the time invested in the preparation and processing of the recourse. The same occurs in the case of filing recourses before the General Comptroller of the Republic.

The filing of the Protection Action before the Court of Appeals can also be made directly by the affected person, but usually an attorney is hired for that purpose. Additionally, certain procedural expenses must be assumed.

For its part, lawsuits filed before the Public Procurement Court require the representation of attorney, and procedural expenses must also be assumed. The same happens for recourses filed before ordinary courts.

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UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

Fifteen years after the entry into force of the Act, it is possible to clearly identify some areas that need improvement, one of which is the dispute resolution system. Currently there is a group of experts studying possible modification to the organisation, procedure and competence of the Public Procurement Court.

Regarding the Public Procurement Court, it has been proposed to increase the number of sessions for reviewing the cases in order to improve resolution times. This modification is extremely important for the decisions of the Court to be effective.

The possibility is being considered that the Public Procurement Court will be able to carry out the compensation procedure once the final decision is issued. At present, once the plaintiff has obtained a favourable decision, it must file a lawsuit before an Ordinary Court to obtain compensation for damages.

Regarding the last aspect, there is a proposal to extend the competence of the Public Procurement Court to allow it to consider illegal acts or omissions that have occurred during the execution of an agreement. Currently, the competence of this court is limited to the illegal acts or omissions that have occurred between the approval of the bidding basis and the award.

It is also proposed to implement a contract management system that allows monitoring of the evolution of the contracts, payments, penalties, modifications and guarantees, among other matters.

Finally, there is a worrying trend to submit draft laws in the Congress that create more difficulties in participating in public procurement. Although such measures could be an effective mechanism for avoiding some types of conduct, the basic principle of free competition between the interested parties is also to be considered.

China

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The two foundational laws governing public procurement activities are the Government Procurement Law (GPL) and the Bidding Law (amended in 2017).

The GPL governs the purchase of goods, projects or services stipulated in the centralised procurement catalogue, or above a threshold value, using fiscal funds by all levels of government authorities, public service institutions and group organisations.

The Bidding Law governs bidding activities with respect to procurement of projects and related goods and services that occur within China.

In order to facilitate compliance with the laws in practice, the Ministry of Finance (MoF) has issued various implementation regulations, the most important of which are the Measures for the Administration of Tenders and Invitations to Bid in Government Procurement of Goods and Services (the MoF Bidding Rules amended in 2017) and the Administrative Measures for Non-Bidding Methods of Government Procurement (the MoF Non-Bidding Rules).

In addition, local provincial governments have promulgated their own implementation rules applicable to government procurement at the provincial level and below.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Regulations in relation to sector-specific procurement are issued by the ministry in charge of the sector, either on its own or in conjunction with the MoF. Some regulations issued by a ministry in charge of a sector set out detailed procedures, while others, such as the Implementation Advice on Government Procurement of Wireless Local Area Network Products, are designed to prioritise the procurement of products that meet national certification standards for the promotion of domestic industries.

For military procurement, the applicable procurement laws are issued separately by the Central Military Commission.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

China has not acceded to the World Trade Organization's Agreement on Government Procurement (GPA) as of the end of March 2019, but has initiated negotiations for accession to the GPA. It has made its sixth market access offer in 2014. Universities, hospitals and state-owned enterprises (SOEs) are included. Other GPA participants are still not satisfied with the coverage of government procurement bodies, particularly SOEs. Chinese President Xi Jinping indicated at the 2018 Boao Forum that China will accelerate its accession to the GPA, and the MoF further stated its intention to continue negotiations for accession to the GPA in its 2018 Q1 press conference on fiscal revenue and expenditure by improving and submitting a new market access offer.

But many domestic industries and key Chinese ministries view government procurement as a tool to promote domestic companies, and, therefore, oppose China's signing of the GPA. This opposition can be seen in some legislation and administrative rules that give preference to domestic goods and services, contrary to the spirit of the GPA, such as article 10 of the GPL, which states that government procurement projects shall purchase domestic goods, projects and services, unless:

- such goods, projects and services are not available within China;
- such goods, projects and services are not obtainable on reasonable commercial terms;
- such goods, projects and services are being procured for use abroad; or
- the relevant laws and administrative regulations specifically require the use of foreign goods, projects and services.

Furthermore it is the practice of Chinese governments to grant advantages to Chinese companies by stipulating requirements in the government procurement process to promote the 'indigenous innovation' policy. An example of this is the abolished Administrative Measures on Government Procurement Contracts for Indigenous Innovation Products and related Qualification Standards on Indigenous Innovation Products, which provided that signing and execution of government procurement contracts must promote indigenous innovation, and that the indigenous innovation product's trademark must be first registered in China.

However, the State Council issued two notices in December 2011 and November 2016 requesting governments at all levels to stop implementing measures that link innovation policy with provision of government procurement advantages.

Proposed amendments

4 | Are there proposals to change the legislation?

To ward off accusations of protectionism or discriminatory conduct, due to their inability to define 'domestic goods', in May 2010, the MoF and three other ministries released the draft Administration Measures on Government Procurement of Domestic Goods for comments.

This draft defines 'domestic goods' as 'goods manufactured in China where the domestic manufacturing cost represents more than 50 per cent of the overall manufacturing costs of the final product.' As of the end of March 2019, these measures have not been promulgated and have not been rendered effective.

In March 2018, the National Development and Reform Commission released the Provisions on Construction Projects Where Bidding Is Legally Required, which became effective on 1 June 2018 (the Provisions). The Provisions raised the thresholds for mandatory bidding requirements and prohibited local governments from stipulating a greater scope and threshold for their own procurements.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

'Government procurement' under the GPL refers to the purchase of goods, projects or services stipulated in the 'centralised procurement catalogue'. It can also apply to items above a certain threshold value, using fiscal funds by all levels of government authorities, public service institutions and group organisations.

Government authorities include central, judicial and prosecution authorities. Public service institutions are non-profit entities established by government authorities, using state-owned assets to engage in education, science, culture or similar activities. A group organisation usually refers to a political party or a non-profit group approved by the government.

While it has been deemed that SOEs are not considered 'purchasers' (ie, contracting authorities) under the GPL, the Bidding Law and its implementing rules still apply to SOEs engaging in bidding activities to procure a construction project.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The GPL is not applicable to procurement of goods, projects and services that do not fall within the 'centralised procurement catalogue' nor meet the procurement threshold value. Local governments, or their authorised institutions, may issue their own centralised procurement catalogue and procurement threshold value. Under the threshold rules for 2017–2018, published by the Central Budget Unit, the GPL and the Bidding Law apply to a department's single or bulk procurement of at least 1 million yuan for goods or services, or 1.2 million yuan for projects, which remains unchanged in 2019.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Parties to a government procurement contract cannot arbitrarily amend a concluded contract. However, if during the performance of the contract the contracting authority needs to add goods, construction works or services of the same type as those set forth in the original contract, amendments may be conducted without a new procurement procedure. This applies if no change is made to other clauses of the contract, and the total value of the additional procurement does not exceed 10 per cent of the original contract price.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

China is governed by civil law. Relevant judicial cases determine that parties of a concluded contract cannot arbitrarily amend, suspend or terminate such a contract. However, the GPL requires parties to a concluded contract to amend, suspend or terminate the contract, if the performance of the contract is against the national and public interest. In practice, disputes on whether the performance of the contract is against national and public interests are ultimately decided by the courts.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Privatisation of a state-owned asset does not follow the GPL and is pursuant to the Law of the People's Republic of China on the State-Owned Assets of Enterprises. Aside from an agreement for direct transfer according to state rules, privatisation of a state-owned asset shall take place publicly, at a lawfully established trading location in an open, fair and impartial manner. If there are more than two potential recipients of the transfer, the transaction shall take place by open auction.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

If a government entity uses state funding, and the operation of a PPP is for procurement of goods, projects or services from within the centralised procurement catalogue, or above the procurement threshold value, the GPL is applicable. The MoF issued the Administrative Measures of Government Procurement in Public-Private Partnership Projects to ensure that in setting up a PPP, the partner may be selected by public bidding, invited bidding, competitive negotiation, competitive dialogue or single-source procurement. PPPs that procure projects or goods or services related to a construction project via bidding are subject to the Bidding Law.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

According to Article 50 of the GPL Implementing Rules, contracting authorities shall announce details of a government procurement contract in media designated by the MOF within two working days of signing the contract, unless the contract involves national or business secrets.

Media platforms designated by the MOF include the China Government Procurement website, and the *China Financial and Economic News*, *China Government Procurement* and *China State Finance* magazines.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The GPL and the Bidding Law permit contracting authorities to set criteria or conditions based on specific requirements of the tender to determine whether suppliers or interested parties are suitably qualified. Such criteria or conditions may not be unreasonable or discriminatory.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

The GPL states that if special goods or services can only be procured from limited suppliers, or if the cost of public bidding is extremely

disproportionate to the total value of the procurement project, the contracting authority may conduct 'invited bidding'. The contracting authority must choose at least three suppliers from the list of suppliers that meet qualification requirements, and send them an invitation to bid accordingly.

For construction projects, the Bidding Law states that the contracting authority has the choice between public bidding or invited bidding, unless the State Council or local government confirm the project is unsuitable for public bidding. In that case the approval of the competent authority is required prior to invited bidding. Invitations to bid under this scenario must also be sent out to at least three qualified entities.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The GPL states that a supplier may be blacklisted from participating in government procurement activities for one to three years if it is found to have engaged in unlawful behaviour, such as bribery. On expiry of the prohibition the supplier may again participate in government procurement activities, in principle. Whether it can actually participate will still depend on the qualification requirements of the procurement project.

There is no concept of 'self-cleaning' in the laws and regulations of China.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Article 3 of the GPL and article 5 of the Bidding Law iterate the principles of transparency, fair competition, justice (including equal treatment), honesty and trustworthiness.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The GPL requires a contracting authority to adhere to the principles outlined in question 15. Article 12 of the GPL also addresses conflict of interest scenarios (see question 17).

Conflicts of interest

17 | How are conflicts of interest dealt with?

A conflict of interest is defined as:

- having an existing employment relationship with a bidder within the three years prior to the bidding activities;
- serving or having served as a bidder's director, supervisor, controlling shareholder or actual controller;
- having a spousal, blood relative or in-law relationship with the responsible person of the bidder; or
- having a relationship that may affect the fairness of the procurement.

Article 12 of the GPL requires procurement personnel and related personnel that have a conflict of interest with a bidder to recuse themselves from the bidding process. If a bidder believes that procurement personnel or related personnel have a conflict of interest with another bidder, they may apply for the personnel to be recused from the bidding process. Related personnel include members of bid evaluation committees, negotiation groups for procurement and members of quotation request groups.

The Bidding Law and the Bidding Implementing Rules have similar requirements on the recusal of natural or legal persons that have a conflict of interest with a bidder, which may affect the fairness of the proceedings.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The GPL Implementing Rules allow the contracting authority to seek the advice of relevant bidders and experts if the project is technically complex or requires expert confirmation on certain details. It is not expressly stipulated that such activity is sufficient to prohibit the bidder's subsequent participation, and the GPL Implementing Rules only disqualify a bidder if it provided the overall design, preparation of standards, project management, supervision or testing. This does not apply to single-source procurement.

Given the fundamental principle of transparency and conflict of interest rules, a bidder involved in the preparation of the tender should recuse itself from the bid.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

Article 26 of the GPL provides that procurement procedures used by contracting authorities include:

- public bidding;
- invited bidding;
- competitive negotiations;
- single-source procurement;
- requests for quotations; and
- other methods recognised by the State Council Government Procurement Supervisory and Management Department.

The MoF promulgated the Interim Administrative Measures on the Procurement Method of Competitive Dialogue for Government Procurement (the Competitive Dialogue Measures) in 2014, which allow the use of competitive dialogue as a procurement method under certain circumstances.

In general, public bidding is the primary method of government procurement, and prior approval is needed from competent authorities if different procurement methods are required.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

According to the GPL Implementing Rules, related bidders that have the same persons in charge, or have direct shareholdings or management relationships, may not participate in the government procurement activities under the same contract. Members of a consortium that participate in government procurement activities cannot participate in the same government procurement activities under the same contract by itself or by forming another consortium with other suppliers. The Bidding Implementing Rules contain similar provisions, a violation of which renders such bids void.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Pursuant to the GPL and the MoF Non-Bidding Rules, goods or services that meet one of the following may be purchased using competitive negotiation:

- there was no bidder nor a qualified bidder, and a new tender could not be established;
- detailed specifications or actual requirements cannot be confirmed, owing to technical complexity or special nature of the project;
- reasons not foreseen by the contracting authority, or a delay not owing to the contracting authority, causing the time required for the bidding procedure not to satisfy the urgent need of the user; or
- the total price cannot be calculated beforehand because procurement of artwork, patents, proprietary technology, time and service levels cannot be confirmed in advance.

The Competitive Dialogue Measures state that projects that meet one of the following may be purchased using competitive dialogue:

- government purchase of services;
- the project is technically complex, or has a special nature, and detailed specifications or actual requirements cannot be confirmed;
- the total price cannot be calculated beforehand because procurement of artwork, patents, proprietary technology or time and level of service cannot be confirmed in advance;
- the project involves scientific research for which there is insufficient market competition, and technological achievements that require support; or
- the project involves construction and falls outside of the category of construction projects requiring a bidding procedure, according to the Bidding Law and its Implementing Rules.

The applicable scope for competitive negotiations and competitive dialogue are similar, but there are differences. Competitive negotiation is decided by the lowest quote, and competitive dialogue uses a comprehensive scoring method.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

As outlined in question 21, there are two circumstances under which competitive negotiation and competitive dialogue may apply: the project is technically complex or has a special nature that renders certain details or requirements unable to be confirmed, or the total price cannot be calculated in advance. The use of a comprehensive scoring method under competitive dialogue, which entails consideration of non-price factors, may in theory lead to a more reasonable decision, but legislation does not clearly stipulate a preference for either method.

In practice, the applicable procurement method is decided mostly by considering the circumstances and the characteristics of the procurement project.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

The relevant laws and implementing rules do not expressly recognise the concept of a framework agreement. According to contract law the content of a procurement contract that expressly stipulates the relevant procurement information, and does not violate the country's mandatory laws, can constitute an effective procurement agreement.

24 | May a framework agreement with several suppliers be concluded?

Neither the GPL nor the Bidding Law address the issue of a framework agreement.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The GPL does not expressly permit a change to membership of a bidding consortium. Under the Bidding Implementing Rules it is the contracting authority's responsibility to stipulate the relevant consortium bidding rules in the qualification pre-review announcement. A bidding consortium that changes the composition of its members after qualification pre-review will render its bid invalid.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Under the Law of the People's Republic of China on the Promotion of Small and Medium-Sized Enterprises, which was implemented on 1 January 2018, the relevant government departments of the State Council shall draft the relevant preferential policies for government procurement from micro, small and medium-sized enterprise (SMEs). The idea is to increase the proportion of SMEs involved in government procurement through various measures, such as:

- drafting the standards for procurement;
- reserving quotas for procurement through SMEs;
- providing preferential treatment in price reviews; and
- giving priority to procurement through SMEs.

The reserve quota in particular should take up at least 30 per cent of the department's annual government procurement budget, and the quota for small and micro enterprises shall be no less than 60 per cent. In addition, government procurement shall not discriminate based on the enterprise's shareholding structure, term of operation, size of business and financial indicators.

Before the effectiveness of the aforesaid law, the MoF and the Ministry of Industry and Information Technology have jointly issued the Interim Measures for the Promotion of Small and Medium-sized Enterprises through Government Procurement (the SME Measures), and have granted many benefits to SMEs in the course of government procurement activities. SMEs are defined according to the number of employees, operating income and total assets. Using the construction industry as an example, SMEs comprise enterprises that have operating incomes of less than 800 million yuan or total assets of less than 800 million yuan. Within this category, medium enterprises have operating incomes of at least 60 million yuan and total assets of at least 50 million yuan; small enterprises have an operating income of at least 3 million yuan and total assets of at least 3 million yuan; and micro enterprises refer to those enterprises with operating incomes and total assets below that of small enterprises.

Benefits in the course of government procurement activities include:

- government procurement activities cannot discriminate against SMEs by registered capital, total assets, operating income, employees, profit, payable tax and other details regarding the scale of the bidder;

- conditional upon the self-operation and provision of basic needs of public services, at least 30 per cent of the 'annual budget of public procurement' shall be purchased from SMEs. At least 60 per cent thereof should be allocated to small and micro enterprises;
- for projects that are not specifically targeted at SMEs, the contracting authority shall reduce the bidding price offered by small and micro enterprises by 6 to 10 per cent, and the reduced bidding price is considered in the bid evaluation. For a consortium in which contract value from small and micro enterprises accounts for more than 30 per cent of the total contract value, the bidding price offered by the consortium could be reduced by between 2 and 3 per cent for bid evaluation purposes; and
- encouraging large enterprises to subcontract SMEs, but prohibiting small and micro enterprises from subcontracting large or medium enterprises, or prohibiting medium-sized enterprises from subcontracting large enterprises.

The contracting authority cannot break a contract that is subject to public bidding requirements into lots for the purpose of evading a bidding requirement. However, the relevant laws do not provide for a limitation on the number of lots a single bidder may be awarded.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Unless set out in the bid invitation, a bidder may not put forth alternative bids; otherwise these will be rejected by the bid evaluation committee.

28 | Must a contracting authority take variant bids into account?

The contracting authority can accept alternative bids but is not required to.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

If a bidder changes the tender specifications or submits their own standard terms of business and either fails to meet the substantive requirements and conditions set out in the bid invitation documents, their bid will be deemed invalid.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

As discussed in question 19, government procurement can be conducted by the following methods:

- public bidding;
- invited bidding;
- competitive negotiations;
- single-source procurement;
- requests for quotations; and
- competitive dialogue.

The award criteria for the respective methods are as follows.

Evaluation methods for bids

Evaluation methods for bids under the GPL Implementing Rules are the lowest price method and the comprehensive scoring method. Projects for the supply of goods and services that are subject to uniform technical, services or other standards shall apply the lowest price method.

In the lowest price method, assuming that the substantive conditions set forth in the bid invitation documents are satisfied, the winning bidder will be the bidder that offers the lowest price.

In the comprehensive scoring method, assuming that all the substantive conditions set forth in the bid invitation documents are satisfied, the winning bidder will be the bidder that obtains the highest score from a comprehensive scoring of key factors. The price of goods shall be weighted at no less than 30 per cent and no higher than 60 per cent of the total score, and the price of services shall be weighted at no less than 10 per cent and no higher than 30 per cent of the total score.

Evaluation methods for construction projects include the lowest price method, comprehensive scoring method or other evaluation methods permitted by the legislation or administrative measures.

Evaluation method for competitive negotiations and requests for quotations

According to the MoF Non-Bidding Rules, the winning supplier will be the entity who can satisfy the substantive requirements of the bid invitation documents at the lowest price.

Evaluation method for competitive dialogue

The comprehensive scoring method, pursuant to the Competitive Dialogue Measures, shall be used.

Evaluation method for single-source procurement

The contracting authority and supplier shall follow the principles outlined in the GPL, guarantee the quality of the procurement project and agree on a reasonable price.

Apart from the specific evaluation methods expressly provided in legislation, a contracting authority will usually apply an evaluation method based on the requirements of the project. The contracting authority shall stipulate and explain the chosen evaluation method on the relevant documents distributed to the public.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The Bidding Law and the MoF Bidding Rules do not contain the term 'abnormally low bid', only the similar term 'bid prices below costs' and 'bids that are substantially lower than those from other bidders who have passed their qualification reviews'.

32 | What is the required process for dealing with abnormally low bids?

Under the MoF Bidding Rules, if the price offered by one bidder is substantially lower than the price offered by other qualified bidders then it is likely to jeopardise the product quality or the good-faith performance of the procurement contract, the evaluation committee must request the bidder to provide a written explanation on site within a reasonable period as well as the relevant supporting documents (if necessary) to justify its low price, failing which the evaluation committee shall disqualify the relevant bidder from the bidding process.

In construction projects, a bidder cannot submit a bid price below cost. The bid evaluation committee shall disqualify such bids.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The applicable appeal and review process depends on the type of procurement and appeal content.

For goods or services procurement projects governed by the GPL

A supplier with a query regarding government procurement activities may raise it with the contracting authority, which shall respond within a reasonable time. Legislation does not expressly provide whether relief may be sought by a bidder dissatisfied with the response.

A supplier that believes the determination of the bid, the contracting result, the procurement procedure or the procurement documents have harmed its rights may submit a challenge to the contracting authority in writing within seven working days from the date the supplier knows or should have known that its rights were harmed. The contracting authority is required to respond within seven working days after receiving the challenge. If the supplier is dissatisfied with the reply (or if there is no response), the supplier may, within 15 working days of the deadline for the reply, file a complaint with the competent finance authorities.

The finance authority shall render a decision concerning the handling of the complaint within 30 working days of the receipt of the complaint, which does not include the time required by the finance authority to undertake inspection, testing, evaluation, expert review or to ask the complainant to supplement materials. If the supplier is still dissatisfied, or the finance authority fails to respond to the complaint within the stipulated time, the supplier may apply for administrative reconsideration, or initiate an administrative action in court.

According to the MoF Non-Bidding Rules, any supplier, entity or individual may submit an objection in writing to the contracting authority challenging its decision to use single-source procurement, and copy the relevant finance authorities. The contracting authority should consider whether the objection is valid within five business days of the expiry of the said publication period and adopt other procurement methods if the objection is valid. If the contracting authority is of the view that the challenge is not valid, it should notify the relevant finance authorities of its review opinion and its reasoning. The MoF Non-Bidding Rules, however, do not further provide the objecting party with an appeal remedy.

For the construction bidding procedure under the Bidding Law

A bidder or other interested party who believes that bidding activities violate the legislation or administrative measures may raise a complaint with the relevant administrative supervisory department within 10 days of the date that the bidder or other interested party becomes aware, or should have become aware, of the violation. If there is a disagreement with the qualification pre-review, bid invitation documents, opening the bid or bid result, prior to the submission of the aforesaid complaint, the concerned bidder or other party shall raise an objection with the contracting authority. The administrative supervisory department shall render a decision in writing within 30 days of the date of complaint. A complainant who is dissatisfied with the decision may apply for administrative reconsideration or initiate an administrative court action.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

As discussed in question 33, there are different review authorities, depending on the case, and, in most cases, there is an order of application. It is unlikely for more than one authority to rule on a review application. In addition, pursuant to the Bidding Implementing Rules, if a complainant lodges a complaint with respect to the same matter in more than two administrative supervisory departments that are authorised to process the matter, whichever department first received the complaint is responsible.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

See question 33 for the deadlines to review challenges and complaints by the contracting authority or the MoF.

If a complainant proceeds for an administrative reconsideration, an administrative reconsideration authority will render a decision within 60 days from date of application. If the situation is complicated, the deadline may be extended for up to 30 days.

If the complainant is still dissatisfied with the result of the administrative reconsideration decision and initiates an administrative lawsuit, the court shall make its first decision within six months from the date the case goes on record. Therefore, from the above, once the case enters administrative litigation, the proceeding is expected to take at least six months, and may take years.

36 | What are the admissibility requirements?

See question 33 for reasons and substantive issues for an application for review.

Under the Measures for Questions and Complaints Regarding Government Procurement (the Questions and Complaint Measures, effective from 1 March 2018), the admissibility requirements for a complainant to raise a complaint are as follows:

- the complainant must have raised a query prior to filing the complaint in accordance with relevant rules;
- the complaint must meet the conditions in relevant regulations;
- the complaint must be filed within the relevant deadlines;
- the matter has not been complained about and processed by the MoF before; and
- other requirements stipulated by the competent finance authorities must be met.

37 | What are the time limits in which applications for review of a procurement decision must be made?

See question 33.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The GPL states that if the matters raised in the query or challenge may affect the results of a bid award or deal closing, the contracting authority shall suspend the conclusion of any contract, and the performance of any contract that has been signed.

In the construction bidding procedure, if a bidder, potential bidder or other interested party raises objections to the qualification pre-review, bid invitation documents or bid evaluation result of a project that are subject to the bidding process, the contracting party shall suspend the bidding activities before it responds to such objection.

In addition, Article 28 of the Questions and Complaint Measures provides that a financial government department may, depending on the actual circumstances while handling a complaint matter, notify the

procurement party and the procurement agent in writing to temporarily suspend procurement activities for up to 30 days.

The procurement party and the agent shall suspend all procurement activities upon receiving the aforementioned notice during this legally stipulated suspension period, or until the finance department issues a written order for the resumption of procurement activities.

There is no provision allowing the parties of a suspended contract to request the bidding activities to resume. However, according to the Administrative Litigation Law, if parties to a suspended contract believe that the contracting authority's decision to suspend has infringed their rights and interests, they may initiate legal action in court.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

No relevant statistics are available.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Under the GPL, the contracting authority must make a public announcement about the winning bidder within two working days of the date of finalising the winning bidder, on media platforms nominated by the finance authorities for one working day.

For construction procurement that must go through the bidding process, the contracting authority must make a public announcement about the proposed winning bidder within three days of the date of receiving the bid evaluation report. This public announcement must be available for at least three days.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

There are no laws or regulations granting an applicant access to the procurement file.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

No relevant statistics are available, but according to 2016 statistics published by the Central Government Procurement Centre, the number of challenges with respect to procurement documents and results is on the rise. About 70 per cent of challenges regarding procurement documents were about the inclination or discrimination of technical index. For challenges to procurement results the most common allegations are that the products of the winning bidder do not satisfy the stated requirements.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

If a contracting authority, a procurement agency or its officers, or an individual supplier breaches the GPL and causes damages to a party's interests, it shall be held civilly liable under the relevant law. However, this legislation does not specify the extent of civil liability and the elements to establish a claim; thus they will depend on the relevant law being asserted.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The GPL states:

> *if the failure of the contracting authority, procurement agency or winning bidder to comply with relevant laws on government procurement procedure has affected or may affect the bid result or closing deal, if the procurement contract has been signed but not performed, the contract shall be rescinded.*

There are, however, no available statistics on the success rate of an unsuccessful bidder to rescind a government procurement contract based on violations of procurement laws.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

If the procurement should be conducted through public bidding procedures but the contracting authority fails to do so, the contracting authority may be fined and ordered to rectify within a certain period of time. If such failure to conduct public bidding causes damage to a party's interests, the contracting authority shall bear civil liability under the relevant law.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

Generally speaking, the costs include the costs of preparing an application. To process the review, the MoF cannot ask the complainant or party subject to the complaint for payment of costs. However, if examination costs are incurred in the course of processing the review, the party at fault shall bear all costs.

No application or review fee is required for administrative reconsideration. As for administrative litigation, payment shall be made depending on the individual case for application costs and other incidental costs, including transportation, accommodation and compensation for loss of work occurred by the witness, examiner or translator for attending the hearing.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

After considering the unnecessary legal costs that small-size bidding projects may incur, as well as the need to specify the application scope of public procurement laws and regulations on construction projects, the National Development and Reform Commission released the Provisions on Construction Projects Where Bidding Is Legally Required, which became effective on 1 June 2018 (the Provisions). The Provisions raised the thresholds for mandatory bidding requirements and prohibited local governments from stipulating a greater scope and threshold for their own procurements.

The Supreme People's Court issued Interpretation II of the Supreme People's Court on Issues Concerning the Application of Law for Trials over Undertaking Contracts in Construction Projects, which became effective on 1 February 2019. This specifies the relationship between the contract awarded under the bidding process and the construction contract that is separately executed by the contracting authority and the winning bidder. If such separate contract contains substantive provisions of the awarded construction project, such as the scope of the construction project, construction period, quality requirement of the construction project or project payment, that turn out to be inconsistent with those in the awarded contract, the awarded contract shall prevail.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Cyprus acceded to the European Union (EU) on 1 May 2004. As an EU member state, Cyprus has enacted legislation on public procurement law in order to comply with European public procurement legislation.

The Regulation of Procedures for the Award of Public Contracts and for Related Matters Law of 2016 (Law 73(I)/16) is the basic legislation governing the tender procedure for public contracts. This law is based on EU Directive 2014/24 as amended.

The Regulation of Procedures for the Award of Public Contracts by Authorities Acting in the Water, Energy, Transport and Postal Services Sectors and for Related Matters Law of 2016 (Law 140(I)/2016) is based on the EU Directive 2014/25 as amended.

The Recourse Procedure in the field of Public Contracts Law (Law 104(I)/2010) (the Remedies Law) regulates remedies and the functioning of the Tenders Review Authority in compliance with Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

The subsidiary legislation, the General Regulations for the Award of Public Supply Contracts, Public Works Contracts and Public Service Contracts (KDP 2001/2007) regulates procedural matters and provides for the establishment and the operation of the appropriate public organs for handling public tenders, and sets the rules for the requirements and the procedure of tender invitation, the submission of tenders, the evaluation of tenders and the award of tenders.

There are also a number of other subsidiary legislations regulating procurement procedures to be followed by specific contracting authorities (eg, the Cyprus Ports Authority, the Cyprus Electricity Authority, municipalities).

The Regulations on the Management of Public Contracts Execution and the Procedures on Exclusion of Economic Operators from Public Contract Award Procedures, 138/16 (KDP) as amended, regulate the management of the execution of public contracts, the establishment of a number of committees and the exclusion of economic operators from public contracts.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Yes, sector-specific procurement legislation includes the Regulation of Procedures for the Award of Public Contracts by Authorities Acting in the Water, Energy, Transport and Postal Services Sectors and for Related Matters Law of 2016 (Law 140(I)/2016), which is based on EU Directive 2014/25 as amended.

Law 173 (I)/2011 regulates the procedures for the award of specific public contracts in the defence and security sectors in compliance with EU Directive 2009/81/EU.

Law 11/2017 regulates the procedures for the award of public concession contracts, in compliance with Directive EU 2014/23/EU.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The relevant legislation is in compliance with the relevant EU procurement directives. Primary legislation was enacted following the obligation to adopt EU procurement directives, while secondary legislation regulates more procedural matters.

Proposed amendments

4 | Are there proposals to change the legislation?

We have been informed that legislation amendments relating to the Remedies Law are currently being considered. These amendments relate to the professional qualifications of the members of the Tenders Review Authority, the threshold of €500,000 for the concession contracts to be examined by the Tenders Review Authority and the power of the Tenders Review Authority to issue costs orders, as well as new powers of the Tenders Review Authority to examine referrals made by the competent national authority and the rules on the interim measures.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Contracting authorities are defined to be the state, local or rural authorities and public law organisations. No other entities are considered to be contracting authorities, with the exception, under certain circumstances, of those that have been awarded concession agreements.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Different types of contract have different thresholds. The threshold values are reviewed considering any review thereof by the Commission, according to article 6 of Directive 2014/24/EU.

Currently the main threshold rules are as follows:

- central government contracts: services and supply contracts of minimum €144,000 and works contracts of minimum €500,000;
- public sector (local or rural authorities and the public law organisations): services and supply contracts of minimum €221,000 and works contracts of minimum €500,000;
- contracting authorities of the central government or the public sector in general, acting in the public utility fields: services and supply contracts of minimum €443,000 and works contracts of minimum €500,000;
- concession contracts: services contracts of minimum €5,548,000 and works contracts of minimum €500,000; and
- contracts in the defence and security fields: services and supply contracts of minimum €443,000 and works contracts of minimum €5,548,000.

If a contract does not fall under the thresholds and the specific procurement legislation does not apply, the main principles governing public procurement procedures need to be complied with.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Legislation (KDP 138/16) provides for the establishment of special committees that examine any proposals from the contracting authorities to amend contracts. The main principles governing the amendment procedures are as follows:

- the financial and the physical contract object must not undergo a substantial deviation;
- the amendment must be necessary and must not constitute a breach against the principles of equal treatment and non-discrimination among the economic operators, as well as the principle of transparency, and the principle of proportionality is required to be safeguarded;
- in the event that as a direct or indirect result of the contract amendment additional credit will be needed, the coordinator must ensure that additional credits are available; and
- certain rules apply relating to the value of the amendment when compared with the value of the initial contract.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

As far as we are aware, there have not been any cases dealing directly with this aspect.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Law 28 (I)/2014 on the Regulation of Privatisation Matters, which has been very recently repealed, did not provide for a specific procurement procedure; it nevertheless referred to the principles of transparency, non-discrimination and equal treatment, within the frame of the existing legislation.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The only form of PPP that is regulated by law is the concession agreement. If the concession agreement matter falls under the procurement legislation (ie, Law 11(I)/2016 on the Regulation of Concession Agreement Procedures), then a procurement procedure is required.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

There are two methods of advertising:

- electronic advertising, which is effected through the upload to an online portal, where interested economic operators have access; and
- non-electronic advertising in the Cyprus official government gazette and the Official Journal of the EU.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from the general rule that any limitations must comply with the principles governing public procurement law, the criteria may relate to three factors only: the ability of the economic operators to exercise their professional activity, financial adequacy, and technical and professional ability. The criteria that the contracting authorities can set as prerequisites are limited only to those explicitly set in law (article 58 Law 73(I)/2016).

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Yes, in some procedures (ie, the restricted procedure, the competitive procedure with negotiation, the competitive dialogue and the innovation partnership), the contracting authorities may limit the number of suitable bidders to be invited to participate. The minimum number of bidders is five in the restricted procedure and three in the other procedures referred to above. In any case, the number of bidders must be adequate for competition reasons.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

'Self-cleaning' is a new concept in the Cypriot legal system, introduced by a relative recent law amendment. Any economic operator that is in certain exclusion situations may provide evidence to the effect that the measures taken are sufficient to demonstrate its reliability, despite the existence of a relevant ground for exclusion. If such evidence is considered sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. Article 4 of Law 73(I)/16 and article 4 of Law 140(I)/16 state these principles.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Independence and impartiality are fundamental principles of our public law system, and are provided for in a number of pieces of legislation, including public procurement law.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Law 73(I)/16 and Law 140(I)/16 both provide that the contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures, so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

The concept of 'conflicts of interest' is deemed to cover at least any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure, have, directly or indirectly, a financial, economic or other personal interest that might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Subsidiary legislation regulates that any person involved in the evaluation of the tenders has to sign a declaration that he or she will execute his or her duties in light of the principles of independence and impartiality. Any person who has a conflict of interest is obliged to disclose it and to exclude himself or herself from the procedure. Failure to comply with this obligation results in the annulment of the whole procedure if the case is brought up before the court or the Tenders Review Authority.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

In cases where a bidder has had previous involvement in the tender procedure, the contracting authority has to take all appropriate measures to safeguard the principles of competition law. Those measures include notifying the rest of the bidders of the relevant information made known to the bidder or candidate. The bidder or candidate is excluded from the procedure only if there is no other way to safeguard compliance with the principles of equal treatment. The bidder is nevertheless given the right to prove that its previous involvement in the procedure cannot cause competition distress.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure is the open procedure.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Separate legal entities can submit separate bids in one procurement procedure, as long as they do not collaborate in aiming to influence competition.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Yes, there is a certain procedure set down in detail in law. The main characteristics of the competitive dialogue procedure are as follows. Participation in the competitive dialogue procedure is allowed only for economic operators that have been invited by the contracting authority following examination of the information provided with the application initially submitted. The award criterion is the best price-quality ratio. During the dialogue, the contracting authorities safeguard the equal treatment of all economic operators, and they do not disclose any suggested solutions or other confidential information without the consent of the bidder concerned.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Unfortunately we are not in the position to answer this question with certainty; such information is not made public.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

The framework agreements have a time limitation and their duration can exceed four years only in extraordinary situations. The agreements concluded based on a framework agreement have to follow the rules set down in law, and the parties may not in any way cause substantial amendments in the provisions of the framework agreement.

24 | May a framework agreement with several suppliers be concluded?

Yes, a framework agreement with several suppliers may be concluded. The contract award under a framework agreement may be concluded either with or without a new competitive procedure, depending on whether all the provisions and terms and the objective requirements for defining the economic operator that will execute the contract are provided for.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Tender documents normally regulate that no amendments are permitted after deadline for tender submission. During the execution period, the members of the consortium may change under specific circumstances, provided that the contracting authority agrees on such a change.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

There is a mechanism to monitor the participation of small and medium-sized enterprises (SMEs) in the procurement procedures, together with a number of other factors. This is conducted through an obligation of the contracting authority to send a notification to the European Commission that includes specific information, part of which is the participation of SMEs in the tender.

There are rules on the division of a contract into lots. The rules are provided for in the law and they include provisions limiting the number of lots that single bidders can be awarded; it is a prerequisite that the maximum number of lots that single bidders can be awarded is explicitly provided for in the procedure documents.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids are allowed only when this is explicitly provided for by the contracting authority in the contract notice or invitation to confirm interest.

28 | Must a contracting authority take variant bids into account?

Yes, if variant bids are allowed as explained in question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

If the actions of an economic operator result in substantial deviation from the tender specifications, its tender will be excluded from the tender award.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The award criterion is the most economically advantageous tender, whereby this tender is identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and social aspects, linked to the subject matter of the public contract in question.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no definition of the term 'abnormally low' bid. According to our case law, an 'abnormally low' bid is the one which in comparison to the estimated tender value is abnormally low. A deviation of 8 per cent has not been considered abnormally low, whereas a deviation of 35 per cent has been considered abnormally low.

32 | What is the required process for dealing with abnormally low bids?

The contracting authority requires clarification from the bidder as to the cost or the price it offers with its tender. Upon receipt of those clarifications, the contracting authority evaluates the clarifications submitted. The contracting authority may reject the tender only in the event the information does not explain in a satisfactory way the low price or low cost suggested. The contracting authority must reject the tender if it is abnormally low owing to non-compliance with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by specific international environmental, social and labour law provisions.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The authority that may rule on review applications is the Tenders Review Authority established by law or an administrative court. It is possible for an economic operator to challenge the decision of the Tenders Review Authority by filing recourse before an administrative court. The contracting authority does not have any remedy against the decision of the Tenders Review Authority.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

It is not possible to have parallel procedures. If the economic operator chooses to file recourse before the Tenders Review Authority, it cannot file recourse before the administrative court for the same decision. If it is not satisfied by the decision of the Tenders Review Authority, it can, upon the delivery of the decision, file recourse before the administrative court, which can then either confirm or overrule the decision.

The remedies granted by the administrative court are limited to the annulment of the challenged decision and the declaration thereof as null and void. The Tenders Review Authority is, in addition, empowered by law to declare under certain circumstances a concluded contract as ineffective or to declare specific terms as illegal at the early stage of the contract notice.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

A recourse before the Tenders Review Authority normally takes four to six months. A recourse before an administrative court takes much longer, namely two to three years with the exception of cases that the parties agree to expedite.

36 | What are the admissibility requirements?

The economic operator must be able to prove that it had an interest in the tender award and that it has suffered or is likely to suffer damage from the decision. Any decision of the contracting authority prior to the contract (contract signing) is justiciable.

37 What are the time limits in which applications for review of a procurement decision must be made?

Recourse before the Tenders Review Authority must be filed within a time frame of 15 calendar days (in some cases 10 days) from the day on which the economic operator gained knowledge of the decision it wants to challenge. Recourse before the administrative court must be filed within 75 days from the day on which the economic operator gained knowledge.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Regarding the Tenders Review Authority, the application for review has an automatic suspensive effect for the period until the Tenders Review Authority delivers its decision on the interim injunction (ie, five working days from the day on which the recourse was notified to the contracting authority). The notification occurs within a period of two working days from the recourse submission. Upon recourse submission, the contracting authority will be requested to appear before the Tenders Review Authority and justify its opposition – if any – to the continuing of the suspension period.

With regard to the administrative court, recourse has no automatic suspensive effect. The applicant may file an application aiming at the suspension of the decision.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Regarding the Tenders Review Authority, some 80 to 85 per cent of applications are successful. This is not the case with regard to the Supreme Court, where the success rate does not exceed 5 per cent.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Yes, unsuccessful bidders must be notified as soon as the decision is reached.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

Access to the procurement file is only granted if the decision is challenged by recourse submission.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

Yes, it is quite customary, although the number of recourses filed before the Tenders Review Authority has been significantly lower in recent years in comparison to 2009–2013: 61 cases in 2018, 44 cases in 2017, 79 cases in 2016, 66 cases in 2015 and 71 cases in 2014.

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Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Damages cannot be claimed in review proceedings. Damages can only be claimed before civil courts in a different procedure following the review procedure.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The Tenders Review Authority or the administrative court will not review a concluded contract, with the exception mentioned in question 45. In practice, the contracting authorities hardly ever proceed to terminate a concluded contract on the basis of an annulling decision following recourse submission.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes, protection is available through a procedure before the Tenders Review Authority (not the administrative court) that aims at declaring a contract noneffective.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

The costs for an application before the Tenders Review Authority differ according to the contract value. The range is €4,000 to €20,000. This does not include legal fees.

The costs for an application before the Supreme Court are significantly lower, at about €300. This does not include legal fees.

European Union

Totis Kotsonis
Eversheds Sutherland

LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Public procurement in the EU is regulated primarily by a set of Directives that EU member states are required to implement in their domestic legislation. The relevant legislation is as follows:

- Directive 2014/23/EU on the award of concession contracts (the Concessions Directive);
- Directive 2014/24/EU on public procurement (the Public Sector Directive); and
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal sectors (the Utilities Directive).

The three directives are collectively referred to below as the '2014 Procurement Directives'.

In addition, there is a separate directive, Directive 2009/81/EC, which regulates the awarding of certain contracts in the fields of defence and security (the Defence Directive), as well as a directly applicable regulation (that is to say, EU legislation the rules of which are binding without the need for national implementation) that sets out the rules that apply to the award of certain public passenger transport services by rail and road (Regulation 1370/2007/EC).

Review procedures and remedies for breaches of obligations under the 2014 Procurement Directives and the Defence Directive are dealt with under:

- Directive 89/665/EC on the application of review procedures to the award of public contracts; and
- Directive 92/13/EC on the application of review procedures to the award of contracts in certain regulated utility sectors (collectively the Remedies Directives).

The Remedies Directives have been amended a number of times, including by Directive 2007/06 and Directive 2014/23. In addition to the remedies available at a national level, the European Commission may take action against a member state in the Court of Justice of the EU (CJEU) in relation to any alleged breach of EU legislation. In that context, the European Commission has brought a number of infringement proceedings against member states in relation to breaches of EU procurement legislation.

Over and above the obligations that arise under the legislation referred to above, the CJEU has established that the award of contracts that are not subject to the Procurement Directives may, nonetheless, be subject to obligations under the principles that emanate from the Treaty on the Functioning of the EU (TFEU) (the Treaty Principles), to the extent that such contracts are of certain cross-border interest, that is to say that the nature of the contract in question is such that it would be of interest to a supplier in another EU member state.

The Treaty Principles in question, include the principles of non-discrimination, equal treatment, transparency and proportionality. Compliance with these principles would generally require the carrying out of a sufficiently advertised procurement process based on objective criteria.

Finally, the award of contracts by EU bodies is regulated by separate legislation, namely Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union. Unless otherwise specified, the responses to the questions below relate to the application of the Public Sector Directive.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Yes; see question 1.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The EU is a party to the GPA and, accordingly, EU procurement legislation is designed to be compliant with GPA requirements. However, EU legislation goes much further than the GPA, concerned as it is not merely with the liberalisation and expansion of international trade, but with opening up public procurement in EU member states to intra-EU competition so as to help realise the European single market. As a result, the EU procurement rules are much more detailed than the GPA's requirements.

Proposed amendments

4 | Are there proposals to change the legislation?

No. The most recent legislative change has been the introduction of the 2014 Procurement Directives.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

EU procurement legislation defines the type of bodies that are subject to procurement regulation.

The Public Sector Directive includes a general definition that captures 'bodies that are governed by public law' and meets certain characteristics identified in that legislation. The question of whether an entity comes within the definition of a regulated body is ultimately a question for national review authorities to determine. At the same time,

there have been a few references to the CJEU for a preliminary ruling on this type of issue.

Separately, the Utilities Directive sets out a procedure under which a member state, or a utility in a member state, may apply to the European Commission for an exemption from procurement regulation on the basis that a regulated utility is directly exposed to competition in the member state in which it is performed, and access to that utility market is not restricted. This process was first introduced in the predecessor 2004 EU utilities legislation and the Commission has already granted a number of exemptions pursuant to this type of procedure.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The EU procurement legislation only applies when certain value thresholds are met or exceeded. These thresholds are reviewed by the European Commission every two years, partly so as to ensure that these correspond to the thresholds established in the context of the GPA. The last review took place on 1 January 2018, and the next will take place on 1 January 2020.

The Public Sector Directive applies when the estimated value of a works contract meets or exceeds €5.548 million. The value threshold for supplies and most services contracts is significantly lower at €221,000 (or €144,000 for most procurements by central government bodies). The value threshold for services contracts for social, educational, cultural and certain other types of services stands at €750,000.

The Utilities Directive applies when the estimated value of a works contract meets or exceeds €5.548 million or €443,000 for supplies and most services contracts. The value threshold for services contracts for social and certain other types of services stands at €1 million.

The Concession Contracts Directive applies when the estimated value of a works or services contract meets or exceeds €5.548 million. The same value threshold triggers the application of the Defence Directive for the purposes of works contracts. The value threshold for supplies and services contracts under the Defence Directive is €443,000.

All of the above figures are exclusive of VAT. EU procurement legislation contains a complex set of calculation rules that must be applied for the purposes of determining whether relevant value thresholds are met. Explicit provisions prohibit the splitting of contract requirements artificially so as to bring them below the relevant value thresholds and circumventing the rules. Equally, it is prohibited to choose to apply a particular calculation method with the intention of excluding a contract requirement from the scope of the legislation.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The 2014 Procurement Directives incorporate provisions that regulate the modification of contracts following their award. These prohibit substantial modifications. In brief, a modification will be deemed substantial when it:

- renders a contract materially different in character from the one initially concluded;
- introduces conditions that, had they been part of the initial procurement procedure, would have:
  - allowed for the admission of other candidates than those initially selected;
  - allowed for the acceptance of an offer other than that originally accepted; or
  - would have attracted additional participants in the procurement procedure;
- changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract;
- extends the scope of the contract considerably; or
- involves the replacement of the original contractor (unless 'safe harbour' provisions apply – see below).

At the same time, the directives in question incorporate certain provisions that specify the conditions that, if met, a modification would not be deemed to constitute a substantive modification, and as such it would be permissible (generally referred to as the 'safe harbour' provisions). These rules differ in certain respects, depending on whether the contract is subject to the Public Sector or the Utilities Directive or whether a concession contract is awarded by a contracting authority in the exercise of an activity that is not regulated under the Utilities Directive. Briefly, modifications would not be deemed to be substantive where they:

- have already been provided for in the original procurement documents in clear, precise and unequivocal review clauses and provided these do not alter the overall nature of the contract;
- relate to the provision of additional requirements by the original contractor that are outside the scope of the original procurement, but where a change of contractors is not possible for economic or technical reasons and it would cause significant inconvenience or substantial duplication of costs for the contracting entity and the value of the modification does not exceed 50 per cent of the value of the original contract (this value rule does not apply to utility procurements);
- have become necessary as a result of circumstances that a diligent contracting authority could not foresee and the modification does not alter the overall nature of the contract and the value of the modification does not exceed 50 per cent of the value of the original contract (this value rule does not apply to utility procurements);
- are limited to the replacement of the original contractor with a new one in certain circumstances, including where this is the result of corporate restructuring, and the new contractor meets the original selection criteria and this does not entail other substantial modifications and is not aimed at circumventing the rules;
- are not 'substantial' within the meaning of the legislation; and
- are of a value that is below the relevant value threshold for the application of the rules, and less than 10 per cent (for services or supplies) or 15 per cent (for works) of the value of the original contract, and provided there is no change to the overall nature of contract. The value must be calculated cumulatively if there are successive modifications.

The second and third safe harbour provisions also require the publication of a 'modification of contract' notice in the Official Journal of the EU (OJEU).

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The CJEU dealt with the issue of modifications to contracts following their award in a number of cases. Case C-453/06, *Pressetext Nachrichtenagentur GmbH* merits particular mention for providing important clarifications in relation to the question of what type of amendments might be regarded as 'material' and as such be inconsistent with legal requirements. At the same time, *Pressetext* (and the subsequent Case C-91/08, *Wall*) did not go far enough. It is for this reason that in drafting the 2014 Procurement Directives, EU legislators decided not to merely codify but to develop further the principles set out in CJEU jurisprudence, including by setting out contract modification safe harbours.

In September 2016, the CJEU provided some further clarifications in relation to the question of modifications post-contract award, by ruling in Case C–549/14, *Finn Frogne A/S v Centre for Emergency Communication of the National Police* that reducing the scope (and value) of a concluded contract from that which was originally advertised can constitute a material amendment that is prohibited.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

The 2014 Procurement Directives do not regulate 'pure' privatisations – that is the type of arrangement where the state chooses to sell off to the private sector an enterprise or other asset that was previously owed wholly or partly by the state. However, certain types of privatisation may constitute contracts that are subject to procurement regulation. That might be the case, for example, in cases where the state grants a private sector entity the right to exploit state infrastructure for a certain period of time in exchange for that entity operating the infrastructure under certain conditions, carrying out certain works to upgrade that infrastructure and sharing with the state the profits to be made in operating that infrastructure. Very often, this type of 'build–operate–transfer' arrangement would constitute concession contracts that would be subject to EU procurement regulation. Separately, outright sales of state infrastructure or other assets might also be subject to procurement regulation to the extent that they involve the buyer, for example, providing certain services to the state for payment or other pecuniary interest.

Also, even where a privatisation does not constitute a type of contract that is subject to EU procurement regulation, EU state aid compliance considerations will often require the carrying out of a sufficiently well-publicised and fair competitive tender process, with the winner determined on the basis of highest price. This is so as to avoid the risk of selling a state enterprise, for example, below market value, which would be problematic under EU state aid rules.

Finally, although the issue requires further clarification, at least some CJEU jurisprudence might be interpreted as supporting the view that in certain circumstances where the state is granting a commercial opportunity (and a privatisation is likely to be seen as such) that might require the carrying out of a fair and transparent competitive tender process to ensure compliance with obligations pursuant to the TFEU.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The setting up of a PPP in itself would not normally raise obligations under the EU procurement rules (although see question 9 about possible obligations under the TFEU). However, when the setting up of a PPP involves assigning to the private sector partner or to the PPP a contract for the carrying out of works or the provision of services (or less likely, the provision of supplies) the whole arrangement is likely to be subject to procurement regulation under the 2014 Procurement Directives. That would be the case, for example, when the PPP arrangements on the one hand and a regulated works, services or supplies requirement on the other are 'objectively separable', in that they are capable of being awarded separately but the contracting authority chooses to award a single contract instead. In those circumstances, the award of a single contract would be subject to procurement regulation irrespective of the value of the regulated element or the question of whether the regulated element constitutes or not the main subject of the single contract.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

Regulated procurements must be published in the OJEU. Article 52(3) of the Public Sector Directive prohibits contracting authorities from publishing at a national level prior to publication in the OJEU. However, if publication does not take place within 48 hours following confirmation of receipt of the notice by the EU Publications Office, contracting authorities may publish at a national level.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Yes, there are. For example, the Public Sector Directive provides that contracting authorities may only impose selection criteria that relate to the suitability to pursue a professional activity, economic and financial standing, and technical and professional abilities. The legislation also sets out detailed rules as to how these issues may be taken into account at the selection stage of a procurement process and the type of evidence that contracting authorities may ask applicants to provide to prove compliance with specific requirements in this regard. In addition, the legislation imposes an overarching obligation that contracting authorities' requirements at the selection stage should be related and proportionate to the subject matter of the contract.

Separately, the legislation allows, or in certain circumstances requires, contracting authorities to exclude economic operators that have committed certain offences or find themselves in certain situations. The right or obligation to exclude is limited to a maximum of three years where discretionary grounds for exclusion apply and to five years where the grounds for exclusion are mandatory. In both cases the legislation permits a longer or shorter exclusion period if this is set by final judgment.

In addition, a supplier who finds itself in one of the circumstances that require or permit disqualification may avoid this if it can demonstrate to the satisfaction of the contracting authority that it has taken sufficient 'self-cleaning' measures (see question 14).

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

In the context of the tender procedures that permit contracting authorities to invite only a minimum number of bidders to participate in a competition, the legislation requires that bidders are shortlisted on the basis of objective and non-discriminatory criteria or rules that must be disclosed at the start of the process.

In terms of the minimum number of bidders that may be shortlisted, the legislation requires the shortlisting of a minimum of five bidders under the 'restricted procedure' and a minimum of three, under the 'competitive process with negotiations', the 'competitive dialogue' and the 'innovation partnership'. However, where the number of bidders meeting the selection criteria and minimum levels of ability is below the minimum number set in the legislation, the contracting authority may continue the procedure by inviting the bidders who meet the minimum conditions for participation, provided that there is a sufficient number of qualifying bidders to ensure genuine competition.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The legislation provides that an economic operator who is in one of the situations that permit or require disqualification from the process, may avoid disqualification to the extent that it is able to provide sufficient information that demonstrates that it has 'self-cleaned' in that it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offence or misconduct.

It is for the contracting authority conducting the procedure to determine whether or not the self-cleaning measures taken are sufficient to justify not excluding the economic operator in question. In evaluating the sufficiency of the measures, the contracting authority must take into account the gravity and particular circumstances of the criminal offence or misconduct. If the contracting authority considers the measures to be insufficient it must provide the economic operator with a statement of the reasons for that decision.

The concept of self-cleaning is a relatively new addition to EU procurement legislation, having been introduced with the 2014 Procurement Directives.

Separately, the legislation permits member states to provide for a derogation from mandatory exclusion, where the mandatory exclusion grounds are met, on an exceptional basis, for overriding reasons relating to the public interest.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The 2014 Procurement Directives impose an obligation on regulated authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Similarly, a procurement must not be designed with the intention of excluding it from the scope of procurement legislation or of artificially narrowing competition (eg, by favouring or disadvantaging certain economic operators).

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

While the legislation does not impose an explicit obligation on contracting authorities to be independent and impartial, not acting in this manner would be inconsistent with the explicit obligation to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner.

Conflicts of interest

17 How are conflicts of interest dealt with?

The 2014 Procurement Directives have introduced specific provisions that require contracting authorities to take appropriate measures to prevent, identify and remedy effectively conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure the equal treatment of all economic operators.

According to the legislation, the concept of 'conflict of interest' must include at least any situation where those who are involved in the conduct of the procurement procedure or who may influence the procedure's outcome, have a financial, economic or other personal interest that might be perceived as compromising their impartiality and independence in the context of the procurement procedure.

A conflict of interest that cannot be remedied effectively by other less intrusive measures constitutes a discretionary ground for exclusion under the public sector and Concession Directives and may constitute such a ground under the Utilities Directive.

Bidder involvement in preparation

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The issue of bidder involvement in the preparation of a procurement procedure was considered by the CJEU in Case C–21/03, *Fabricom*. The case established, among other things, that the disqualification of a supplier who has been involved in the preparation of a procurement procedure without first giving the opportunity to that supplier to prove that, in the circumstances of the case, the experience that it has acquired was not capable of distorting competition, is disproportionate and, as such, inconsistent with EU law requirements.

This principle has now been codified and clarified further in the public sector and Utilities Directives. These provide that the contracting authority must take appropriate measures to ensure that the participation of a supplier (or an undertaking related to such supplier) who has been involved in the preparation of the procurement procedure, will not distort competition.

Such measures must include the communication to all other suppliers participating in the competition of relevant information exchanged in the context of, or resulting from, the involvement of the supplier in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

The supplier in question must only be excluded from the competition where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. In addition, prior to any such exclusion, the supplier in question must be given the opportunity to prove that its involvement in preparing the procurement procedure is not capable of distorting competition.

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

Under the Public Sector Directive, the use of the open and restricted procedures is available to contracting authorities in all circumstances. It must be assumed, therefore, that these two procedures are likely to be used more frequently than the other procurement procedures in the legislation that involve the conduct of negotiations (including dialogue) with bidders, which are only available when certain conditions are met.

There are no such conditions attached to the choice of a procurement procedure under the Utilities Directive so that utilities may choose freely between the various procedures available. The Concessions Directive provide even greater flexibility allowing procuring authorities

the freedom to design the procurement procedure they wish to adopt in awarding a concession contract, subject to that procedure being compliant with the other requirements of that Directive.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The 2014 Procurement Directives do not contain any provisions that address this issue explicitly. However, the CJEU considered this issue in Case C–538/07, *Assitur*. According to this, an absolute prohibition on the participation in the same tendering procedure by related bidders, breaches the principle of proportionality in that it goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency. Instead, in line with the CJEU decisions in *Assitur*, a contracting authority must allow those bidders an opportunity to demonstrate that, in participating in the competition, there is no real risk of practices capable of jeopardising transparency and distorting competition occurring. A number of subsequent CJEU decisions have now confirmed this approach.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Under the Public Sector Directive, the use of the competitive dialogue and the competitive procedure with negotiation are only available when any one of the following conditions apply:

- the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- the requirement includes design or innovative solutions;
- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of the risks attaching to them;
- the technical specifications cannot be established with sufficient precision; and
- in response to an open or restricted procedure, only irregular or unacceptable tenders were submitted.

The use of procedures involving negotiations is not subject to any special conditions under the Utilities Directive (see also question 19).

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The practice varies between member states.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Under EU procurement legislation, a framework agreement is an agreement between one or more contracting authorities and one or more suppliers, the purpose of which is to establish the terms governing the contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. In Case C-216.17 *Autorità Garante della Concorrenza e del Mercato*, the CJEU clarified, among other things, that the procurement documents that are made available at the start of a procurement process for the award of a framework agreement should specify (i) the contracting authorities that are potential users of the framework agreement; and (ii) an estimate of the total quantity and maximum amount of purchases to be covered by call-off contracts awarded under the framework agreement. Framework agreements may be awarded by following any one of the procurement procedures available under the legislation.

Under the Public Sector Directive the duration of a framework agreement must be limited to a maximum of four years other than in exceptional and duly justified cases. The rules that apply to framework agreements under the Utilities Directive are more flexible and provide, for example, for a maximum duration of eight years, which again may be exceeded in exceptional and duly justified cases. There are no framework agreement provisions under the Concession Directive.

24 | May a framework agreement with several suppliers be concluded?

Yes, contracting authorities are permitted to set up multi-supplier framework agreements. The Public Sector Directive provides specific rules as to how to award 'call-off' contracts under such framework. In brief:

- a contract may be awarded without reopening competition where the framework sets out all the terms governing the provision of the requirements and the objective conditions for determining the framework supplier that will provide the requirement;
- where not all the terms governing the provision of the framework requirements are laid down in the framework agreement, competition must be re-opened among the parties to the framework. The legislation sets out the rules on the basis of which a call off competition must be carried out. This essentially provides for consulting framework bidders (capable of performing the contract) in writing and allowing them sufficient time to submit bids that must be assessed on the basis of the award criteria that had been disclosed in the framework procurement documents; and
- provided this possibility was set out in the framework procurement documents, a contracting authority may also reserve for itself the right to decide on the basis of objective criteria, that have been set out in the framework procurement documents, whether to award a contract without further competition (as per the first option) or with further competition (as per the second option).

The rules governing the award of call-off contracts under the Utilities Directive are less specific and essentially provide that contracts based on a framework agreement must be awarded on the basis of objective rules and criteria, which may include reopening the competition among the framework suppliers.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The 2014 Procurement Directives do not contain any express provisions on this issue. At the same time, in Case C–57/01, *Makedoniko Metro and Michaniki*, the CJEU ruled on the related issue of national law prohibiting a change in the composition of a consortium taking part in a procurement procedure that takes place after submission of tenders. The CJEU concluded that this was permissible. It is important to emphasise that this does not mean that such changes are by definition prohibited under EU law, merely that it is permissible for member states to enact law that prohibit such changes.

In the more recent Case C–396/14, *MT Højgaard v Banedanmark*, the CJEU held that, under certain conditions, it was consistent with the principle of equal treatment for a contracting entity to allow the remaining member of a consortium to stay in the competition, after its consortium partner dropped out, and to take part, in its own name, in

a negotiated procedure. This was conditional on the supplier in question meeting by itself the conditions for participation in the competition, and the continuation of that supplier's participation not leading to other tenderers being placed at a competitive disadvantage.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Encouraging SME participation in public procurement is a key objective of the 2014 Procurement Directives. The legislation seeks to achieve this objective by, among other things, introducing provisions that:

- permit member states to require contracting authorities to divide contract requirements into lots in certain circumstances;
- require contracting authorities to keep a record as to the reasons for their decision not to subdivide a contract requirement into lots (where national implementing legislation allows contracting authorities to decide whether or not to do so);
- allow contracting authorities, under certain conditions, to limit the number of lots that they will award to the same bidder;
- limit the minimum yearly turnover that suppliers must have in order to participate in a procurement procedure to a maximum of two times the estimated contract value;
- seek to limit the administrative burden from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria, by means of the 'European Single Procurement Document'; and
- allow member states to introduce national rules that require the making of direct payments to subcontractors.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Contracting authorities may authorise or required bidders to submit variant bids that are linked to the subject matter of the contract, provided they indicate their intention to do so at the start of the process. Where the submission of variant bids is permitted, contracting authorities must set out the minimum requirements that variants must meet and any specific requirements for their presentation. There is also an obligation to ensure that the chosen award criteria can be applied equally to variant bids as well as to bids that conform.

28 | Must a contracting authority take variant bids into account?

Where the contracting authority has indicated that variants will be considered, it will be obliged to take into account variant bids that satisfy the minimum requirements set out in the contract notice and that are not excluded. If the contracting authority does not indicate that variants are permitted then such variants cannot be taken into account and evaluated.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The Public Sector and Utilities Directives provide that where the information or documentation submitted by a bidder is incomplete or erroneous, contracting authorities may, subject to national implementing legislation requirements, request the bidder concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such request is made in full compliance with the principles of equal treatment and transparency.

The question of what would be the most appropriate action, in this kind of circumstance, must be determined on a case-by-case basis. For example, where the rules of the competition prohibit bidders from changing the tender specifications or submitting their own standard terms of business, the most appropriate course of action would be disqualification from the competition.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The Public Sector and Utilities Directives provide that procuring authorities must award a contract to the bidder who has submitted the most economically advantageous tender, from the point of view of the contracting authority. Which tender is the most economically advantageous must be determined by reference to price or cost, or best price-quality ratio, which must be assessed on the basis of criteria, which are linked to the subject matter of the contract in question. These may include qualitative, environmental or social aspects.

The cost element may also take the form of a fixed price or cost on the basis of which suppliers will compete on quality criteria only. Separately, the legislation permits member states to require procuring authorities not to use price only or cost only as the sole award criterion or to restrict their use to certain categories of contracting authorities or certain types of contracts.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The 2014 Procurement Directives do not define an 'abnormally low bid'. Instead, procuring authorities are effectively invited to take a view as to whether the price or cost of a bid appears to be abnormally low in relation to the works, supplies or services that constitute the requirement.

32 | What is the required process for dealing with abnormally low bids?

Where a contracting authority considers a tender to be abnormally low, it must require the relevant bidder to explain the price or costs proposed in the tender. The Public Sector and Utilities Directives provide a list as to the type of explanations that may be sought in this context and which may relate, for example, to the economics of the manufacturing process, any exceptionally favourable conditions available to the bidder or the possibility of the bidder having obtained state aid.

The contracting authority must then assess the information provided by consulting the bidder. The contracting authority may only reject the tender where the evidence supplied does not provide an adequate explanation for the proposed low price or costs. If the contracting authority establishes that the tender is abnormally low because it does not comply with certain applicable obligations (eg, environmental, social and labour laws) then it must reject the tender. Where the tender is rejected because the tenderer obtained state aid then the contracting authority will need to inform the Commission.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The Remedies Directives require member states to ensure, among other things, that decisions taken by contracting authorities in the context of regulated procurements are reviewed effectively and, in particular, as rapidly as possible.

According to the legislation, the review procedures must be available to at least any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

It is for member states to determine which body or bodies should be responsible for review procedures. Accordingly, a review body may be judicial or non-judicial in character. If the latter, the legislation imposes certain additional requirements. According to these, a non-judicial review body must always give written reasons for its decisions. In addition, any allegedly illegal measure taken by a non-judicial review body or any alleged defect in the exercise of the powers conferred on it must be the subject of judicial review or review by another body that is a court or tribunal within the meaning of article 267 TFEU and independent of both the contracting authority and the review body.

A party that has concerns about the validity of a contracting authority's decision (and irrespective of whether or not it has standing to bring a challenge under procurement legislation) may complain to the European Commission. The European Commission is not obliged to pursue further that complaint, but if it does, this may ultimately lead to infraction proceedings, under article 258 TFEU, against the member state of the contracting authority for breach of an EU law obligation.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The Remedies Directives permits member states to confer the power to grant (different) remedies on different bodies responsible for different aspects of the review procedures.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The Remedies Directives require member states to ensure that decisions taken by contracting authorities that relate to regulated contracts are reviewed effectively, and in particular as rapidly as possible.

In practice, the time frames for carrying out such reviews vary (sometimes considerably) between member states. European Commission infringement proceedings against member states for breaches of EU procurement law obligations, may take more than two years.

36 | What are the admissibility requirements?

The Remedies Directives require member states to ensure that review procedures are made available to at least any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In addition, provided certain conditions are met, the legislation permits member states to require that a person wishing to use a review procedure notifies the contracting authority of the alleged infringement and of the intention to seek review and, separately, that the person concerned first seeks review with the contracting authority.

37 | What are the time limits in which applications for review of a procurement decision must be made?

As to the question of the limitation period within which a claim must be made, this will depend on the type of remedy being sought. The Remedies Directives provide that a claim seeking the remedy of 'ineffectiveness' must be made within a period of six months starting from the day following the date of the conclusion of the contact. The legislation also sets out conditions under which that period may be shortened.

As regards the limitation period that may apply to claims for other types of remedies, this is for member states to decide, subject to certain conditions, including that the minimum time period must be 10 calendar days starting from the day after the date on which the decision was notified electronically to a tenderer or candidate or, where a decision is not subject to any specific notification requirements, 10 calendar days from the date of the publication of the decision concerned.

Separately, in Case C–406/08, *Uniplex*, the CJEU concluded, among other things, that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement and that permitting a court to bar such a claim on the basis that it considered the claimant not to have acted 'promptly' was incompatible with EU legislation.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

An application for review must lead to the automatic suspension of a procurement procedure where the application is to a first instance body that is independent of the contracting authority and relates to the review of a contract award decision that has yet to be concluded. Once the procedure has been suspended, the contract cannot be concluded unless the review body has made a decision for interim measures, lifting that suspension, or decided the claim.

Separately, in cases where member states require that claimants must first seek review with the contracting authority, member states are required to ensure that the submission of such an application for review leads to the immediate suspension of the possibility to conclude the contract.

Other than in the circumstances set out above, the legislation does not require that review applications have an automatic suspensive effect.

Complaints to the Commission or infringement proceedings by the Commission against a member state at the CJEU do not give rise to an automatic suspension of a procurement procedure.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Not applicable – this varies for each member state.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The Remedies Directives impose a requirement on member states to ensure that a contract cannot be concluded before the communication of the award decision to the tenderers and candidates 'concerned' (as defined in the legislation) and the expiry of a minimum standstill period. The definition of 'concerned' tenderers would generally include

all unsuccessful bidders. The calculation of a minimum standstill period would depend on issues such as the means of communication of the contract award decision. Where the contract award decision is communicated electronically the standstill period must be at least 10 calendar days starting from the day following the date on which that decision was communicated to the tenderers and candidates concerned.

Separately, the legislation imposes certain requirements as to the content of the contract award decision notice, including an obligation that this provides information about the characteristics and relative advantages of the successful tender and the name of the successful tenderer.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

There are no express provisions in EU procurement legislation on this point, so that the question of disclosure of relevant documents in the context of a legal challenge is a matter of member state law subject to compliance with EU law requirements. In this regard, it is relevant to note that the CJEU has concluded in Case C–450/06, *Varec SA v Belgium*, that the Remedies Directives must be interpreted as meaning that a review body must safeguard the confidential information and business secrets that might be contained in files communicated to that body by the parties to an action.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

The practice varies between member states.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The Remedies Directives require member states to ensure that review procedures include provision for powers to award damages to persons harmed by an infringement. Where damages are claimed on the grounds that a decision was taken unlawfully, the legislation also allows member states to require first the setting aside of the contested decision.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The Remedies Directives require member states to ensure that a contract is considered ineffective by a review body independent of the contract authority, where:

- the contract was awarded without the prior publication of a notice, in circumstances where one was required;
- there has been a breach of the automatic suspension or standstill obligations (please refer to questions 38 and 40 respectively) depriving the claimant of the possibility to pursue pre-contractual remedies and this is combined with an infringement of the procurement legislation that has affected the chances of the claimant to obtain the contract; and
- in certain circumstances (under the Public Sector Directive) where there has been a breach of requirements for the award of contracts under a framework agreement or a dynamic purchasing system.

It is for member states to decide whether the consequences of a contract being rendered ineffective should be the retrospective or prospective cancellation of contractual obligations. If the latter, then this must also be accompanied by a fine that must be effective, proportionate and dissuasive.

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Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes, subject to limitation period requirements, an interested party may seek an ineffectiveness order (see question 44) or damages (see question 43).

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Not applicable. This will vary for each member state.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

In the EU, a number of member states, as well as the European Commission, are increasingly concerned about the effects of bidder collusion on the transparency of tender procedures as well as on obtaining value for money. It has been reported, for example, that bidder collusion can add up to 20 per cent to the price otherwise paid in competitive markets. The Commission has indicated its intention to develop tools and initiatives to raise awareness and minimise the risks of collusive behaviours in the context of public procurements. Actions in this regard are likely to include initiatives to improve the market knowledge of contracting authorities, as well as improve cooperation and exchange of information between public procurement and competition authorities.

Finland

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Public procurement in Finland is regulated by the Act on Public Contracts and Concessions (1397/2016, as amended, the Public Procurement Act), implementing the Public Contracts Directive (2014/24/EC) and the Directive on the award of concession contracts (2014/23/EC). (See question 2.)

The Market Court is a special court, hearing, among other things, public procurement cases in the first instance. A petition can be submitted to the Market Court by whomever the case concerns and in particular situations by certain authorities. Typically, an unsuccessful bidder or a potential bidder submits the petition. Market Court rulings in public procurement cases are subject to appeal to the Supreme Administrative Court.

In addition, as of 1 January 2017, the Finnish Competition and Consumer Authority (FCCA) supervises compliance with the public procurement legislation, with a particular focus on illegal direct procurement. The FCCA may issue reminders to procurement units if it observes unlawful conduct, and, in the case of illegal direct procurement, may prohibit the implementation of a procurement decision. The agency may also propose that the Market Court impose sanctions, such as penalty payments, shortening of a contract, or the annulment of a procurement decision. Anyone can submit a request for action to the FCCA regarding a procurement unit that has breached the public procurement legislation. The FCCA may also investigate unlawful conduct on its own initiative.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

The Act on Public Contracts and Concessions by Contracting Authorities in Water, Energy, Transport and Postal Services Sectors (1398/2016, as amended, the Public Procurement Act for Special Sectors), implementing the Public Contracts Directive in Special Sectors (2014/25/EC), and the directive on the award of concession contracts (2014/23/EC), applies to procurement in the fields of water, energy, transport and postal services.

The Act on Public Contracts in the Fields of Defence and Security (1531/2011, as amended, the Public Procurement Act for the Defence Sector), implementing the Defence and Security Procurement Directive (2009/81/EC), applies to procurements in the fields of defence and security.

The Act on Services for Transportation (320/2017), in turn, will be applied in services concessions concerning public road transportation (buses) and public transportation by rail other than railway transportation (trams) and in any procurement concerning railway transport including service concessions.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The Public Procurement Act and the Public Procurement Act for the Defence Sector include special national thresholds that extend the use of mandatory competitive bidding procedures to public procurements below the EU thresholds. The procedures that apply to the procurements exceeding national, but not EU, thresholds are less stringent than rules under the EU Procurement Directives.

Proposed amendments

4 | Are there proposals to change the legislation?

Yes. The government proposal (57/2017) related to regional government, health and social services reform suggests amendments to the definitions of contracting entities due to suggested changes in regional government organisation introducing counties. The proposal is under consideration in Parliament. In March 2019 it came evident that the present Parliament does not have time to handle the proposal before the new Parliament election, which will be held on 14 April 2019. Therefore, the proposal will lapse.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The procurement acts define the authorities and entities that constitute the contracting authorities. There is little case law on this issue. For example, listed companies in which the state continues to have a substantial shareholding of strategic importance connected by a common interest, but which engage in normal commercial or industrial activities in the market have not been considered as contracting entities. In a recent case, a company operating in the field of tourism wholly owned by a municipality was not considered a contracting entity, as the nature of operations was commercial and because the loan granted by the municipality to the company, even if it constituted over half of the value of the procurement, was granted on market terms. In another case, a similar company was not considered a contracting entity as the nature of operations was commercial, and therefore it was not considered to have been established for the purposes of serving the common interest without any industrial or commercial interest. In addition, a foundation established for civil aviation and operating an

aviation centre providing, for example, training, was not considered a contracting entity since it was not considered to have been established for the purposes of serving the common interest without any industrial or commercial interest. A road cooperative, which is a body responsible for maintenance of a private road representing persons owning real estate with a permanent right to use that private road and enterprises that have a right to utilise that private road, were also not considered as contracting entities.

In addition, the European Commission has, since 19 June 2006, exempted energy companies from the applicability of the Public Procurement Act for Special Sectors for procurements related to the production and sale of electricity.

Contract value

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Contracts under an applicable national threshold value are generally excluded from the scope of procurement law in Finland. The values are specified in the relevant acts.

The national threshold values in the Public Procurement Act are the following (as applicable in March 2019):

- €60,000 for goods and services contracts;
- €500,000 for service concessions;
- €400,000 for healthcare and social services contracts;
- €300,000 for certain services;
- €150,000 for building contracts;
- €500,000 for building contract concessions; and
- €60,000 for design contests.

Under the Public Procurement Act for the Defence Sector, the national threshold values are the following (as applicable in March 2019):

- €100,000 for goods and services; and
- €500,000 for building contracts.

The Public Procurement Act for Special Sectors does not include lower national thresholds and therefore procurement rules do not apply to procurements below EU thresholds.

Essentially, the threshold values are calculated by applying the equivalent rules of the Public Contracts Directives. Accordingly, the value is generally calculated on the basis of the estimated aggregated value of the contract (ie, the maximum total compensation under the contract, excluding VAT and including possible options, extensions and costs paid to the tenderers during the procedure). In the case of a joint procurement by several contracting authorities this would be the aggregate value of the procurement of all such parties. All income should be included in the value, whether paid by a procurement unit or a third party. In the case of a building contract the value of goods necessary to perform the building services specified by the contracting authority shall be included in the estimated value. For contracting authorities that consist of separate operational units, the estimated value shall normally consist of the aggregate value of all units.

There are also special rules concerning calculating values for concessions for certain services (such as insurance and banking services and design contests), leasing, rental or instalment purchase.

For services contracts valid for a certain contract period (up to a maximum of 48 months) the estimated value is calculated from the entire period, and for services contracts valid in excess of 48 months or for an indefinite period a monthly fee multiplied by 48.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

As of 1 January 2017, the procurement acts include rules for modification of contracts and framework agreements during their term without the need for a new procurement procedure. An essential change is not allowed without a new procurement procedure. The rules specify cases where such modifications are allowed, for example:

- where modifications have been provided for in the initial procurement documents containing review clauses which are clear, exact and unambiguous;
- where additional works, services or supplies have become necessary and a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs, provided that the price increase shall not exceed 50 per cent of the value of the original contract;
- the value of the modification is below the relevant thresholds and only brings no more than a 10 or 15 per cent increase in the initial contract value (depending on contract type); or
- where there are changes in contractor as a result of an unambiguous review clause in the initial contract or due to merger and acquisition operations, company restructuring or change of control, or insolvency proceedings, which are generally allowed, provided that the legal or other successor fulfils the initial qualitative selection criteria and that this does not entail other substantial modifications of the contract nor circumventing the application of the directive.

Where an amendment is made to the contract, which would also have allowed other candidates to participate in the tendering procedure or would have resulted in other candidates participating, or if another tenderer had been awarded the tender, or which would mean the contract will be more beneficial to the contract party in a way that was not determined initially, or which extends the scope of the contract essentially or the contract party is replaced with another (and none of the above allowance grounds apply), the contracting authority has the right to terminate the contract forthwith in order to avoid the risk of a direct award based on an essential change in the contract.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The European Court of Justice (ECJ) issued at least a few relevant decisions – C-496/99 *P Succhi di Frutta*, C-454/06 *Pressetext*, C-91/08 *Wall*, C-549/14 and *Finn Frogne A/S* – before specific rules were included in the Directives.

Currently there are a couple of decisions based on the new legislation (see question 7). As an example, the FCCA made its first proposal to the Market Court regarding an alleged unlawful direct award on 16 February 2018 and proposed indemnity payments of €20,000 payable by a contracting entity based on essential change of a contract related to change in the scope of the procurement. The Market Court ordered the indemnity payment to be paid by the contracting entity in February 2019 (not final yet) as the change was considered to be essential from the perspective of the operators in the field of business: if the amended terms had been used initially, other candidates could have participated, or another tenderer could have been awarded. The tender for the number of deliveries had decreased to half, and only on two days a week instead of the initial five; deliveries were transferred from noon to afternoon; and the unit prices had been amended upwards. The Market Court considered that none of the allowance grounds applied in this case: the existing terms on changes of delivery times and routes were not clear

enough to give the right to these changes; in addition, the decrease in value of the contract was approximately 12 per cent, exceeding the threshold for minor changes of 10 per cent.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Procurement law does not include a definition of 'privatisation', nor does procurement law directly regulate privatisation. Here, mixed or partnership contracts that procurement legislation does not separately define may be relevant. Such arrangements must be assessed against definitions of public sector services and building contracts and concessions related thereto, taking into account the main character of the contract and determining whether the contract includes procurement.

If the privatisation includes procurement for the contracting authority (eg, the contracting authority simultaneously concludes a (long-term) contract under which it acquires services to be provided by the privatised entity) it will require a procurement procedure.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Each arrangement setting up a PPP needs to be assessed as a whole on a case-by-case basis in relation to the purpose and contents of the arrangement.

Where an essential part of the arrangement falls under the Public Procurement Act (eg, a school or a childcare centre for the municipality is acquired) and even if some transactions of the arrangement fall outside the Act, a procurement procedure is required. Therefore, provided that a procurement contract is an essential and inseparable part of the arrangement, procurement rules may apply to the whole arrangement and require a procurement procedure.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

Contract notices regarding procurements exceeding the national thresholds (but below the EU threshold) shall be made publicly available online on the Ministry of Employment and the Economy's HILMA website.

With regard to procurements below the national threshold, the contracting authority may, at its own discretion, decide to publish the notice on the HILMA system. With regard to procurements exceeding the EU threshold, the contract notice shall be made publicly available in the Tenders Electronic Daily (the online version of the Supplement to the Official Journal of the EU (OJEU), dedicated to European public procurement) and on the HILMA system.

After the contract notice has been published in the HILMA system, the contracting authority may also publish it in a newspaper or on its own website. The authority may also send the notice directly to potential tenderers.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Yes. The procurement acts include rules on which criteria the contracting authority may set. The criteria must be in connection with the object of the procurement and they must be proportionate to the nature, use and scope of the procurement. As for the details in EU procurements, if there are criteria for the minimum net sales of interested parties, the requirement for net sales may be at most twice the estimated value of the procurement if no special grounds exist to exceed this maximum.

In addition, the fundamental principles for tender procedures must always be complied with: contracting entities must make use of the existing competitive conditions and ensure equality and non-discriminatory treatment among all participants in the procurement procedure, and act in a transparent way while meeting the requirements of proportionality.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Yes. The contracting authority must invite an adequate number of bidders to ensure competition. The minimum and, if needed, the maximum number of bidders to be accepted must be stated in the contract notice.

In a restricted procedure the minimum number of bidders to be accepted is five and in the competitive procedure with negotiation, the competitive dialogue, and the new innovative partnership procedure, the number is three, unless there are fewer bidders meeting the criteria. The selection of bidders shall be made based on the minimum suitability requirement and the selection criteria set for the bidders in the contract notice.

The procurement procedure related to procurements below EU thresholds, but over the national threshold, and related to social and health services, is more flexible and no set rules exist on the number of bidders allowed to participate.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

As of 1 January 2017, national legislation has included the concept of 'self-cleaning' in line with the EU directives. A bidder to which certain exclusion grounds would be applicable may provide evidence on its reliability showing:

- that it has compensated, or committed to compensate, all the damages resulting from punishable deed, fault or neglect;
- active cooperation with the investigating authority; and
- that it has executed concrete technical, organisational and personnel-related actions which are able to prevent new punishable actions, defaults and neglects.

If such evidence and the entity's reliability are considered sufficient, the bidder concerned will not be excluded from the procurement procedure.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. The Public Procurement Act and the Public Procurement Act for Special Sectors state that the contracting entities must make use of the existing competitive conditions and ensure equality and non-discriminatory treatment among all participants in the procurement procedure, and act in a transparent way while meeting the requirements of proportionality.

These principles also apply to defence and security procurements, unless a derogation is necessary for the protection of essential security interests of the state as indicated in article 346(1)(b) of the Treaty on the Functioning of the European Union (TFEU).

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The public procurement legislation requires that when an entity owned by the contracting authority, or another contracting authority, participates in a tendering procedure, the contracting authority must treat that entity and other bidders equally.

In addition, the comparison criteria of bids must relate to the object of the procurement and enable the impartial assessment of the bids.

Decisions made in the tender procedure must be duly justified and the contracting authority is required to provide a written decision. In addition, authorities must act equally and impartially according to administrative law. (See question 15.)

Conflicts of interest

17 | How are conflicts of interest dealt with?

Finnish administrative law generally governs potential conflicts of interest with regard to persons who are officials.

As a general rule, an official who may have a conflict of interest (eg, due to participation in the procedure of a company led, operated or owned by an official or a relative of an official) should not take part in the award of the contract. Should such an official decide on the award of a contract or otherwise be (actively) involved with the procedure, the parties to the procurement procedure would have the option of raising claims against the contracting authority for non-compliance with the obligations relating to equal treatment of bidders.

With regard to persons who are not officials, potential conflicts of interest should be prevented through organisational and personnel-related arrangements as suggested in the preparatory works of the procurement legislation.

Finally, taking into consideration the proportionality principle, the exclusion of a bidder should be an exceptional action, and a last resort.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

As of 1 January 2017, the procurement acts include an express provision, implementing the EU directives, which imposes an obligation on the contracting authority to ensure that participation in the preparation of procurement by a candidate, bidder or related company does not distort competition. Among the measures referred to in the government proposal implementing EU directives are communication to the other candidates and tenderers of relevant information exchanged in the context of, or resulting from, the involvement of the candidate or tenderer in the preparation of the procurement procedure, and the fixing of adequate time limits for the receipt of tenders.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The most commonly used procurement procedure in Finland is the open procedure. The prevailing type of procurement procedure does, however, vary depending on the object of the procurement.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The public procurement legislation does not regulate this. Therefore, related bidders may generally submit separate bids. The competition law, however, includes rules on forbidden exchange of information between competitors, among others. In addition, it has been considered possible for the contracting entity to prohibit, for example, separate bidders from appointing the same subcontractor in the tender documentation.

The ECJ has issued one decision – C-425/14, *Impresa Esilux Srl* – where it was found to be against the proportionality principle to set a requirement on the candidates and bidders that their relationship to other candidates and bidders does not include any control or association or that they have not concluded, or intend to conclude, any contracts with other candidates and bidders.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Yes. With regard to contracts exceeding EU thresholds, the requirements for the use of the competitive procedure with negotiation and for competitive dialogue are the same and in line with the requirements set forth by the EU directives. Accordingly, the following conditions apply:

- the needs of the contracting authority cannot be met without the adaptation of readily available solutions;
- the contracts include design or innovative solutions;
- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them;
- the specifications of procurement cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; or
- if in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

A new kind of procedure – the innovation partnership – may be used if the needs of a contracting authority cannot be satisfied with goods, services or construction contracts already existing in the market.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Of the two applicable procedures, competitive procedure with negotiation is used more regularly as it has been seen to allow more flexibility. The innovation partnership is a new procedure, but by its nature is

not expected to become more commonly used than the two existing procedures.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

A contracting authority may decide to conclude a framework agreement. There are two types of framework agreement:

- those in which all terms have been agreed on so that the sub-orders can be made without further agreement; and
- those that do not include all relevant terms (in this case, sub-orders generally require a new competitive procedure between the selected participants based on the selection criteria set in a contract notice, invitation to negotiations or request for tender).

Any of the competitive bidding procedures may be used (provided the requirements for the use of such a procedure are met) to choose a supplier or suppliers for the framework arrangement. The contract period should not normally exceed four years (or in special sectors, eight years).

24 | May a framework agreement with several suppliers be concluded?

Yes, a framework agreement may be concluded with one or more suppliers, in which case the minimum number of suppliers to be elected is generally three, although this is not limited by law. The number of suppliers to be selected must be stated in a contract notice, invitation to negotiations or a request to tender. If not all the terms and conditions of sub-orders are specified in the framework agreement, the award of subcontracts under the framework agreement usually requires an additional competitive procedure (mini-competition) between the already selected suppliers.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There are no statutory provisions on this issue. As of 1 January 2017, according to an express provision implementing the EU directives, the contracting authority shall require that the candidate or bidder (eg, bidding consortium) replaces a constituent entity whose capacities it has relied upon, but which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may also require that a candidate or bidder substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

If the entity is not replaced, the contracting authority could exclude the candidate or bidder. It is usually prohibited in the invitation to tender to change or remove members of the bidding consortium, once accepted, to participate in the procedure, as acceptance into the procedure is often determined based on references and the experience of the bidders.

Regarding rules on modifications during the term of contract, see question 7.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

There is a specific rule allowing groups of suppliers to submit bids or put themselves forward as candidates. A candidate or tenderer or a consortium may rely on the capacities of other entities, regardless of the legal nature of its connections with them. A group may rely, for example, on the abilities of members of group companies or on other entities to perform the services and construction contracts that the persons named in the contract are responsible for undertaking, if the partner companies' competence and experience have been assessed. A candidate or tenderer must prove that the capacities referred to will be in use.

The Public Procurement Act and the Public Procurement Act for Special Sectors also include a prohibition to artificially subdivide contracts or combine contracts in order to avoid applicability or procurement rules.

In addition, the contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject matter of such lots. Contracting authorities shall provide an indication of the main reasons for their decision not to subdivide into lots. Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, several or all of the lots.

Contracting authorities may, even where tenders may be submitted for several or all of the lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice. Contracting authorities shall indicate in the contract notice or request for tender the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Contracting authorities may accept variant bids (alternative solutions), provided that the contract notice indicates that alternative bids are allowed. Furthermore, the alternative tender must satisfy the minimum requirements set for the object of the tender and the requirements for presenting alternatives. Contracting authorities may also require tenderers to submit variants.

28 | Must a contracting authority take variant bids into account?

The contracting authority must only take variant bids into account if it has expressly allowed variants in the contract notice.

Another concept is parallel bidding, which means a situation where the same bidder submits several parallel bids (eg, based on several different brands that it resells). Contracting authorities may not reject parallel bids, unless this prerogative is indicated in the request for tender.

Changes to tender specifications

29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The contracting authority is normally obliged by law to exclude bids that are not in line with the terms and conditions of the request for tender. This conformity must be checked before executing the comparison of bids. If the bidders change the tender specifications or submit their own standard terms and conditions in their bids, and they are not in line with the invitation to tender, the bids must normally be excluded in order to ensure equal and non-discriminatory treatment of all participants. Such a tender would not be comparable to other tenders fulfilling the requirements.

The new procurement legislation includes wider possibilities for the contracting authorities to ask for clarification or complements from the bidders, to enable the correction of omissions, discrepancies or errors. Where the information or documentation submitted is incomplete or erroneous or where specific documents or information are missing, contracting authorities may, but are not obliged to, request the candidates or bidders concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

It would be possible, according to the government proposal related to the new legislation, to ask for clarification on non-compliance that is not material to the tender, such as payment terms. Therefore, depending on the non-compliance with procurement documents, the contracting authority may, at its discretion, following the principle of equal treatment, give the tenderer a chance to correct such discrepancy in specifications or in standard terms and conditions. If such discrepancies, however, are material, the bid must be excluded.

Award criteria

30 What are the award criteria provided for in the relevant legislation?

The contract shall be awarded either to the bidder of the tender with best price-quality ratio (which is the most commonly used criterion) in accordance with the comparison criteria, or to the bidder of the tender with the lowest price or the lowest costs.

The criteria for selecting the most economically advantageous offer must be objective and non-discriminatory and relevant in relation to the object of the contract without conferring an unrestricted freedom of choice on the contracting authority. The criteria may comprise:

- quality aspects, which may include:
  - technical merit;
  - aesthetic and functional characteristics;
  - accessibility;
  - operating costs;
  - cost-effectiveness;
  - after-sales service and technical support;
  - maintenance;
  - delivery date and other delivery terms; and
  - applicability and experience of personnel, if this would result in a notable effect in performance;
- price aspects;
- social aspects;
- environmental aspects; or
- innovative characteristics.

Abnormally low bids

31 What constitutes an 'abnormally low' bid?

A bid may be deemed 'abnormally low' in relation to the quality and scope of the contract provided that the tenderer cannot credibly show that it is capable of supplying the goods or providing the service pursuant to the procurement. The contracting authority is entitled to consider a possible rejection if it considers that the acceptance of the bid would create a risk of omissions or defects.

32 What is the required process for dealing with abnormally low bids?

According to a new regulation the contracting authority must always, not only if it is considering rejecting the bid, ask the bidder to explain the price or costs in the tender if the bid seems to be abnormally low. The request may relate to, for example, production method, chosen economic and technical solutions, exceptionally favourable conditions, compliance of environmental, social or employment obligations, subcontracts or possible state aid received by the bidder.

A contracting authority may reject a tender if the information and evidence supplied by the bidder does not satisfactorily account for the low level of price or costs proposed. It shall reject the bid if the abnormally low price or costs are due to non-compliance with environmental, social or employment obligations. A bid that is assumed to be abnormally low because of suspected illegal state aid obtained by the bidder can only be rejected after the bidder has been given sufficient time to prove that the state aid in question was granted legally.

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The contracting authority can set aside a faulty decision and decide to re-award a public contract on its own initiative or at the request of a party to the procurement procedure. This is called the 'correction procedure'. It is not possible to appeal against the review decision of the contracting authority, which rejects a request for correction.

An unsuccessful tenderer may also simultaneously submit a written petition to the Market Court, with a request for correction. The decision of the Market Court can be appealed to the Supreme Administrative Court.

The FCCA supervises compliance with the public procurement legislation, with a particular focus on illegal direct procurement. Provided no appeal has been submitted by a party concerned and no notification of a direct award has been made by the procurement entity, the FCCA may propose to the Market Court that the Market Court imposes sanctions, such as ineffectiveness, penalty payments, shortening of the duration of the contract, or the cancellation of a procurement decision. Anyone can submit a request for action to the FCCA regarding a procurement entity that has breached the public procurement legislation. The FCCA may also investigate unlawful conduct on its own initiative.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes. The contracting authority can only set aside a faulty award decision or cancel other decisions made during the procurement process and decide on the re-awarding of a public contract.

The Market Court may, in addition to cancelling the decision wholly or partly:

- forbid the contracting authority from applying a section in a tender document or otherwise to pursue an incorrect procedure;
- require the contracting authority to rectify an incorrect procedure;
- order the contracting authority to pay a compensation payment;
- order ineffectiveness of the procurement contract;
- order an indemnity payment to the state; or
- shorten the term of the procurement contract.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

There are no exact statutory time limits. Judicial proceedings in the Market Court last on average 7½ months (in 2018), while in the Supreme Administrative Court they last, on average, 15 months (in 2017).

The procurement entity has 90 days from the date of the decision to take the initiative to implement corrections. A correction procedure by the procurement entity usually lasts at least a few weeks.

36 | What are the admissibility requirements?

A condition for the correction request to be accepted is that there has been an error in the application of law in the procurement procedure or if new information on the matter has emerged that may have an effect on the decision or prerequisites for concluding the procurement contract.

A concerned party, typically a bidder or a potential bidder, may submit an appeal to the Market Court. The appeal can be made against a decision made by the contracting authority or another measure taken by the contracting authority affecting the petitioner's position and the outcome of the procurement procedure.

Preparatory actions made by a procurement entity as well as decisions and actions made by it with regard to the division of procurement contracts into lots and using only price or costs as the basis for the most economically advantageous tender cannot, however, be brought to the Market Court.

See also question 33 on the competence of the FCCA.

If the appeal concerns a decision within an existing framework agreement or acceptance to a dynamic procurement system, a review of the appeal to the Market Court is only possible if the court grants a permission to appeal. Such permission is also needed for appeal on procurement decisions within the fields of defence and security made under article 346(1)(b) TFEU.

37 | What are the time limits in which applications for review of a procurement decision must be made?

A party to the procurement procedure may demand that the contracting authority correct the procurement decision. The correction procedure needs to be initiated no later than 14 days from the date on which the tenderer was informed of the procurement decision. The contracting authority may initiate the correction procedure no later than 90 days from the making of the decision. This allows the contracting authority to correct errors even if the matter has been brought before the Market Court. The correction procedure is not possible after the procurement contract has been concluded. Delivering the correction request to the procurement entity does not prevent the party from referring the decision to the Market Court.

An appeal by the party to the procurement procedure needs to be submitted in writing to the Market Court no later than 14 days from the date on which the tenderer was informed of the procurement decision. Where a contract notice for direct award or contract notice of a change of procurement contract has been published, an appeal needs to be submitted in writing to the Market Court no later than 14 days from the date such notice was published. The fact that the contracting authority and the successful tenderer have signed the procurement contract does not prevent an appeal that has been made within the deadline from being considered.

Extended deadlines apply if the appeal instructions provided to the unsuccessful bidder or the procurement decision have been essentially deficient, or the contracting authority has not followed the mandatory standstill period, or if a contract notice has not been published with regard to a direct award. (See question 45.)

Provided no appeal has been submitted by a party concerned and no notification of a direct award has been made, the FCCA may propose to the Market Court that the Market Court imposes sanctions, such as penalty payments, shortening of the contract, or the annulment of a procurement decision (see question 33). The FCCA may submit the matter to the Market Court within six months from the date of the procurement contract.

An appeal against the Market Court's decision to the Supreme Administrative Court must be filed no later than 30 days from the date of which the tenderer was informed of the decision and review of the appeal is subject to the Supreme Market Court granting permission to appeal, except if an indemnity payment to the state has been ordered in which case no permit is needed.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Submitting a correction request to the procurement entity does not have an automatic suspensive effect.

If the value of a contract exceeds the EU thresholds or, with regard to health and social and certain other services contracts and concessions, the national threshold, an appeal to the Market Court has an automatic suspensive effect blocking the conclusion of the contract. The Market Court may, upon request, allow the continuation of the procurement procedure or conclusion of the contract. In other cases, the suspension on conclusion of the contract is not automatic, but a concerned party may claim suspension from the Market Court.

An appeal on the Market Court's decision to the Supreme Administrative Court does not have an automatic suspensive effect.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

There are no statistics available in Finland with regard to applications for the lifting of an automatic suspension.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority must inform all the participants to the procurement process on the procurement decision.

If the contract exceeds EU thresholds or – with regard to health and social and certain other service contracts and concessions – the national threshold, the contract with the successful bidder can be concluded only after 14 days from the day that the participants have been informed of the procurement decision (mandatory standstill period). With regard to the period when a petition has been filed in the Market Court, see question 38. However, other than provided above, in the event that the value of the contract falls below the EU thresholds and with regard to direct awards, there is no mandatory standstill period and the contract can be concluded immediately after the decision. However, the procurement

entity may publish a contract notice with regard to a direct award of a contract exceeding the EU threshold as well as exceeding the national threshold. In such cases, the contract with the successful bidder can be concluded only after 14 days from the publishing of the notice.

If the procurement has been carried out by using the dynamic purchase system or on the basis of a framework arrangement and the value of the contract exceeds the EU thresholds or, with regard to health and social and certain other service contracts and concessions, the national threshold, the above-mentioned standstill period is 10 days. There is no standstill period for individual subcontracts that are made under an existing framework arrangement or within the dynamic purchase system or if there is only one bidder left.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

The publicity of the procurement documents is normally governed by the Act on the Openness of Government Activities. A participant to the procurement procedure (party concerned) has the right of access to the documents submitted to the contracting authority as soon as the decision on the award of contract has been made. Access is not granted to the business and trade secrets of other bidders, except for the comparison price.

The public, including enterprises that have not taken part in the competitive bidding, but wish to obtain information, have a right of access to the public information and documents submitted to the contracting authority (not to business and trade secrets) as soon as the contract has been concluded. However, if the contracting authority is not considered to be an authority defined in the said Act, the procurement documents will not be eligible for public access.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Considering the aggregate amount of public contracts made annually, only a small number end up in review and appeal proceedings. However, there are significant differences between different business sectors. Between 2011 and 2014, approximately 15,000 contract notices were issued annually. In 2018, 413 public procurement cases were submitted to the Market Court (compared with 484 in 2017, 426 in 2016 and 542 in 2015).

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes. If an appeal is filed in the Market Court after a contract has been signed and a violation of procurement law is established, the Market Court may order the contracting authority to pay compensation to a party who would have had an actual chance of winning the contract if the procedure had been correct. The amount of the compensation payment may not exceed 10 per cent of the total value of the contract, unless there is a particular reason for exceeding this amount.

In addition, a claim for compensation for damages can be brought before a district court if an infringement of public procurement regulations has caused damage to the applicant. If the request concerns only compensation for the costs incurred in the competitive bidding, the applicant must show that it would have had a genuine possibility of winning, in addition to infringement of regulations. In addition, if other compensation for damages is required, the applicant must prove that if the regulations had been complied with, it would have been awarded the contract.

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44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The Market Court may order the contract to be ineffective in the case of an illegal direct award of a contract of which no notice has been published or, provided that the contracting authority has made another error affecting the chances of an applicant being awarded the contract, in the event that the contracting authority has concluded the contract without applying the mandatory standstill period or has concluded the contract during proceedings in the Market Court even if it should not have pursuant to law (see question 38). Only the contractual obligations that have not yet been fulfilled can be ordered to be ineffective. This remedy is available only in procurements exceeding EU thresholds or, with regard to health and social and certain other service contracts and concessions, the national threshold. If there are imperative reasons relating to public interest, the Market Court may decide not to order ineffectiveness of the contract. The Market Court may also shorten the duration of the contract. However, for procurements made under article 346(1)(b) TFEU, the only remedies are compensation payments.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes. If the value of the contract exceeds the EU threshold or, with regard to health and social and certain other service contracts and concessions, the national threshold, the Market Court can order the contract to be ineffective in the case of an illegal direct award of a contract and when the contracting authority has not published a contract notice informing of the direct award of the contract before the conclusion of the contract. The petition needs to be submitted to the Market Court no later than six months from the conclusion of the contract. However, if the contracting authority has voluntarily published such a contract notice before the conclusion of the contract, the petition must be submitted no later than 14 days from the publication of the notice. If the contracting authority has only published a notice after the conclusion of the contract, the petition needs to be submitted no later than 30 days from the publication of the notice.

Further, provided no appeal has been submitted by a party concerned to the Market Court and no notification of a direct award has been made, the FCCA may propose to the Market Court that the Market Court imposes sanctions, such as ineffectiveness, penalty payments, shortening of the duration of the contract, or the cancellation of a procurement decision. The FCCA may submit the matter to the Market Court within six months from the date of the procurement contract.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

The correction procedure does not incur any processing fees to the applicant (unsuccessful bidder).

The party initiating the review process in the Market Court is liable for the processing fees of the Market Court. The fee is €2,050. However, in cases where the value of the procurement contract exceeds €1 million, the fee is €4,100 and if the value exceeds €10 million, the fee is €6,140. Natural persons are liable to pay a processing fee of €510, which applies also if the matter is not handled by the Market Court, for example if the application is withdrawn.

The same fees are applicable as to any appeal on the Market Court's decision to the Supreme Administrative Court.

France

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The current legislation is enacted in the Ordinance (delegated legislation) of 23 July 2015, which sets out the general rules, and two implementing Decrees of 25 March 2016 – one on public procurement contracts in general and one on public procurement in the defence sector.

From 1 April 2019, the legislation part of the Code of Public Procurement created by Ordinance of 26 November 2018 and its implementing Decree of 3 December 2018.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Both the utility procurement rules and the work or service concessions award rules are enshrined in the above Code.

There is no specific-sector legislation.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

There are a number of supplementing rules with regard to European Union (EU) procurement directives. For instance, the Decree of 25 March 2016 and, from 1 April 2019, the Code, ban changes in the composition of the consortium during the award process with a few exceptions. The duty to divide public procurement contracts into multiple contracts is compulsory and is also subject to a simple obligation to provide motives in the case of non-division. Moreover, for certain contracting authorities, there is a duty to separate the functions of designing and supervising the construction of buildings, with a few exceptions (Law of 12 July 1985).

Most importantly, exclusion grounds are identical to those set out in Directive 2014/24, but the consequences are harsher under French law. Article 73(b) of the Directive provides that member states shall ensure that contracting authorities have the possibility to terminate a public contract during its term with the contractor when article 57(1) of the Directive is at stake. In other words, the possibility of terminating the contract is imposed for only some of the mandatory exclusion grounds, for example, those related to bidders subject to a final judgment for certain criminal offences. French law goes beyond this and offers the possibility of terminating the contract if the contractor was, at the time of the award, in any situation worthy of exclusion, including the non-mandatory exclusion grounds. The transposition extends the right to terminate where the contractor is facing an exclusion ground at the time of the performance of the contract. In practical terms, it means, for example, that if an economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract that led to early termination of that prior contract, damages or other comparable sanctions, then the contracting authority may terminate the current contract.

Finally French law sets out specific award rules for contracts below the EU thresholds; for example, any public contract whose estimated value is above €90,000 must publish a contract notice in specific official journals (see question 11).

Proposed amendments

4 | Are there proposals to change the legislation?

There is no current proposal to change the legislation.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

There is no case law of this kind.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

In principle, any public procurement contract of any amount is included within the scope of the procurement law. Only those with estimated values of less than €25,000 (excluding VAT) are considered public procurement subject to a negotiated procedure without prior publication. However, even then, the Decree and, from 1 April 2019, the Code, states that the contracting authority shall not contract systematically with the same economic operator (article 30.1.8 of the Decree and R 2122-8 of the Code).

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Amendments of a concluded contract without a new procurement procedure are only authorised in the cases provided for by article 72 of Directive 2014/24.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There was a lot of case law prior to the implementation of article 72 of the Directive. The case law permitted amendments without retendering only if they did not lead to a substantial modification of the initial amount of the contract (ie, not more than approximately 15 per cent) or if they did not lead to a change in the subject matter of the contract. A 2017 guideline issued by the government used the former case law to illustrate some of the exceptions set out in article 72 of the 2014/24 Directive, such as circumstances that a diligent contracting authority could not foresee or a non-substantial modification of the contract.

A case from the Council of State is interesting despite the fact that the contract at stake was a concession contract, since the rules are very similar: the Council ruled that an amendment was not an unlawful modification of a contract, as the modification was required due to a substantial reduction of the subject matter, and the amended contract would have interested other economic operators had the scope of the contract been so in the first place (CE 15 November 2017, Ville d'Aix-en-Provence, No. 409728).

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

There is no requirement of this kind for the privatisation of public entities or functions, since an independent administrative commission, the rules of which are currently set by the Ordinance of 20 August 2014, controls the conditions of privatisation.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPP contracts are considered either public procurement contracts or concession contracts and, as such, are subject to their respective award procedures.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

The requirements regarding publications vary from one contracting authority to another (articles 33, 34 and 35 of the Decree of 25 March 2016 and R 2131-12 to R 2131-17 of the Code).

For those contracting authorities that are public bodies within the meaning of French law (with the exception of public bodies of an industrial or commercial character) and for contracts above EU thresholds, the contract notice must be published in the Official Journal of the EU (OJEU) and in the national official journal for public procurement contracts (BOAMP). For contracts below the EU thresholds but above €90,000 (excluding VAT), they must publish either in the BOAMP or in one of the local official journals (which are local newspapers used by the local state representative to include official announcements) and, 'if necessary', in a sector-specific review. For contracts between €25,000 and €90,000, the contracting authority may choose freely which publications are applicable to the nature and to the estimated value of the future contract. This 'freedom' is nonetheless relative, since the courts may check if the advertising was sufficient and, if not, they may annul the award process (see Council of State, 7 October 2005, Région Nord pas de Calais).

For the other contracting authorities and their contracts above the EU thresholds, publication must only be in the OJEU. For contracts below the EU thresholds, the contracting authorities may freely choose which publications are applicable to the nature and to the estimated value of the future contract.

However, there are exceptions regarding social services and other specific services referred to in article 74 of the Directive 2014/24. If there are contracts below the EU thresholds, any contracting authority can choose freely which publications are applicable to the nature and to the estimated value of the future contract. For contracts above the EU thresholds, the contracting authority publishes its intention to contract by means of a contract notice, or by means of a prior information notice as set out in article 75 of the Directive 2014/24.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

There are no specific limitations since the transposing statute and Decrees and, from 1 April 2019, the Code, are strictly in line with Directives 2014/24 and 2014/25 in this regard.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

Article 47 of the Decree of 25 March 2016, and, from 1 April 2019, articles R 2142-15 to R 2142-18 of the Code, provide for such a possibility on the condition that the contract notice or the invitation to confirm interest sets out objective and non-discriminatory criteria, the minimum number and the maximum number of bidders. In principle, the minimum number must be set so as to allow for sufficient competition. However for certain award procedures, the Decree is more precise: the minimum number is five for restricted procedures and three for competitive procedures with negotiation and competitive dialogue.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' has recently been introduced under French law with the transposition of the 26 February 2014 Directives. However, the possibility of self-cleaning exists in only five cases:

- where the contracting authority has received sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- where there is a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure;
- where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract that led to early termination of that prior contract, damages or other comparable sanctions;
- where the bid of the economic operator creates a conflict of interests; or,
- where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain

confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

No specific measures for self-cleaning are specified.

This reduced scope of self-cleaning raises some compatibility concerns with EU law, since article 57.6 of Directive 2014/24 provides that any economic operator that has been the subject of a conviction by final judgment regarding specified criminal offences may demonstrate its reliability despite the existence of a relevant ground for exclusion.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes it does: in article 1 of the Ordinance of 23 July 2015 and, from 1 April 2019, in article L 3 of the Code.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The impartiality principle stems from the case law and is also applicable to advisers of contracting authorities intervening in the award process (see, for example, Council of State, 24 June 2011, Minister of Ecology).

Conflicts of interest

17 | How are conflicts of interest dealt with?

There are no provisions other than those provided by the EU directives. For instance, article 57 allows for the exclusion of an economic operator where a conflict of interest within the meaning of article 24 cannot be effectively remedied by other less intrusive measures. To our knowledge there is no case law regarding public procurement.

However, in more general terms, there is case law that is applicable to public procurement regarding the wrongful participation (because of personal or business interest) of public agents in the adoption of any administrative act. There is also a specific criminal offence called 'the illegal taking of interest': article 432-12 of the criminal code reads:

> *The taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment, is punished by five years' imprisonment and a fine of €75,000.*

Finally, a recent statute put in place new rules in order to prevent risks of conflicts of interest in any area linked to the public sphere (Law No. 2013–907 of 11 October 2013, regarding the transparency of public life).

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

There is no prohibition in the statutes. However, the case law holds that, depending on the circumstances, a bidder that took part in the preparation of the tender procedure cannot be excluded per se, but shall be excluded if there are no other means to ensure the equality between bidders (CE 29 July 1998, Génicorp).

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The type of procurement procedures that prevail, in practice, are the open or restricted procedures, both because of the conditions set for the use of other procedures and the traditional suspicion regarding negotiated procedures that allegedly lack transparency.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Related bidders can submit separate bids unless they do not have sufficient autonomy to one another, since the courts apply competition law to contracting authorities they must make sure that by awarding a contract they would not favour a collusive agreement or breach competition rules.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Yes, the conditions are the same as those set out in article 24.4 of the Directive 2014/24 for contracting authorities. However, there are no conditions for contracting entities allowed by Directive 2014/25.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

There is no data on this, but it seems that French contracting authorities are keen to use competitive dialogues, especially for complex contracts, probably because France anticipated the introduction of the competitive dialogue at EU level in 2004 by introducing a similar procedure in 1994 called 'bidding on performance'. They also use the competitive procedure with negotiation in certain sectors, such as the defence sector, as traditionally it was not subject to any conditions of use.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

The requirements are identical to those set forth in the directives.

24 | May a framework agreement with several suppliers be concluded?

Such a framework agreement may be concluded and, in that case, the awarding of subsequent contracts is subject to competition as set out in article 33.2 of Directive 2014/24.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Article 45 of the Decree of 25 March 2016 and, from 1 April 2019, article R 2342-13 of the Code forbids, in principle, the change of consortium in the course of a procurement procedure with a few exceptions:

reorganisation of one bidder, or, if the consortium proves that one member cannot accomplish its task for a reason outside its will, the consortium can remain on course with the possibility of proposing a new participant or subcontractor, whose capacity will be analysed by the contracting authority along with the rest of the new consortium (article R 2342-14 of the Code).

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Prior to the new directives, there have been attempts to favour small and medium-sized enterprises (SMEs). For instance, a governmental guideline asked to favour SMEs by drawing lots adapted to SMEs (circular of 20 January 1994).

The provision of a decree that imposed a minimum number of SMEs at the bidder selection stage was, however, declared unlawful, as it was contrary to the principle of equal treatment (CE 9 July 2007).

Nowadays, SMEs can see their participation level increase via all the means provided by the directives. In addition, the duty to divide a contract into lots has been compulsory since 2006. The exceptions are identical to the examples of reasons, quoted in recital 78 of Directive 2014/18, that can be given by a contracting authority for not dividing into lots:

- the risk of restricting competition;
- the risk of rendering the execution of the contract excessively technically difficult or expensive; or
- if the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.

Finally, the PPP contracts subject to the procurement rules have specific rules regarding SMEs: the share of the forthcoming contract that will be performed by SMEs is a compulsory award criterion and at least 10 per cent of the PPP contract must be allocated to SMEs.

Prior to the 2014 Directives, case law already illustrated the possibility of limiting the number of lots that single bidders can be awarded. For instance, a contracting authority is right to limit to one geographical lot the award of a contract for the supply of DNA tests on the grounds that it will secure future supplies and that it will also secure the competitive nature of this niche market (*The French Supreme Administrative Court adopts a strict approach with regard to equal treatment of bidders in case of a false information from the contracting authority (Dynacité)*, Concurrences, 12 March 2012).

Variant bids

27 | What are the requirements for the admissibility of variant bids?

For contracts subject to a regulated procedure (ie, open or restricted, competitive procedure with negotiation, competitive dialogue), variants are forbidden unless otherwise stated in the contract notice or in the invitation to confirm interest.

For contracts subject to the adapted procedure (ie, a procedure where characters are freely set by contracting authorities), it is the other way around: variants are allowed unless explicitly forbidden in the contract notice or in the invitation to confirm interest (article 58.I of the Decree of 25 March 2016 and, from 1 April 2019, articles R 2151-8 to R 2151-11 of the Code).

28 | Must a contracting authority take variant bids into account?

Once the variant is admitted, a contracting authority must take it into account.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders cannot change the tender specifications without being excluded from the award. But they can submit their standard terms of business, which are valid if signed by the contracting authority if not contrary to the contract documents established by the contracting authority and if not contrary to public order or general principles applicable to public contracts. For instance, a standard clause by which the economic operator can terminate the contract in case of late payment is valid only if the enforcement of the clause leaves enough time for the regularisation of the payment and if there is no general interest reason for maintaining the contract (CE 8 October 2014, Société Grenke location).

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The limitations are identical to those set out in article 67 of Directive 2014/24 – they are non-discriminatory criteria and they must have a link with the subject matter of the contract, and a duty to weigh the criteria. However, French law restricts the use of price as the sole award criterion to contracts whose subject matter is services or supplies that are standardised and whose quality is unlikely to vary from one economic operator to another.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no written legal definition of an abnormally low bid or tender in French law or in the directive. It should be referred to case law that has a case-by-case approach.

32 | What is the required process for dealing with abnormally low bids?

The process is identical to that set out in article 69 of Directive 2014/24.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

There are no administrative authorities in charge of reviewing the award decisions; only the courts are competent.

Owing to the private and public law divide under French law, challenges to award decisions may be lodged either before the administrative courts if the contract is of administrative character, or before civil courts if it is a civil matter. A public procurement contract is of administrative character if awarded by a public body within the French meaning or, very exceptionally, when awarded by a publicly owned entity regulated by private law under very specific circumstances set by the case law (ie, if the private entity acts as an agent of a public body on his or her behalf, or on his or her account).

The main route to reviewing the award process is the pre-contractual remedy. The appeal goes directly before the Council of State or the Court of Cassation and is limited to questions of law with a time limit of 15 days.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Not applicable.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Regarding the pre-contractual remedy put in place since 1992, it takes a maximum of 20 days in front of the courts of first instance of both the administrative courts and civil courts. The appeal takes approximately two months in practice. If the remedy sought is damages then it will take approximately two years.

36 | What are the admissibility requirements?

The standing for action is limited to any person who may have had an interest in bidding regarding their field of interest and not only to those who participated in the process or were deprived of a chance to participate as was the case prior to 1995. There is no standing for action requirement for the European Commission or the local state representative challenging the award of a contract by a regional or local authority.

For a long time, any legal ground was accepted in front of the courts with the effect, proved by a 2006 Organisation for Economic Co-operation and Development (OECD) report, that more than half of the challenges were successful. Since 2008, for administrative courts (and more recently for civil courts), only alleged breach of award rules that have harmed or are likely to have harmed the applicant are acceptable (CE 3 October 2008, SMIRGEOMES).

This new requirement has been extended to a new remedy created by the Council of State case law and called the *Tarn-et-Garonne* remedy (see question 37).

37 | What are the time limits in which applications for review of a procurement decision must be made?

For the pre-contractual remedy the time limit is correlated to the award process: the challenge can be lodged up until the contract is signed.

For the contractual remedy introduced in 2009 by way of implementation of the 2007 Directive on Review of Public Procurement Contracts, the time limit is 30 days after the post-award notice is published, or six months after the signature of the contract if no post-award notice was published.

There is also the possibility of lodging another challenge as set by the Council of State in a 2007 case reformed in the 2014 *Tarn-et-Garonne* case for which the time limit is two months.

For damages, the time limit is four years from the first January following the breach that causes the harm.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The pre-contractual remedy has an automatic suspensive effect: once the challenge is lodged before a court and the contracting authority informed of it by the applicant, the award process is automatically suspended until the court takes steps regarding the legality of the award process. There is no possibility of lifting the automatic suspensive effect.

Neither the contractual remedy, the *Tarn-et-Garonne* remedy nor the remedy of damages have an automatic suspensive effect, but, for the two former remedies, the court may decide to suspend the execution of the contract until its decision is made.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Not applicable.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Unsuccessful bidders must be notified for any regulated procedure, but no time limit is set for the contracting authority to notify them. However, the award of the contract cannot be made before a period of 11 days after notification, if the latter is sent by electronic means, or 16 days if sent by mail.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Access is not granted, unless the applicant asks for the communication of any administrative documents related to the award process. In case of refusal, he or she may enlist the Commission for Access to Administrative Documents (CADA), an independent administrative authority, to obtain the relevant document.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

It is quite common for an unsuccessful bidder to file review applications. There is no recent data on this, but the OECD 2006 report quoted above mentions an average of 4,000 challenges a year.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Disadvantaged bidders can claim to be compensated from the bid costs if they were deprived of any chance to win the award; that is, if they have no reason to be excluded from the award process, in the absence of exclusion grounds and if they had the financial and technical capacity to carry out the contract. If they can prove they had a serious chance of winning the contract initially, had the violation not occurred, they might even be awarded damages for loss of profits, irrespective of whether they later had the capacity to run several contracts at the same time.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be terminated on the grounds that its conclusion violates procurement law. Regarding the contractual remedy, the arguments to be invoked are quite limited:

- an absence of advertising or an absence of the OJEU;
- not respecting the award rules of a framework agreement at the award of the subsequent contract stage; or
- not respecting the suspensive effect of the pre-contractual remedy.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

There is a possibility of challenging this direct award through the contractual remedy within the above-mentioned time limit: six months after the signature of the contract. However, it may happen that no one is aware of the signature of contract, unless its consequences are visible, such as the starting of new public works.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

For the most common – and efficient – remedy used, that is, the pre-contractual remedy, legal costs are generally between €5,000 and €10,000 before administrative courts of first instance.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

A public procurement code was created in late 2018 to consolidate the rules applicable to French procurement procedures.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The current German public procurement law is set out in the following laws and regulations:

- Part IV of the German Act against Restraints of Competition (GWB);
- the Regulation on the Award of Public Contracts (VgV);
- the Utilities Regulation (SektVO);
- the Procurement Regulation on Defence and Security (VSVgV);
- the Procurement Regulation on Construction Works (VOB/A);
- the Procurement Regulation on Concessions (KonzVgV); and
- the Procurement Regulation on the Award of Public Contracts under the EU thresholds (UVgO) for the Federal republic and the Federal states Bavaria, Hamburg and Bremen.

In general, German procurement law transposes the EU Directive 2014/24/EU on public procurement, the EU Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services (utilities) sectors and the EU Directive 2014/23/EU on concessions (the EU directives).

The GWB sets out general regulations regarding bidding procedures and the enforcement of the legislation. The VgV regulates the procurement of all kinds of services, except construction works, while the SektVO regulates procurement by utility providers. The VSVgV regulates procurement in the security and defence sector, and the VOB/A regulates the procurement of construction contracts. Last but not least, the KonzVGV sets out all regulations with regard to the procurement of concessions.

These rules only apply to procurement contracts with values above a specific threshold (see question 6). National regulations for construction contracts with a lower value are set out in Part 1 of the VOB/A. For all other contracts with a lower value the UVgO applies (for the federal states in which the UVgO has not commenced yet, the Regulations on the Award of Public Service Contracts (VOL/A) still applies). In addition, the federal budgetary laws apply. Furthermore, most of the German federal states have implemented specific state procurement regulations to strengthen the rights of bidders, especially for procurement procedures under the thresholds, and add the application of additional award criteria (eg, payment of minimum wages, compliance with collective labour agreements and the creation of a blacklist of corrupt bidders).

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Sector-specific legislation has been implemented for utility providers with the SektVO and for defence and security contracts with the VSVgV (see question 1), the latter by transposing Directive 2009/81/EC on the coordination of procedures for the award of certain works, supply and service contracts by contracting authorities or entities in the fields of defence and security. Part 3 of the VOB/A is also dedicated to construction contracts in this sector.

The procurement of train passenger transport services is supplemented by section 131 GWB by reference to Regulation (EC) No. 1370/2007 (the Public Passenger Transport Regulation), which by itself is binding law in all member states of the European Union (EU). The German Passenger Transport Act (PBefG) further supplements the procurement of bus and tram passenger transport services.

Pursuant to German jurisdiction, public health insurers are contracting authorities pursuant to section 99 GWB and, therefore, the award of contracts in this sector requires a public procurement procedure. In such procedures some provisions of the Code of Social Law (SGB V) must be observed in addition to the GWB.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

National regulations for the award of contracts below the EU thresholds have been set out in Part 1 of the VOB/A and in the VOL/A (see question 1). German procurement legislation also implements the World Trade Organization's Agreement on Government Procurement (GPA) in a more detailed way.

Proposed amendments

4 | Are there proposals to change the legislation?

After the substantial reform of German procurement legislation in 2016 by the implementation of the 2014 EU Procurement Directives, which govern public procurement procedures started after 18 April 2016, the national regulations for procurement procedures under the EU thresholds in part A of the VOL/A have not yet been adapted to the wording and structure of the new legislation applied to procurement above the EU thresholds. To replace the VOL/A, on 2 February 2017 the Federal Ministry of Economics and Energy released the Regulation on the Award of Public Contracts under the EU thresholds (UVgO), which is based on the structure of the VgV. The Regulation will come into force once the federal republic and every federal state issues an Application Command making it applicable. For the federal republic, the command was issued on 2 September 2017. Some federal states issued their

commands in 2018. The remaining federal states are expected to issue their commands during 2019.

The need to provide acceptable legal protection in case of procurement procedures under the EU thresholds is an ongoing discussion. The chance to provide a legal framework in connection with the reform of 2016 has not been used and no additional specific legislative plans in this regard have been announced so far.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

According to section 99 GWB, 'contracting authorities' are regional or local authorities and their special funds, and other legal persons under public or private law that meet specific legal requirements and were established for the specific purpose of meeting non-commercial needs in the general interest, if they are mostly controlled or financed individually or jointly by entities that are contracting authorities pursuant to section 99 GWB themselves.

Entities that do not fall under this definition are not considered contracting authorities. For example, Deutsche Telekom AG and Deutsche Postbank AG, religious orders, trade fair promoters, the Red Cross and savings and loan associations are not considered to be contracting authorities pursuant to section 99 GWB.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Contracts under the EU thresholds are excluded from German procurement law as described in question 1, in particular bidders are not allowed to file review applications with competent procurement review chamber.

The current EU thresholds are as follows:

- public work contracts: €5.548 million;
- public supply or service contracts: €221,000;
- public supply or service contracts of the highest or higher federal authorities: €144,000;
- public supply or service contracts in the sectors of transport, water and energy (utilities) and in the fields of defence and security: €443,000;
- work or service concessions: €5.548 million; and
- social and other special service contracts (eg, healthcare, education): €750,000 for public contracts and €1 million for utilities contracts.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Generally, amendments of a concluded contract without a new procurement procedure are permitted. Whether a new procurement procedure is mandatory depends on the essentiality of the amendment. Pursuant to section 132, GWB amendments are essential when the public contract differs substantially from the assigned public contract. This is usually the case when the amendment would permit other applicants, enable the acceptance of other offers or the interest of other applicants would have raised. Amendments are also essentially when the extension of the public contract is substantial or when the economic equilibrium has been shifted in favour of a company.

A new procurement procedure is not necessary if:

- the original procurement documents state clear and precise review clauses or options for changes, and the total character of the procurement contract does not change;
- additional public supply, work or service contracts that are mandatory are not included in the initial contract;
- an amendment is necessary with regard to conditions that the contracting entity could not have foreseen;
- the new contractor replaces the previous contractor owing to circumstances such as a takeover, insolvency or merger;
- the total character of the procurement contract is not changed;
- the value of the change does not exceed the respective EU threshold value; and
- within public supply and service contracts, the amendment, when compared to the original value of the contract, costs:
  - not more than 10 per cent for services and supply contracts; and
  - not more than 15 per cent for work contracts.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

As section 132 GWB was not in force before 18 April 2016, there is no clarifying jurisdiction in place. Nevertheless, as section 132 GWB implemented established case law (eg, European Court of Justice (ECJ) case *Pressetext* C-454/06), already existing case law could be referred to with regard to a clarification of the legislation.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

German public procurement law does not provide any specific regulations regarding privatisations. However, in general, privatisations are at least subject to the provisions of EU primary law or national budget law. Therefore, the basic principles of EU law (transparency, equal treatment and a ban on discrimination) must be respected, and budget law requires the authorities to use their capital as efficiently as possible.

The GWB may only apply if a procurement element is involved in the overall business transaction and the procurement element constitutes the main element of the contract, or if an element is found to require a procurement procedure by itself: for example, if a private party acquires access to a public contract as a result of a privatisation or if the privatisation is suspected of being used to bypass the rules on public procurement, the law may require a formal procurement procedure.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

German public procurement law does not provide any rules or regulations for setting up a PPP. As confirmed by German courts and procurement review chambers, in most cases the contract will be governed by the terms of the public procurement law, because the PPP includes the procurement of construction work, supplies or services by contracting entities and the contractual partner is at least partly in private hands.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised within the Official Journal of the European Union (OJEU) (Section 40, VgV) and in Tenders Electronic Daily, the EU public procurement database.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Pursuant to section 122 paragraph 1 GWB, public contracts are awarded to competent and capable (qualified) bidders, if they are not excluded pursuant to sections 123 and 124 GWB. Sections 123 and 124 provide for an exhaustive list of mandatory and discretionary grounds for exclusion relating to the professional qualities of a bidder for all procurement procedures. Pursuant to section 122 paragraph 2 GWB the selection criteria may exclusively relate to:

- suitability to pursue the professional activity;
- economic and financial standing (section 45 VgV and section 6a No. 2 EU VOB/A); and
- technical and professional ability (section 46 VgV and section 6a No. 3 VOB/A).

All criteria must fall into one of these categories, but the contracting authorities have some discretion in assessing the qualification of bidders for a specific tender. The use of this discretion is subject only to limited judicial review (especially review for factual errors and arbitrary assessments) as long as the authorities treat all bidders equally.

Nevertheless with the implementation of the 2014 EU directives in 2016, the proof of eligibility for tenderers has been simplified for the bidders by stating in section 48 paragraph 3 VgV and section 6b paragraph 1 VOB/A that contracting authorities shall accept the European Single Procurement Document as preliminary evidence in replacement of certificates issued by public authorities or third parties. These sections of the VgV and the VOB/A also contain a list of other documents acceptable as proof of the respective qualification criteria, which the contracting authority may ask the tenderers and candidates to submit at any moment during the procurement procedure.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

The public entity is entitled to limit the number of bidders that can participate in a tender procedure if it is not an open tender procedure and if sufficient suitable bidders are available (section 51 paragraph 1 VgV). This must be in the announcement of the procurement contract in combination with the objective and non-discriminatory suitability criteria. The minimum number of bidders that must be invited to participate is three, and, in case of a restricted procedure, five.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The new GWB upholds the possibility for 'self-cleaning' procedures that companies may fulfil (section 125 GWB). In order to do so, the company needs to prove it has complied with one of the following measures:

- paid damages, or accepted the obligation to pay damages, for each crime or misconduct;
- provide full clarifications of all crimes and misconduct and resultant damages in collaboration with the public contractor and investigating authorities; or
- the implementation of specific technical, personnel and organisational measures that will prevent further crimes or other misconduct.

In any case a bidder can be excluded for not more than three years (in case of optional grounds for exclusion) or five years (in case of mandatory grounds for exclusion), beginning from the date of the final conviction.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Section 97 paragraph 2 GWB and section 2 paragraph 2 EU VOB/A state there must be equal treatment, and section 97 paragraph 1 GWB and section 2 paragraph 1 EG VOB/A state the fundamental principles of transparency and competition.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

German public procurement law generally requires neutrality and impartiality of the contracting authority. This is stated in section 97 paragraph 2 GWB, section 6 paragraph 1 VgV and section 2 paragraph 5 EU VOB/A.

Conflicts of interest

17 How are conflicts of interest dealt with?

Entities deemed biased due a conflict of interest are not allowed to participate in the decision-making of the contracting entity with regards to a tender procedure (section 6 VgV, section 6 SektVO and section 7 KonzVgV). For example, a person is deemed biased if he or she is a member of a governing body or an employee of the contracting entity and simultaneously a bidder in the tender procedure. The same applies for consultants of the contracting entity (eg, lawyers, tax advisors and auditors) or for any other authorised person (eg, an architect or engineer) who is, at the same time, a bidder or consults or supports a bidder.

This legislation also applies where relatives are involved (eg, if the spouse of the employee of the contracting entity is a bidder).

In addition, pursuant to section 124 paragraph 5, any economic operator may be excluded from participation in a procurement procedure if there is a conflict of interest with regard to the implementation of the tender procedure, which could affect the impartiality and independence

of a person acting on behalf of the contracting authority and which cannot be effectively remedied by other less restrictive measures.

Bidder involvement in preparation

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The contracting authority needs to guarantee the principle of competition by implementing measures that ensure that distortion is avoided (section 7 paragraph 1 VgV, section 6 paragraph 3 No. 4 EU VOB/A). Such measures, in general, are the disclosure about the bidder's involvement and the exchange of information to the other bidders.

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure used by contracting authorities is the open procedure (with price as the lone award criterion), especially in standard cases, as it can be used without any requirements and allows a strict and controlled procedure. However, following the reform of German procurement legislation in 2016, contracting authorities are allowed to freely choose between an open and a restricted procedure with a call for competition, so it is to be expected that many contracting authorities will prefer the restricted procedure with a call for competition as it allows them to limit the number of bidders after the call for competition to a minimum of five.

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

Pursuant to German case law, in general a bidder may not submit a tender if he or she has knowledge of another bidder's tender, because such knowledge implies anticompetitive behaviour, which leads to exclusion from the bid.

Generally, a bidder participating alone, and as another bidder's subcontractor, is not prohibited unless a flow of relevant information between the bidders is traceable.

If bidders are controlled by the same parent company, or control each other, the bidders will have to prove an absence of knowledge (eg, by verifying a Chinese wall between the bidders) or a court will presume anticompetitive behaviour.

In case of a bidder participating alone and as a part of a consortium, the courts will, in almost all cases, presume anticompetitive behaviour.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

The negotiated procedure means a procedure whereby the contracting authority directly negotiates elements of public procurement contract with one or more bidders is only permitted as an exception from the open or restricted procedures.

Under the circumstances detailed in section 14 paragraph 3 VgV and section 3a paragraph 2 EG VOB/A (ie, negotiation is mandatory to determine the awarded assignment or technical solutions) a negotiated procedure with a call for competition is allowed.

A negotiated procedure without a call for competition is only allowed under the circumstances pursuant to section 14 paragraph 4 VgV and section 3a paragraph 3 VOB/A (ie, if no tenders or no suitable tenders have been submitted in response to an open procedure or a restricted procedure, if the assignment can only be supplied by a particular bidder, or in cases of extreme urgency).

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The negotiated procedure with a call for competition is the most commonly used procedure with negotiations, as its requirements are the easiest to fulfil.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

Framework agreements are defined pursuant to section 103 paragraph 5 GWB as agreements between one or more public authorities and one or more private entities to outline the general terms and conditions that apply to contracts, especially the price, to be awarded under a framework agreement for a given period of time. According to that legislation, procurement generally applies to the conclusion of a framework agreement.

In addition, section 21 VgV and section 19 SektVO stipulate rules on the conclusion of a framework agreement and the individual contracts to be closed under a framework agreement. Generally, the maximum term of a framework agreement is four years. The parties may not make substantial amendments to the terms of the framework agreement when awarding individual contracts. In addition, contracting authorities are not allowed to use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

According to relevant decisions of higher regional courts, the contracting authority must define the terms of the framework agreement as clearly as possible, especially to prevent unreasonable calculation risk for the bidder. The federal Public Procurement Chamber recently held that discount arrangements by health insurance funds that allow multiple companies to join are not public contracts and procurement legislation does not apply to them.

24 May a framework agreement with several suppliers be concluded?

The public procurement law provides the possibility of concluding framework agreements with two or more different companies (section 21 paragraph 4 VgV; section 4a EU VOB/A). If the terms of the framework agreement are sufficiently detailed, the award of the individual contracts can take place on the basis of the framework agreement without the need for a further procurement procedure. If the framework agreement is sufficiently detailed only in part, then the individual contract will be awarded by a mix of a direct award and a simplified award procedure. If the framework agreement is not sufficiently detailed, then the commissioning entity must conduct a simplified award procedure among the parties within the framework agreement. An individual contract will be awarded based on the offers submitted and the award criteria stated in the framework agreement.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The German public procurement law does not cover changes to members of the bidding consortium. However, German law allows changes in some small number of instances. Some review bodies allow

changes if the legal identity of the bidder is not changed (eg, a change from a consortium to a single bidder is not allowed) if there are good reasons and no circumvention of procurement law is intended, if there is no danger of discrimination and if the contracting authority concludes that the consortium still fulfils the suitability criteria.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Pursuant to section 97 paragraph 4 GWB the interests of small and medium-sized enterprises (SMEs) must be primarily considered and contracting authorities are obliged to divide public contracts into lots by quantity (partial lots) or by field of work (technical lots). To support the division of contracts into lots German law states that a contracting authority cannot decline to divide a contract into lots on the obvious grounds that it would require additional effort regarding the tender specifications, the assessment of the bids or the coordination of the procurement procedure. Bidders are allowed to put in a claim for the division of a contract if they are interested in one lot of the contract, even though the contract authority has discretion in deciding whether to create lots, and therefore this decision is subject to only limited judicial review. The only matter that can be reviewed is whether it is based on the correct facts and follows reasonable consideration.

Another way of supporting the participation of SMEs is the admission of bidding consortia (which is allowed pursuant to section 43, paragraph 2 VgV; section 50, paragraph 2 SektVO; section 6, paragraph 1, No. 2 EU VOB/A; and section 24, paragraph 2 KonzVgV). Additionally, small companies rely on the capacities and abilities of their subcontractors to prove their qualification (section 47, paragraph 1 VgV; section 47, paragraph 1 SektVO; section 6d, paragraph 1 EU VOB/A; and section 25, paragraph 3 KonzVgV).

With regard to the number of lots single bidders can be awarded, the contracting authority must avoid lots that can only be carried out effectively by one single or a few companies. Pursuant to German jurisdiction, contracting authorities may limit the number of lots that can be awarded to a single bidder to achieve this.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Contracting entities can allow alternative bids in the tender procedure. However, this must be clearly referred to in the tender notice. Additionally, the contracting entity needs to define minimum requirements for the alternative bids in the tender notice or the tender documents. Alternative bids that do not fulfil the minimum requirements must be excluded. Contracting authorities can also require that alternative bids can only be presented as an addition to a main bid.

Section 35, paragraph 2 PPR now explicitly states that alternative bids are also admissible if the price or costs are the only award criterion. This was questioned by national courts before the reform of German procurement legislation in 2016.

28 | Must a contracting authority take variant bids into account?

The contracting authority must take variant bids into account, if variant bids were expressly permitted and stated minimum requirements are fulfilled.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

In general, bidders are not permitted to change the tender documents and the contracting conditions, so the offers will be excluded from the procedure. This rule does not apply if the tender documentation allows changes (eg, in a negotiation procedure, a competitive dialogue or variant bids). If changes are made, the principles of non-discrimination, transparency and fair competition need to be observed. If a bidder submits its own standard terms of business, according to the majority view of German law this is an impermissible change of the tender specifications and the bid will be excluded.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The most economically advantageous tender wins the award procedure (section 127 paragraph 1 GWB). Therefore the price is very relevant in most cases, and contracting authorities are allowed (and strongly encouraged) to set out additional criteria such as quality, operating costs, aesthetics, time schedule, cost-effectiveness and technical merit. Additionally, bidders might be expected to meet further requirements, such as social, environmental or innovative aspects, if these have a direct relation to the subject matter of the contract. The list of additional criteria in section 127 paragraph 1 GWB is not limited, and the contracting authority is awarded discretion in defining such criteria.

The award criteria need to be determined in such way that an effective competition is guaranteed. The award is not arbitrary, and a review is possible. The award criteria need to be stated either in the tender notice (above EU thresholds) or in the tender documentation (below EU thresholds).

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

Pursuant to German law an 'abnormally low' bid can be considered if the bid is between 10 and 20 per cent lower than the second lowest bid. But the disparity between the price and the service provided or the price compared to the second lowest bid alone is not decisive. German courts decided that, for example, a low bid is justified for the purpose of gaining access to the market. To exclude a bidder on the ground of an 'abnormally low' bid, the contracting authority must clarify the price by asking the bidder for an explanation (see question 32) and show that the bidder will not be able to reliably fulfil the contract.

32 | What is the required process for dealing with abnormally low bids?

In the case of an abnormally low bid, pursuant to section 60 VgV and section 54 SektVO, the contracting authority must check if the bid is abnormally low at first glance and then in a more precise way. If the bid appears to be too low, the contracting authority must clarify the bid by contacting the bidder, giving him or her the chance to explain the bid, and to prove that it is adequate. The grounds shown by the bidder can relate to special technical solutions or favourable conditions (eg, being able to save costs because of another project conducted simultaneously, special manufacturing processes, or financially favourable conditions, such as receipt of state aid). After that, if the contracting authority is still convinced that the price offered is not justified, it may exclude the offer from the tender procedure. The contracting authority

can also reject the tender, if it is convinced that the bid is abnormally low because it does not comply with the obligations pursuant to section 128, paragraph 1 GWB.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Full legal protection is only granted for public contracts above the applicable EU threshold. The judicial review for these European public contracts is generally based on a two-level system.

The first instance of review is granted by the competent procurement review chambers in the relevant federal state or by the Federal Review Chamber for procurement procedures. Decisions by the procurement review chambers can be appealed against at the competent higher regional court (the higher regional court in Düsseldorf is competent in all cases of federal procurement procedures). Pursuant to section 179 paragraph 2 GWB, a court of appeal must submit the case to the Federal Supreme Court if it wants to deviate from a decision from another court of appeal or the Federal Supreme Court.

With regard to procurement procedures under the EU thresholds, there is no legal protection within the public procurement legislation. Nevertheless, decisions in this area can be challenged before civil courts by obtaining injunctions, specific performance or damages. The procedural requirements for obtaining an interim injunction are typically higher than at the procurement review chambers, but as described in question 4, the addition of legal protection for public contracts below the thresholds to the procurement legislation remains open.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

There is only one competent procurement review chamber to rule on a review application.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Pursuant to section 169 paragraph 1 GWB, the procurement review chamber must decide the review within five weeks of receipt of the review. In exceptional cases the tribunal is entitled to extend the time limit, but for no longer than two additional weeks. Nevertheless, in practice proceedings at the procurement review chamber take about two to four months, and at the courts of appeal two to six months.

36 | What are the admissibility requirements?

The admissibility requirements for a review application pursuant to the GWB, meaning for procedures above the EU thresholds, are described below.

The applicant must have an interest in the awarded contract, which is generally proven by the submission of an offer. The submission of a bid is not a requirement if the alleged violation of public procurement law that is subject to review prevents the applicant from submitting an offer.

The applicant must claim that its rights were violated by non-compliance with public procurement provisions – a possible infringement is enough.

The applicant must show that he or she has suffered or might suffer a loss as a consequence of the alleged violation of public procurement provisions. This condition is interpreted broadly in German law. An application will be rejected if the applicant's offer ranks so low among all offers that it has no realistic chance of winning the award, even without the breach.

Pursuant to section 160 paragraph 3 No. 1 GWB, the application is generally inadmissible if the applicant became aware of the violation of procurement rules during the procurement procedure and did not complain about the violation to the contracting entity within at least 10 days.

Pursuant to section 160 paragraph 3 No. 2 GWB, the application is inadmissible if the contracting entity is not notified, by the end of the period specified in the notice for the submission of a bid or application, that a violation of procurement provisions has become apparent.

Pursuant to section 160 paragraph 3 No. 3 GWB, the application is inadmissible if, by the end of the period specified in the notice for the submission of a bid or application, the contracting entity is not notified about violation of provisions governing the awarding of public contracts that become apparent from the award documents.

Pursuant to section 160 paragraph 3 No. 4 GWB, the application is inadmissible if it is filed more than 15 calendar days after the contracting authority has rejected the applicant's complaint. Pursuant to German case law, the contracting authority is obliged to inform the bidder of this deadline in the contract notice, otherwise it cannot be held against the applicant.

37 | What are the time limits in which applications for review of a procurement decision must be made?

A review application can be filed at any time before the award of a contract. Nevertheless, for a review application to be admissible, section 160 GWB requires that it is be made no more than 15 calendar days from the rejection of a complaint (see question 36). To allow the bidder to file a review in time, pursuant to section 134 GWB a contract may only be awarded at the earliest 15 calendar days (10 days if the information is sent by fax or electronically) after the following information has been sent to other tenderers: that their tenders were rejected; who the contract will be awarded to; and why the successful bidder was preferred.

After the contract is awarded, a challenge is, in general, no longer possible. However, an aggrieved bidder can claim that the contract was invalid from the beginning, pursuant to section 135 GWB, if the contracting authority has failed to inform or has not correctly informed the unsuccessful bidders, or has made an illegal 'de facto award' (see question 44). Such a claim must be filed within 30 days of knowledge of the respective breach of law or 30 days after the contracting authority has published the contract award in the OJEU, and, in any event, at the latest, six months after conclusion of the contract.

Pursuant to section 172 paragraph 1 GWB, an appeal against a decision of a procurement review chamber must be filed within two weeks of the party receiving the decision.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Pursuant to section 169 GWB, the information of the procurement authority by the procurement review chamber has an automatic suspensive effect. The effect remains in place until 14 days after receipt of the review decision by the applicant. In case of an appeal the court of appeal must prolong the suspensory effect upon request by the applicant.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

According to the Federal Ministry of Economic Affairs and Energy, about 15 per cent of applications for the lifting of an automatic suspension are successful (data from 2011 to 2017).

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Pursuant to section 134 GWB, the contracting authority must provide the unsuccessful bidders with an advance notification of the intended award (see question 36). This notification must contain the name of the successful bidder, the reasons for the rejection of the tender and the earliest date of the conclusion of the contract.

The contract cannot be awarded until 15 calendar days after the notification has been sent. In the case of sending the notification by fax or electronically, the standstill period is reduced to 10 calendar days.

In cases of an award in the area of defence and security, the contracting authority is entitled to withhold certain information about the tender procedure or the conclusion of a framework agreement, if the disclosures:

- may impede law enforcement;
- are contrary to the public interest, especially the interest in defence and security issues;
- would damage the economic interests of a company; or
- would affect the competition between the companies.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

Pursuant to section 165 GWB access to the procurement files is granted to the applicant. Nevertheless, the procurement review chamber must prohibit access to the procurement files if this is necessary in respect of business and trade secrets or confidential secrets.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

Keeping the high number of procurement procedures in mind, it is not customary for bidders to file review applications. In 2017, 824 bidders filed a review application – a typical amount. A total of 108 decisions have been appealed at the higher regional court, which is low compared with earlier years.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Pursuant to section 181 GWB, disadvantaged bidders can claim damages if the public contractor has violated a regulation that protects the company and the company would have had a real chance to win the procurement contract if the violation had not happened. The disadvantaged bidder can claim damage for the costs of preparing the offer and the participation in the tender process. Pursuant to German law, it is not necessary for the contracting authority to be at fault for the damages claimed.

Disadvantaged bidders also have the option of claiming damages pursuant to section 311, paragraph 2 and section 241, paragraph 2 German Civil Code (BGB). The bidder can seek to participate in the procurement procedure in question if he or she is able to show that the contracting authority breached an obligation of protection or consideration and the contraction authority was at fault. Furthermore, the bidder is under the obligation to show that there is a strong likelihood that he or she would have been awarded the contract if the contracting authority had acted lawfully. In contrast to section 181 GWB, an applicant may also claim expectation damages if it would have been awarded the contract under a lawful procurement procedure. On the other hand, contributory negligence by the applicant can be taken into account (eg, if the claiming bidder failed to initiate review proceedings or judicial proceedings).

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44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Pursuant to section 168 paragraph 2 GWB, a concluded contract cannot be cancelled or terminated following a review application.

However, pursuant to section 135 GWB, a concluded contract is void from the beginning if:

- the contracting authority violated its duty pursuant to section 134 GWB (see question 40);
- awarded the contract to a company without giving other companies the chance to participate – an illegal direct award or 'de facto award' – unless a de facto award is permitted by law; and
- the violation was established in a review procedure, allowing a review of the contract after the award.

In addition, since the reform in 2016, a contract can be terminated by the contracting authority, pursuant to section 133 paragraph 1 GWB, if the CJEU has established that the contract was awarded in grave violation of EU procurement law.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Pursuant to section 135 GWB, a concluded contract is void from the beginning if the contracting authority awarded the contract to a company without giving other companies the chance to participate, unless the de

facto award is permitted by law, and such a violation has been established in a review procedure.

The procurement review chambers will order contracting authorities to revoke the contract if an applicant has to demonstrate that it has a direct interest in the contract award, which usually exists if the applicant is generally suitable to perform the contract.

Such a claim must be filed within 30 days of knowledge of the respective breach of law or 30 days after the contracting authority has published the contract award in the OJEU, and, at the latest, six months after conclusion of the contract (section 135 paragraph 2 GWB).

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

Pursuant to section 128 paragraph 2 GWB the charge for a judicial review by procurement review chamber is at least €250 and up to €50,000. In cases in which the expense or economic importance is exceptionally high, an increase up to €100,000 is permitted. The procurement chamber has discretion in setting costs. In general, the costs relate to the contract value: for example, the costs for a contract valued at €1 million are about €3,125, for a contract valued at €10 million, about €9,250; or for a contract valued at €50 million, about €36,450.

In the case of a lost judicial review, the losing party must pay the full costs, so the lawyer costs for the other side would also have to be borne.

Ghana

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The main legislation that regulates and governs public procurement in Ghana is the Public Procurement Act 2003 (Act No. 663) (the Act) as amended by the Public Procurement (Amendment) Act 2016 (Act 914) (the Amendment Act). The promulgation of the Act was an integral part of Ghana's Public Financial Management Reforms and good governance initiative, which sought to instil propriety and accountability in public sector financial management and expenditure. The Act regulates the procurement of goods, works and services financed, in whole or in part, from public funds and the disposal of government stores. All government agencies, institutions and establishments in which the government has a majority interest are mandated to comply with the Act.

The key exceptions to which the scope of application of the Act is subject are in respect of the following;

- procurement with international obligations arising from a grant or concessionary loan to government which shall be in accordance with the terms of the grant or loan subject to review and 'no objection' to the procurement procedures by the Public Procurement Authority (the Authority); and
- procurement arising from an external loan and commercial facility secured by government other than a concessionary loan and grant which specifies in particular the procurement procedures which shall be subject to the prior review and 'no objection' to those procurement procedures by the Authority.

The Authority is mandated to ensure that public procurement is carried out in a fair, transparent and non-discriminatory manner and is vested with administrative powers to ensure that procuring entities comply with the Act. It is also mandated to:

- monitor the processes employed by procuring entities;
- review procurement decisions made by procuring entities;
- investigate procurement malpractices; and
- sanction offenders.

Procuring entities under the Act have responsibility for the procurement of goods, works and services for prescribed threshold values set out in the schedules to the Act.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

There is no sector-specific procurement legislation to supplement the Act. With respect to public-private partnership (PPP) arrangements, the proposed PPP Bill has a specific procurement process for the selection of a private sector partner for a PPP project.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Ghana is not a member of the European Union or a signatory to the World Trade Organization's Agreement on Government Procurement (GPA). Therefore, the EU directives and the GPA do not affect Ghana's procurement regime. However, the key principles of transparency and non-discrimination are reflected in the Act and the Amendment Act aims to ensure the Act is consistent with the United Nations Commission on International Trade Law's model law on public procurement.

Proposed amendments

4 | Are there proposals to change the legislation?

There is no existing proposal to amend the Act as amended by the Amendment Act. The amendment effected in 2016 addresses shortcomings identified since the original Act was brought into operation in 2004. The Amendment Act addresses the following issues:

- an increase in the threshold limits, to ease operations and empower procurement entities to make smaller value purchases without reference to approving authorities, with corresponding changes to thresholds of referrals to approving authorities. This now enables entity tender committees (ETCs) and entity heads, for example, to purchase more than twice as much than they were previously permitted. Certain categories of ETCs (including state-owned enterprises) would be able to go directly to the Central Tender Board for concurrent approval for limits above 1 million cedis for goods and services and 2 million cedis for works; and
- the streamlining of the following areas in order to speed up procurement decision-making and minimise delays or administrative costs:
  - re-categorisation, based on the type of institution and spending levels;
  - powers of delegation to key ETC members, to ensure a continuous implementation process;
  - availability of requisite legal and procurement personnel of ETCs, especially outside the regional capitals;
  - clarification and harmonisation of ETC functions;
  - simplification of the concurrent approval process; and
  - inclusion of thresholds for consultancy services.

To avoid subjecting procurement decisions of decentralised entities (ie, metropolitan, municipal and district assemblies) to centralised administrative review (the decision is left to be challenged through a court process) the following have been addressed under the Amendment Act:

- the removal of the Minister of Finance's discretion to exempt the application of the Act where it is in the national interest to do so;
- the introduction of provisions on the rejection of tenders, proposals and quotations;
- the introduction of provisions on the rejection of abnormally low submissions;
- the expansion of the process for public notice of a procurement contract award;
- the addressing of the issue of inducements from suppliers, contractors and consultants to deal with unfair competitive advantage;
- the provision of rules on disclosures of information to suppliers and contractors; and
- the introduction of provisions on competitive negotiation and framework agreements.

The Authority has commenced the process for the preparation of subsidiary legislation to implement, interpret and enforce the Public Procurement (Amendment) Act 2016 (Act 914) (the Amendment Act).

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The Act, without limiting the generality of the scope of application, applies to the following entities:

- central management agencies;
- government ministries, departments and agencies;
- subvented agencies;
- government institutions;
- state-owned enterprises to the extent that they utilise public funds;
- public universities, public schools, colleges and hospitals;
- the Bank of Ghana and financial institutions such as public trusts, pension funds, insurance companies and building societies that are wholly owned by the state or in which the state has a majority interest;
- institutions established by the government for the general welfare of the public or community;
- statutory funds, commissions and other bodies established by the government for a special purpose; and
- phases of contract administration.

In addition, any other institution, as far as it is engaged in the procurement of goods, works and services financed in whole or in part from public funds, must comply with the Act. By implication, any institution that does not fall into any of the categories above, and whose procurement is not financed in whole or in part from public funds, is not required to comply with the Act.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

There are no contract values excluded from the application of the Act.

The Act applies to all goods, works and services financed in whole or in part from public funds and does not exclude contracts based on the value. It does, however, provide different threshold limits above which the procurement process must be carried out by a higher authority and approved by the appropriate entity tender committee. The Act also provides thresholds beyond which specific procurement methods must be used. The Amendment Act has amended these thresholds and the respective ETCs.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The amendment of a concluded contract does not require a new procedure. However, some changes, such as an increase in the value of the contract, will require prior approval. Where there will be an aggregate increase in the original value of a contract by more than 10 per cent, a procuring entity is mandated to inform the appropriate tender review boards of any proposed extension, modification or variation order, with reasons. In the case of contracts that are not subject to review by a tender review board, any proposed modification of a contract that will result in an increase in the contract price in excess of the procurement method threshold, or the threshold of the procuring entity, shall be effected only with the prior approval of the appropriate tender review board. The requirement for prior approvals does not apply in cases of 'extreme urgency'. However, the Authority must subsequently approve any such emergency procurement.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

We are not aware of any decided case law that clarifies how amendments to concluded contracts are to be carried out.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Privatisation is currently regulated by the Divestiture of State Interests (Implementation) Law 1993 (PNDCL 326), and not the Act. Divestiture involves the disposal of government interests (ownership of shares, debentures, securities and any other property) held by the state. The Law establishes the Divestiture Implementation Committee (DIC), which is charged with the responsibility for overseeing all divestitures in Ghana. The DIC has a procedures manual that sets out the different procurement methods that may be used, depending on the nature of the divestiture.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPPs in Ghana are currently regulated by the National Policy for PPPs in Ghana (the PPP Policy). Except for unsolicited bids, the selection of private sector parties in PPP transactions shall be carried out through competitive bidding methods. The PPP Policy, however, requires that the selection and procurement of a transaction adviser to assist and advise a contracting authority on the PPP project must comply with the procurement procedures under the Act. There are currently efforts being made to prepare a specific law to regulate PPPs in Ghana, including regulating the procurement process for a private partner.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

The Amendment Act provides that requests for tenders must be published in the Public Procurement Bulletin and on the Authority's website. The invitation to tender or pre-qualify must also be published in at least one daily newspaper of national circulation. In addition, the

procurement entity may also opt to publish the invitation in a newspaper of wide international circulation, in a relevant trade publication or technical or professional journal of wide international circulation.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The Act provides that the qualification of tenderers must be assessed based on procedures and criteria set out in the invitation document. The Act specifically prohibits the contracting authority from using any criteria not set out in the invitation document. The Amendment Act provides that the procurement entity may ask a supplier or contractor for clarification of its qualification information or its submission at any stage of the procurement proceeding. However, the Amendment Act expressly prohibits the procurement entity from permitting a change in qualification information that will make an unqualified supplier or contractor qualified or an unresponsive bid responsive.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

The Act provides for restricted tendering, single-source and request for quotation methods of procurement. These methods may only be used under specific conditions outlined under the Act and the Amendment Act, with the approval of the Authority.

A procurement entity may for economy and efficiency, and with the approval of the Authority, use restricted tendering where:

- goods, works or services are available only from a limited number of suppliers or contractors; or
- the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services to be procured.

The single-source procurement method may be used where:

- the goods, works or services are available from only one source;
- there is an urgent need for the goods, works or services;
- there is an urgent need due to a catastrophic event;
- the procurement entity requires continuity or additional supply of the goods, or the performance of the works or service;
- the procurement entity enters the contract with a supplier or contractor for research, experiment, study or development purposes;
- where procurement concerns national security and single source procurement is deemed to be the most appropriate method; or
- where it is necessary to promote a socio-economic policy;

A procurement entity may request quotations for:

- goods or technical services that are readily available and are not specially produced or provided to the particular specifications of the procurement entity; and
- goods where there is an established market.

Where the request for quotations is used, the procurement entity must request quotations from at least three different supplier/contractor sources.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The Act provides that the Authority will maintain a list of debarred firms, but does not provide for modalities on how blacklisted firms may 'self-clean'. The concept of self-cleaning does not seem to be recognised or established.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The memorandum to the Act restates these fundamental principles. The Act also provides that the Authority is vested with the power to ensure that, among other things, public procurement is carried out in a fair, transparent and non-discriminatory manner.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Even though there is no express provision in the Act requiring the impartiality of the contracting authority, the Act requires that bid processes must be fair, open and transparent. Additionally, the Authority has the power to reverse or annul procurement decisions that do not comply with the Act's requirements for fairness, openness and transparency.

Conflicts of interest

17 | How are conflicts of interest dealt with?

A procuring entity shall reject a bid if a bidder offers, gives or agrees to give, directly or indirectly, to 'any current or former officer or employee' of the procuring entity or other governmental authority a gratuity in any form, an offer of employment, or any service of value as an inducement to influence the procurement process. The Amendment Act also expressly provides that a procurement entity shall reject a tender proposal or offer if the supplier or contractor has an unfair competitive advantage or a conflict of interest.

Additionally, the Act requires all officials to comply with the constitutional requirement that enjoins public officers not to put themselves in a position where personal interest conflict, or is likely to conflict, with the performance of the functions of their office.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The Act does not provide for a bidder's involvement in the preparation of tender documents.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing procurement procedure is the competitive tendering process (national or international). However, the Act provides for the

use of less-competitive procedures including restricted tendering procedures, quotations and sole source under specific circumstances, subject to the approval of the Authority.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The Act does not allow a bidder to submit separate bids in one procurement procedure. However, where the bidder is a consortium, the constituent firms – except for the lead firm – can associate with other bidders in the same procurement procedure, if the specific request for tender or proposal does not prohibit such multiple associations.

In addition, related bidders may be unable to submit separate bids in one procurement procedure, as this may be interpreted as collusion, which may lead to disqualification of the related bidders. The nature of the relationship between the bidders would, however, have to be examined on a case-by-case basis.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

There is no provision in the Act for a competitive dialogue procedure and it has not been used in practice in relation to procurement of goods, works and services financed from public funds. However, the Amendment Act introduces competitive negotiations by providing that a procurement entity may engage in procurement by requesting quotations by competitive negotiations. The detailed procedure is to be provided for by regulations.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See our response to question 21.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

The Amendment Act introduces framework agreements as a cost-saving government policy. The Amendment Act provides that a procurement entity may engage in a framework agreement for a procurement contract where the Board of the Authority and the Minister of Finance introduce a framework contracting agreement and in accordance with Regulations to be passed. The Regulations are yet to be enacted to provide the detailed rules for the conclusion of a framework agreement.

24 | May a framework agreement with several suppliers be concluded?

See our response to question 23. The Amendment Act allows a framework agreement with several suppliers to be concluded.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There are no specific provisions in the Act in this regard. In practice, once a bid is submitted and submission of bids is closed, any change of members of a consortium may be effected only with the consent of the procurement entity.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The Act does not provide direct mechanisms to further the participation of small and medium-sized enterprises and there is currently no obligation to partition awards into lots. However, the law seeks to increase the competitiveness of domestic businesses by:

- the application of a margin of preference; and
- the restriction to domestic suppliers and contractors for the procurement of goods, works and technical services where the value of the procurement does not exceed the thresholds that are now to be set by the Regulations mentioned in question 23.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant or alternative bids are admissible only where the tender document provides that such bids will be admissible. In practice, an alternative bid should be submitted together with a conforming bid.

28 | Must a contracting authority take variant bids into account?

The contracting authority is obliged to take variant bids into account when it is indicated in the tender documents that variant bids will be accepted.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

A bid is required to respond to the criteria prescribed in the set of bid documents. A bid that does not conform to the requirements prescribed in the bid documents shall be judged to be nonresponsive and shall be rejected. Generally, a tender may be declared nonresponsive if it contains deviations that materially alter or depart from characteristics, terms, conditions and other requirements set out in the invitation documents, or it contains errors or oversights that are incapable of being corrected without altering the substance of the tender.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The Act provides that the contracting authority shall accept the bid with the lowest evaluated price. The lowest evaluated tender is ascertained on the basis of objective and quantifiable criteria that are given relative weight in the evaluation procedure or expressed in monetary terms.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There are currently no provisions for abnormally low bids in the Act. The Act, however, requires the procurement entity to award the contract to the lowest evaluated bidder, which is determined on the basis of the evaluation method adopted by the procurement entity. In practice, an

abnormally low bid often relates to a bid price based on rates significantly below the known prevailing rates so as to entitle the procuring entity to reasonably assume that a successful bidder cannot meet the procurement requirements at those rates if the contract is awarded. In practice, procuring entities compile price indices periodically and may determine the 'abnormality' of the price on the basis of existing price indices. The Amendment Act, however, provides that a procurement entity may reject a submission if the procurement entity has determined that the tenderer's price combined with other considerations is abnormally low in relation to the subject of the procurement and the ability of the supplier or contractor to perform the procurement contract if the procurement entity has:

- requested the details of the submission from the supplier or contractor in writing; and
- taken account of any information provided by the supplier or contractor but maintains the view that the submission is abnormally low for the performance of the procurement contract.

32 What is the required process for dealing with abnormally low bids?

There are currently no prescriptions in the law for dealing with abnormally low bids. See question 33 on the proposal introduced in the Amendment Act. In addition to the above, the Amendment Act provides that the decision of the procurement entity to reject a submission, the reasons for the decision, and communication between the procurement entity and the supplier or contractor, must be included in the procurement proceedings and quickly communicated to the supplier or contractor concerned.

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

A complaint shall in the first instance be submitted to the head of the procurement entity within 20 days of the complainant becoming aware of the circumstances giving rise to the complaint. The procurement entity is required to make a decision within 21 days of the submission of the complaint.

The complainant may make an application to the Authority to review the decision of the procuring entity or make an application directly to the Authority if the procuring entity has not made a decision within the 21-day period. The decision of the Authority is subject to review by a court of competent jurisdiction. The Amendment Act exempts decisions of decentralised departments or agencies from this further review by the Authority. The Constitution and the Local Governance Act 2016 (Act 936) require that local government assemblies (metropolitan, municipal and district assemblies) are the highest decision-making body at the local government level. In line with that, the Amendment Act removes any power of administrative review of procurement decisions of decentralised departments and agencies and provides that such decisions can only be challenged in a court of law.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The Authority and the courts have the power to grant remedies following an application for review. The remedies granted by the court may differ from that of the Authority where an application is made to the court following a decision by the Authority.

Timeframe and admissibility requirements

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

An initial complaint to a head of a procuring entity and any subsequent review by the Authority is to be concluded within 21 days in each instance. The duration of an appeal before a court of competent jurisdiction will depend on the complexity of the case and the applicable procedural rules of the civil court.

36 What are the admissibility requirements?

Any bidder that alleges to have incurred a loss, or asserts the likelihood of an impending loss, due to a breach of a duty imposed on the procurement entity, may seek a review.

The Act, however, states that the selection of a method of procurement and the choice of a selection procedure shall not be subject to review. The Amendment Act also seeks to restrict this prohibition by providing that the selection of a method of procurement and the choice of selection procedure can be challenged where inappropriate procedures have been applied.

37 What are the time limits in which applications for review of a procurement decision must be made?

See our response to question 33.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The Act provides that where review proceedings are instituted, procurement proceedings may be suspended for a maximum of 30 working days. The Amendment Act empowers the Authority to order suspension of a procurement contract that has not entered into force, or order the suspension of a procurement contract that has entered into force, as long as the suspension is necessary to protect the interest of the applicant, unless the Authority decides that urgent public interest considerations require the procurement proceedings or a contract to proceed. However, the procurement process may only be suspended in the following circumstances:

- if the complaint is not frivolous;
- where the bidder demonstrates in the complaint that it will suffer irreparable damage if the process is not suspended;
- where the complaint has a high likelihood of success; and
- where the hearing of the complaint will not cause inappropriate harm to any procurement entity or other bidders.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Usually, the Authority suspends the procurement process for a maximum period of 30 working days. The Authority in most cases will make the final decision prior to the expiry of the 30 working days, although the Authority may extend the period if necessary.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

A procurement entity is required to give notice in writing to all unsuccessful bidders on the award of a procurement contract to a successful

bidder. The notice shall be given after the commencement of the procurement contract and shall specify the name and address of the successful bidder and the contract price.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Subject to the parts of the records that the Act restricts (and which may not be disclosed), records of a procurement proceeding may be made available to an applicant on request.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Prior to the enactment of the Act, disadvantaged bidders did not file review applications for fear of being victimised by procuring entities. However, this has changed, and recent developments indicate that there has been an increase in the number of review applications to the Authority.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The Act empowers the Authority to annul the procurement proceeding or cancel the procurement contract if a violation of the Act is established. In addition, the Act provides that the Authority can order the payment of compensation for a reasonable cost incurred by the bidder who submitted the complaint, in connection with the procurement proceedings as result of an illegal decision of, or procedure followed by, the procurement entity. The courts generally have power to award damages to any bidder who suffers damage owing to the breach of duty imposed either under law or contract and, therefore, can award damages to a disadvantaged bidder. The requirement for such a claim would be the general requirements for claims in a court of law.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

When a contract is awarded in violation of the procurement law, the Authority is empowered to annul the proceedings and cancel the procurement contract.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

No, legal protection is not available in respect of de facto awards of contract. The parties can apply to the court or the Authority for investigation into the award of the contract.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

The cost and duration of an application for review will depend on the complexity of the case and the applicable procedural rules of the civil court.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

India has a quasi-federal constitution, with a pro-federal leaning. The Union List, the State List and the Concurrent List in the Indian Constitution govern the legislative functions of the central (union) and state governments.

'Procurement' does not figure in any of the lists as a distinct subject, though the subject is covered under the State List heading 'Trade and Commerce'. The union can also legislate on the subject under its residuary powers. Parliament has not enacted any legislation on the subject so far (see question 4). Several states have enacted legislation on the subject, but the law is not comprehensive. Hence, public procurement is governed by government policies and court judgments. The policy framework primarily covered by the General Financial Rules (GFRs) 1963 (amended in 2005 and 2017) framed by the Ministry of Finance by executive order and the Delegation of Financial Powers Rules 1978 (again framed by the Ministry of Finance). The GFRs 2017 were issued by the Ministry of Finance on 11 February 2017 and came into force on 8 March 2017. Rule 153(iii) of the GFRs 2017 allows the Central Government to provide (by way of notification) mandatory procurement of any goods or services from any category of bidders, or provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services with a view to enhancing income and employment. Pursuant to this, on 15 June 2017, the Ministry of Commerce and Industry issued the Public Procurement (Preference to Make in India) Order 2017. The Order specifies the manner in which purchase preference is to be given to local suppliers. For instance, where the estimated value of procurement is approximately US$70,000 less only local suppliers will be eligible. The Order was revised by the Ministry on 28 May 2018. The revised Order now covers works as defined in the GFR Rules, 2017 and is also applicable to turnkey works. The works incude all new constructions, site preparation, additions and alteration to existing works, special repairs to newly purchased or previously abandoned buildings or structures, including remodelling or replacement; minor works; and repair works undertaken to maintain building and fixtures.

The Directorate General of Supplies and Disposals Manual on Procurement and the Central Vigilance Commission (CVC) Guidelines prescribe the procurement procedure to be followed by all central ministries. In furtherance of these rules, in August 2006 the Central Government, through the Ministry of Finance, carried out a detailed exercise and issued three manuals providing for procurement of goods, works and services. These manuals are meant to be guidelines to government ministries, relevant departments and public sector undertakings. The Ministry of Finance, Department of Expenditure issued a revised manual on the Procurement of Goods 2017 on 5 April 2017 and manual for Procurement of Consultancy and Other Services 2017 on 18 April 2017.

State governments generally follow the same procedure as the Central Government.

Judicial review of administrative action is vested in the high courts exercising their writ jurisdiction. Each state of the union has a High Court as its apex court.

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

There is no legislation for procurement, as stated in question 1. However, of late some sector-specific guidelines and regulations have come into play.

Procurement by the Ministry of Defence is covered by the Defence Procurement Procedures 2016 introduced by the Ministry of Defence on 28 March 2016 (replacing the 2013 version) and the Defence Procurement Manual 2013. The Ministry of Defence issued the Defence Procurement Manual 2016 on 4 November 2016. A subsequent notification dated 16 November 2018, issued by the Ministry of Defence, Department of Defence Production, makes it mandatory to give preference by all procuring entities to domestically manufactured defence items and products.

Similar orders have been passed for a variety of industries, such as the automotive industry (vide Notification dated 18 May 2018), railways (vide Notification dated 1 February, 2018), mining industry (vide Notification dated 16 October 2018), telecom industry (vide Notification dated 29 August 2018) and shipping industry (vide Notification dated 31 August 2018).

The Electricity Act 2003 provides for the determination of tariffs through a bidding process for the procurement of power by distribution licensees.

Under the Petroleum and Natural Gas Regulatory Board Act 2006, a board was constituted that introduced the New Exploration Licensing Policy over 1997 to 1998 to enhance exploration activity in the country. Bids are evaluated by the board on the basis of transparent quantitative bid evaluation criteria; the key criteria being technical capability, financial capability, work schedule and fiscal package.

The government of India has also developed special procedures and guidelines for the procurement of public-private partnership (PPP) projects (see question 9). There are no separate central rules or regulations governing works or service concessions. States including Gujarat, Andhra Pradesh, Tamil Nadu, Himachal Pradesh, Punjab and Bihar have infrastructure development laws that include matters pertaining to work or services concessions.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

India has not acceded to the World Trade Organization's Agreement on Government Procurement (GPA).

Proposed amendments

4 | Are there proposals to change the legislation?

In January 2011, a committee on public procurement was set up, which recommended that a public procurement law be enacted as soon as possible. Thereafter, a Group of Ministers on Corruption (an ad hoc group formed to investigate specified matters) approved the Draft Public Procurement Bill 2012. This Bill has, however, since lapsed.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The rules governing public procurement are binding only on the 'state' as defined in article 12 of the Constitution of India. 'State' is widely defined and interpreted to include not only the government, but also agencies and other autonomous bodies directly or indirectly controlled by it. Therefore, private bodies not under the government's control are not bound by the procurement procedures described in question 1.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The procurement rules and policies mentioned in question 1 are applicable to all contracts, except those of a very low value (generally US$400 or less).

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

After the awarding of the contract, the terms thereof including the scope and specifications specified should not be 'materially varied'. In exceptional cases, however, where the modifications and amendments are 'unavoidable', the same may be allowed after taking into account the corresponding financial and other implications. In order to vary the conditions, specific approval of the competent authority must be obtained.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Illustratively, in *Nex Tenders (India) Private Limited v Ministry of Commerce and Industry and Ors* (W. P. (C) No. 6,574 of 2007) the petitioner sought to challenge the extension and amendment of a government contract for providing services for the conduct of e-tendering, which according to the petitioner had the effect of widening the scope of the contract. The Delhi High Court quashed the extension and amendment of the original contract as 'the same materially and illegally alters the terms and conditions and scope of the original contract, which itself was entered into irregularly'.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

If the public entity or function is transferred into private ownership, a procurement procedure is required. On 16 May 2007, the Ministry of Finance issued special procedures and guidelines for procurement of PPP projects. The bidding process for PPP projects has been divided into two stages. The first stage is generally referred to as a request for qualification or expression of interest. The objective of the first stage is to shortlist eligible bidders for the second stage of the process. The second stage is generally referred to as the request for proposal or invitation of financial bids. Here, shortlisted bidders conduct a comprehensive examination of the project and submit their financial offers. On 18 May 2009, the Ministry of Finance issued revised guidelines for request for qualification (RFQ) for pre-qualification of bidders for PPP projects. Some of the main changes in the RFQ include elimination of the provision relating to shortlisting of bidders for more than one project. Provision has been made to:

- enable the project authority to specify restrictions to prevent concentration of projects in the hands of a few entities;
- make suitable amendments to meet social sector and other project requirement;
- increase the number of shortlisted bidders from five to six and further to seven in projects costing less than 5 billion rupees or for repetitive projects; and
- create a reserve list of bidders in case of substitution in the event of their withdrawal or rejection.

In April 2016, the Department of Economic Affairs introduced the PPP Guide for Practitioners, which serves as a manual for practitioners to develop projects through appropriate PPP frameworks. States including Andhra Pradesh, Karnataka, Rajasthan and Bihar are beginning to grant PPP Projects through the 'Swiss Challenge' method.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

See question 9.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

See question 19.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

As a result of the mandate of the Constitution of India, the government and its agencies cannot treat citizens unequally, discriminatorily, arbitrarily or unreasonably. It must not waste public money and is accountable to judicial action if it attempts to do so. The CVC Guidelines in this regard also state that there must be transparency, fairness and maintenance of competition.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

As per the Guidelines issued by the CVC from time to time, the emphasis has been on open tendering as the most preferred mode of tendering and widest possible publicity. In some cases, the procuring entity may limit the number of bidders. However, a statement of reasons to justify such imposition to limit the bidders must be provided by the procuring entity.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Under Indian law, there is no concept of 'self-cleaning', nor is there any measure to judge it. Exclusion and the extent thereof are subject to judicial review (among other things, on the grounds of proportionality).

After the specified period of exclusion is over, the officer in charge of procurement shall review the case and submit its report to the competent authority either recommending or rejecting the enlistment of the contractor. The competent authority may allow the enlistment of the contractor based on the recommendations and its own evaluation and findings.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes.

Conflicts of interest

17 | How are conflicts of interest dealt with?

The general rule prescribed by courts, as part of the administrative law of India, is that any person having a conflict of interest will not be part of the bid evaluation or award process. More specific provisions can be found in the documents created in relation to PPP projects (see question 9). The PPP bid document, among other things, provides that a bidder shall not have any conflict of interest and if it does, the authority shall forfeit the bid security or performance security bond as damages (without prejudice to any other right the authority may have). Conflict of interest is defined to include, among other things, when:

- a bidder or its constituent has a common controlling shareholding or other ownership interest;
- a constituent of a bidder is also a constituent of another bidder;
- two bidders have the same legal representation for the purposes of the bid;
- the bidders have a relationship that allows them access to each other's information or to influence the bid of any bidder; or
- the bidder has participated in preparation of any document, design or technical specification for the project.

Further, most government authorities are required to adopt the Integrity Pact recommended by Transparency International; this, among other matters, requires that the owner must exclude from the bidding process any known prejudiced person. The GFRs 2017 state that no official of a procuring entity or bidder shall act in contravention of the Code of Integrity, which includes disclosure of conflict of interest.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Any involvement of the bidder in the bidding process including in the drafting of tender documents or discussing possible specifications would lead to disqualification. Where the code of integrity has been breached, debarment for a period not exceeding two years may follow.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The general rule is that any tender above a value of 2.5 million rupees must be through invitation by public advertisement. There are five types of tenders as per the GFRs 2017:

- advertised tender enquiry;
- limited tender enquiry;
- single tender enquiry;
- two stage bidding; and
- electronic reverse auctions.

Ordinarily most procurement is conducted through advertised tender enquiries. The advertisement must be issued in the *Indian Trade Journal* (published by the government) and additionally in a national newspaper having wide circulation. The government has created a central public procurement portal where the advertisement is also to be published. Further, it should also be published on the website of the organisation. In the case of a global tender, the tender notice should be sent to the concerned foreign embassies requesting them to give it wide publicity and also post the tender notice on embassy websites.

Exceptions to the general rule of advertisement are:

- organisation certifies that the demand is urgent, setting out the nature of urgency and reasons why the need could not be anticipated earlier;
- the competent authority sets out reasons why it would not be in the public interest to procure the goods or services through advertised tender enquiry; and
- the sources of supply are definitely known and the feasibility of new sources beyond those being used are remote.

In such cases, a limited tender enquiry can be sent to all firms registered with the organisation or otherwise through the usual means of communication.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The tender documents usually prohibit 'related bidders' from submitting separate bids. The definition of related bidders can vary from instance to instance but the general intent is to prevent cartelisation and a party being able to make multiple attempts in the same process.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Post-tender negotiations are discouraged. This is specifically stated in government guidelines (CVC Guidelines dated 3 March 2007). Even post-tender negotiations with the lowest bidder (L1) are not permitted, except for reasons to be recorded in writing. CVC Circular dated 6 April 2018 clarifies that the guidelines are not applicable to projects funded by the World Bank, ADB etc (if found to be in conflict with the applicable procurement rules of these funding agencies).

The GFRs 2017 also state that negotiation with bidders after bid opening must be 'severely discouraged'. However, they state that in exceptional cases 'where price negotiation against an ad hoc procurement is necessary owing to some unavoidable circumstances, the same may be resorted to only with the lowest evaluated responsive bidder'.

The basic principle is that there shall be no competitive dialogue. In some situations retendering may be ordered. This may be if L1's price does not seem to be reasonable and it is not willing to negotiate the same or sufficient number of tenders or responsive tenders have not been obtained.

In exceptional cases, for instance, during natural disasters, where procurement is possible from a single source, the bids offered were too low or the tendering was held on numerous dates but no bidders were present, then in such situations such contracts may be awarded through private negotiations.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

The requirements for the conclusion of a framework agreement are not provided for in the procurement procedure.

24 | May a framework agreement with several suppliers be concluded?

Yes, a framework agreement (commonly referred to as 'rate contracts' in India) may be entered into with one or more suppliers for a specified period of time where the procuring entity is unsure of its specific requirements. The prices may be predetermined or determined at the stage of actual procurement. It is up to the procuring entity whether to adopt an additional competitive procedure. This, however, is limited to low value orders.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There is no specific prohibition against changing consortium members in the general procurement legislation. However, in PPP documents, there is a restriction on changing of consortium members. The authority may permit the same during the bidding stage where the lead member continues as before and the substitute is at least equal in terms of technical or financial capacity to the member sought to be replaced. Approval for change of composition shall be at the sole discretion of the authority.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Yes. The Ministry of Micro, Small and Medium Enterprises had formulated a public procurement policy for micro, small and medium-sized enterprises (MSMEs), which had been approved by the cabinet in November 2011. An order dated 23 March 2012 was issued, titled the Public Procurement Policy for Micro and Small Enterprises Order 2012. It states that the Central Government, departments and public sector undertakings shall procure a minimum 20 per cent of their annual value of goods or services from micro and small enterprises. This minimum procurement has become mandatory from April 2015. The Public Procurement Policy for Micro and Small Enterprises (MSEs) Amendment Order, 2018 came into force on on 9 November 2018 to increase the quota to 25 per cent. Further, out of the total annual procurement from MSEs, 3 per cent from within the 25 per cent target is to be done from MSMEs owned by women.

The policy also includes a further reservation of 4 per cent in favour of MSMEs owned by specified 'backward classes'. The Ministry of Micro, Small and Medium Enterprises issued a Circular dated 10 March 2016 allowing central public sector undertakings to relax the norms of 'prior experience and prior turnover' for those MSMEs that can deliver goods as per prescribed technical and quality specifications. The Ministry has also stated that there is a need for central public sector undertakings to achieve the minimum 20 per cent annual procurement target including 4 per cent by socially disadvantaged classes. It was stated that by the Ministry that during the previous financial year, 38 public sector undertakings managed to achieve the 20 per cent procurement target.

There are no rules on the division of a contract into lots.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids will be considered only if permitted by the tender conditions. Otherwise the tender is liable to be rejected.

28 | Must a contracting authority take variant bids into account?

Yes, if permitted by the terms of the tender. (See question 27.)

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Any unilateral change by the bidder may result in the bid being considered unresponsive and being rejected. However, if the deviation is a mere technical irregularity or of no significance and does not pertain to an essential condition of eligibility, the authorities have discretion to waive the same.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The general rule is that the tender is awarded to L1. The exceptions are if the price of L1 looks unreasonable and it is not willing to negotiate or if it is considered that the organisation has not received a sufficient number

of bids or responsive bids. In such a situation there can be a retender. Otherwise, the tender will be awarded to L1 without negotiation.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

As per the Manual for Procurement of Goods 2017, an 'abnormally low bid' is one in which the bid price, in combination with other elements of the bid, appears so low that it raises material concerns as to the capability of the bidder to perform the contract at the offered price. 'Abnormally low' bids vary from the estimated rates by more than 25 per cent even after updating the scheduled rates to match the prevailing cost index.

32 | What is the required process for dealing with abnormally low bids?

Abnormally low tenders may lead to a conclusion of anticompetitive behaviour and this is a ground to order retendering. Factors have been prescribed to judge the reasonableness of price, such as current market price, price of raw materials, period of delivery and quantity involved (though these are usually resorted to if the price is found to be too high and not abnormally low).

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

A tenderer shall have a right to be heard if it feels that the proper tendering process has not been followed or that its bid has been wrongly rejected. Such representation must be sent to the specified authority within one month of the adverse order and be responded to by the said authority within one month thereof. Further, the Independent External Monitors appointed under the Integrity Pact can be approached seeking review of any decision. Save for this, the decision of a contracting authority is final unless challenged before a court of law. Judicial review would lie before the High Court of the relevant state. This is an exercise of the writ-issuing powers conferred on the high courts by the Constitution of India. The Indian judiciary is independent and proactive. It can review administrative actions if they are vitiated by any bias, arbitrariness, unfairness, illegality, or if they are discriminatory or irrational or even grossly unreasonable.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes, if an appellate authority is provided for it generally has the power to modify or reverse the decision delivered by the subordinate authority. These are administrative procedures.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

This would vary from case to case. In straightforward cases of violation of constitutional principles, the review procedure may take up to 60 days – in other cases it may take up to two years.

36 | What are the admissibility requirements?

The scope for interference in a procurement procedure is limited and the courts, over a period of time, have devised rules under which they may admit a challenge to a tender. The courts would interfere only in cases where the procedure followed is arbitrary, irrational or grossly unreasonable (see question 33), or the procedure prescribed has not been followed. The view taken is that interference by the courts in commercial transactions concerning the state is not justified except where there is substantial public interest involved and where the transaction is mala fide. The courts have affirmed from time to time that the government and its undertakings must have a free hand in setting the terms of the tender. The court cannot interfere with the terms of the tender prescribed by the government merely because it feels that some other terms would have been fair, wise or logical. Recently, the Bombay High Court in *Sterling and Wilson Private Limited and Ors. v Union of India and Ors.* (W.P (L) No. 1261 of 2017), held that the decision to award the tender by the State was illegal and based upon an incorrect reading and interpretation of the Public Procurement Policy for Micro and Small Enterprises Order, 2012 and stated that it was a fit case that warranted judicial interference. It further held that if the act or award of such a contract or tender is based upon illegality or perversity and is arbitrary, there is no bar for judicial review to interfere. Another recent Judgment of the High Court of Karnataka in *Ashodaya Cement Products v Bangalore Electricity Supply Company Ltd*, dated 30 January 2019, reiterated the principles of judicial review of tender conditions and stated that where the process adopted or decision made by the authority is not mala fide or intended to favour someone or is not arbitrary and irrational or where public interest is not affected, then there should be no interference by the court in exercising its writ jurisdiction.

37 | What are the time limits in which applications for review of a procurement decision must be made?

There is no deadline for approaching a court in its writ jurisdiction. However, the court expects an aggrieved party to approach the court in good time and may decline to interfere if there has been an unreasonable delay.

No appeal lies as a matter of right, but in cases of public importance, where significant questions of law are involved or where the high court decision is grossly erroneous, an appeal would lie with the Supreme Court. The period for the same is 90 days.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No. A suspension can only be ordered by a court issuing an interim order. This is granted on consideration of the merits on a prima facie basis and the balance of injury to parties.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

No. The GFRs 2017 only make it mandatory for the procuring entity to publish details of the bid award on a central public procurement portal.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

The procurement file is treated as confidential and may not be disclosed to any person not officially involved in the procurement process. However, an application under the Right to Information Act may be made seeking disclosure of the file, including the classification, evaluation and comparison process.

An application for disclosure can be declined on several grounds, including if the state concludes that the information concerns commercial or trade secrets of third parties. Further, the third parties involved are required to be notified and heard before ordering the disclosure of information submitted by them. Besides, the court under its writ jurisdiction may call upon the state to produce the procurement file for the court's perusal (to satisfy itself or due process). The court may, at its discretion, also allow disclosure of the whole or part of the file to the parties in dispute.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Since Indian courts are independent and proactive, it is fairly common for disgruntled bidders to seek judicial review.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

So far there has been no reported case of a disadvantaged bidder claiming damages. However, in a 2007 decision (*Jagdish Mandal v State of Orissa* (2007) 14 SCC 517), the Supreme Court held obiter that, in order to claim damages, the disadvantaged bidder must establish that the process adopted or decision made by the authority was made in bad faith or intended to favour someone, or so arbitrary and irrational that the court can say that no responsible person acting reasonably and in accordance with the relevant law could have reached it, or the public interest is affected.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

This would depend upon the facts of the case and discretion of the court. Sometimes, where third-party interests have crystallised and public interest is involved, the court may not cancel the contract. See also question 36. However, there are cases to the contrary (see *Dr Subramanian Swamy v Union of India*, 2012 (3) SCC 1).

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Any party deprived of a contract owing to an illegal or unconstitutional procedure can approach the High Court in its writ jurisdiction and seek redress. As to the grounds for interference, see questions 12 and 33.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

The court fees involved in an application for review of a procurement decision are fixed and nominal (usually a few hundred US dollars). Counsel costs have a large variation.

Indian courts do not award realistic costs to the prevailing party, neither is a litigant seeking interlocutory relief subject to conditions.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The push for giving preference to goods manufactured in India began with the 'Make in India' Order 2017. This is being further defined by industry-specific orders making it mandatory to acquire goods from Indian businesses. The government continues to work on making the public procurement process more transparent and improving its World Bank Ease of Doing Business Ranking by digitising the process as much as possible.

The Supreme Court of India in a recent Judgment extensively considered the extent of judicial review in defence procurement.

The politically charged 'Rafale deal' led to a judgment passed by the Supreme Court of India on 14 December 2018 (see www.sci.gov.in/supremecourt/2018/32813/32813_2018_Judgement_14-Dec-2018.pdf). Several Public Interest Litigations (PILs) were filed inter alia questioning the legality and transparency in the procurement process of 36 Rafale fighter jets for the Indian Airforce by the Defence Ministry pursuant to a €7.87 billion Inter-Governmental Agreement dated 23 September 2016 entered into between India and France.

The Supreme Court scrutinised three issues, namely: (i) the decision-making process; (ii) the difference in pricing; and (iii) the choice of IOP (Indian Offset Partner) (a private entity called Reliance Defence) and whether there was commercial favouritism by the Indian government by swinging the contract in favour of the said entity. Initially, it was made clear that the issue of pricing or technical suitability of the equipment would not be gone into by the court. However, subsequently the court (in order to satisfy itself) received pricing details in sealed covers.

The Court, while exercising its jurisdiction and in the context of a national interest defence deal inter alia held:

- even if minor deviations in the decision-making process have occurred, it would not result in either setting aside the contract or requiring a detailed scrutiny by the court;
- where there are national security implications, the court's jurisdiction is more restricted. Defence procurement should be subject to a narrower degree of judicial review. It held as follows:

  the extent of permissible judicial review in matters of contracts, procurement etc. would vary with the subject matter of the contract and there cannot be any uniform standard or depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. The scrutiny of challenges before us, therefore, will have to be made keeping in mind the confines of national security, the subject of the procurement being crucial to the nation's sovereignty.

- the appointment of IOP (Indian Offset Partner) is a private commercial arrangement and does not assign any role to the Government of India; and
- it was also stated that it is neither appropriate nor within the experience of the court to step into the arena of what is technically feasible or not.

A petition to review this judgment is currently pending before the Supreme Court of India.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

In Ireland, the legislation regulating the award of public contracts is derived from the European Union directives that govern this area. On 5 May 2016, Directive 2014/24/EU was transposed into Irish law by the European Union (Award of Public Authority Contracts) Regulations 2016 (SI No. 284 of 2016). Legislation governing the award of contracts by utilities is dealt with separately in question 2.

The European Union (Award of Public Authority Contracts) Regulations 2016 (the Public Sector Regulations) are deemed to have come into operation on 18 April 2016, the deadline for transposition of Directive 2014/24/EU, and they apply to all procurements by 'contracting authorities' commenced on or after 18 April 2016. The Public Sector Regulations revoke the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI No. 329 of 2006), which transposed Directive 2004/18/EC in Ireland, however the 2006 Regulations continue to apply to contract award procedures or design contests commenced by contracting authorities prior to 18 April 2016 and to the award of specific contracts based on framework agreements concluded either before 18 April 2016, or on or after 18 April 2016, following a contract award procedure that commenced before 18 April 2016. The Public Sector Regulations specify the circumstances in which a contract award procedure has been commenced before 18 April 2016.

The principal exception to these rules on application is Regulation 72 of the Public Sector Regulations, which relates to the modification of public contracts, and which will apply to a contract or framework agreement concluded prior to 18 April 2016 (as well as those concluded after that date).

As in the UK, Ireland took a conservative approach when transposing Directive 2014/24/EU; the approach to implementation was essentially a 'copy out' of the provisions of the Directive.

In May 2017, new national legislation transposing Directive 2014/23/EU on the award of concession contracts (see question 2) corrected certain anomalies in the Public Sector Regulations, including aligning the rules on de minimis modifications with the provisions of Directive 2014/24/EU.

In relation to remedies, the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI No. 130 of 2010) give effect to Directive 89/665/EEC as amended by Directive 2007/66/EC (the Remedies Directives). The 2010 Regulations were amended by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015 (SI No. 192 of 2015), principally in order to grant the High Court jurisdiction to lift the automatic suspension of a contract at interim or interlocutory stage. The 2010 Regulations were further amended in July 2017 by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2017 (SI No. 327 of 2017). These amending Regulations are designed to bring the 2010 Regulations into line with the Public Sector Regulations of 2016.

Additionally, the Rules of the Superior Courts (Review of the Award of Public Contracts) 2010 (SI No. 420 of 2010) prescribe the procedure in respect of applications to the High Court pursuant to the above legislation.

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

The European Union (Award of Contracts by Utility Undertakings) Regulations 2016 (SI No. 286 of 2016) (the Utilities Regulations) transpose into Irish law Directive 2014/25/EU, which governs procurement in the water, energy, transport and postal services sectors. The Utilities Regulations were made on 5 May 2016, however, they are deemed to have come into effect on 18 April 2016 – the latest date for the transposition of the Directive – and apply to all procurements by relevant contracting entities commencing on or after 18 April 2016. The Utilities Regulations revoke the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (SI No. 50 of 2007), which transposed Directive 2004/17/EC in Ireland, however the 2007 Regulations continue to apply to contract award procedures or design contests commenced by contracting entities prior to 18 April 2016 and to the award of specific contracts based on framework agreements concluded either before 18 April 2016, or on or after 18 April 2016 following a contract award procedure that commenced before 18 April 2016. The Utilities Regulations specify the circumstances in which a contract award procedure has been commenced before 18 April 2016.

As with the Public Sector Regulations, the principal exception to these rules on application is Regulation 97 of the Utilities Regulations on contract modifications, which will apply to contracts or framework agreements concluded prior to 18 April 2016 (as well as those concluded after that date).

In May 2017, new national legislation transposing into Irish law Directive 2014/23/EU on the award of concession contracts (see further below) was used to correct certain anomalies in the Utilities Regulations, including by aligning the rules on de minimis modifications with the provisions of Directive 2014/25/EU.

Remedies in the utility sector are governed by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (SI No. 131 of 2010), as amended by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015 (SI No. 193 of 2015). The 2010 Regulations were further amended in July 2017 by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2017 (SI No. 328 of

2017). These amending Regulations are designed to bring the 2010 Regulations into line with the Utilities Regulations of 2016. The Rules of the Superior Courts (Review of the Award of Public Contracts) 2010 (SI No. 420 of 2010) prescribe the procedures in respect of remedies applications to the High Court.

The Concessions Directive (Directive 2014/23/EU) was finally transposed into Irish law by the European Union (Award of Concession Contracts) Regulations 2017 (SI No. 203 of 2017) (the Concessions Regulations) in May 2017. The Concessions Regulations are deemed to have come into operation on 18 April 2016 and apply to concession contract award procedures commenced by a contracting authority or contracting entity on or after 18 April 2016.

In July 2017, the Irish government published the European Union (Award of Concession Contracts) (Review Procedures) Regulations 2017 (SI No. 326 of 2017). These latter Regulations implement into Irish law those parts of Directive 2014/23/EU providing for remedies for breaches of the rules on concession contracts and which were not transposed by the Concessions Regulations. As such, they are the final piece in the jigsaw of Irish domestic legislation implementing the EU's reform of the public procurement regime and their promulgation aligns the remedies regimes applying to public, utility and concessions contracts.

The Defence Procurement Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security was transposed into Irish law by way of the European Union (Award of Contracts Relating to Defence and Security) Regulations 2012 (SI No. 62 of 2012).

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

In contrast to the UK, where the implementing regulations include obligations relating to public sector procurements with a value below the thresholds for application of the EU procurement rules, the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations do not include any significant additional obligations beyond those laid down in Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU (which are based on the World Trade Organization's Agreement on Government Procurement (GPA)).

Proposed amendments

4 | Are there proposals to change the legislation?

At the time of writing, we are not aware of any proposals to change or amend Irish procurement legislation.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Irish legislation defines which persons are 'contracting authorities' or 'contracting entities' rather than defining or specifying which persons do not fall under either of those terms.

Under the Public Sector Regulations, a 'contracting authority' is defined as:

(a) a state, regional or local authority,
(b) a body governed by public law, or
(c) an association formed by one or more such authorities or one or more such bodies governed by public law.

In turn, a 'body governed by public law' is defined as a body that has the following characteristics:

(a) it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
(b) it has legal personality;
(c) it has any of the following characteristics:
(i) it is financed, for the most part, by the State, a regional or local authority, or by another body governed by public law;
(ii) it is subject to management supervision by an authority or body referred to in clause (i);
(iii) it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, a regional or a local authority, or by another body governed by public law.

The Utilities Regulations apply to procurement by 'contracting entities', which are persons that are either: contracting authorities (see above definition) or public undertakings (ie, undertakings over which contracting authorities exercise directly or indirectly a dominant influence by virtue of ownership, financial participation or rules governing the undertaking) that pursue specified activities in the gas, heat, electricity, water, transport, port, airport, postal services and fuel sectors; or persons that pursue any such specified activities and have been granted special or exclusive rights by a competent authority.

The Concessions Regulations follow the definitions of 'contracting authority' and 'contracting entity' as set out above.

There is a relative paucity of Irish case law that considers the issue of whether an entity constitutes a contracting authority or contracting entity. The Court of Justice of the EU (CJEU) has considered the status of Coillte Teoranta (Irish Forestry Board) in two cases – *Commission v Ireland* (Case C–353/96) and *Connemara Machine Turf v Coillte Teroanta* (Case C–306/97) – and determined that it was a contracting authority.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The procurement legislation will only apply where a procurement has a value (net of VAT) that is estimated to be greater than or equal to the values specified in the relevant regulations.

In the public sector, the following threshold values apply:

- €5.548 million for works contracts;
- €144,000 for supply contracts and services contracts awarded by central government authorities and design contests organised by central government authorities;
- €221,000 for supply contracts and services contracts awarded by sub-central contracting authorities and design contests organised by sub-central contracting authorities; and
- €750,000 for services contracts falling within Annex XIV of Directive 2014/24/EU (ie, 'light touch services').

In the utilities sector, the following threshold values apply:

- €5.548 million for works contracts;
- €443,000 for supply contracts, services contracts and design contests; and
- €1 million for services contracts for social and other specific services listed in Annex XVII of Directive 2014/25/EU (ie, 'light touch services').

The Concessions Regulations apply to concessions with a value equal to or greater than €5.548 million.

Where the value of a contract falls below these thresholds, the procurement process will not be subject to legislation. However, such contracts may still need to be procured in accordance with the fundamental principles of procurement law where there is cross-border interest in a particular contract.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The Public Sector Regulations (Regulation 72), the Utilities Regulations (Regulation 97) and the Concessions Regulations (Regulation 43) permit the amendment of a concluded contract without a new procurement procedure in the following circumstances:

- where the contract includes a clear, precise and unequivocal review clause that provides for the proposed modification;
- where the modification involves the provision of additional goods, works or services by the original contractor, and a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the authority. Under the Public Sector Regulations and the Concessions Regulations, but not under the Utilities Regulations, there are limits on the increase in a contract's price or value a modification may entail. In the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations, the modification must be publicised in the Official Journal of the European Union (OJEU);
- where the need for modification is as a result of unforeseeable circumstances (which a diligent authority could not foresee) and the modification does not alter the overall nature of the contract. In the Public Sector Regulations and the Concessions Regulations (but not under the Utilities Regulations), there are, as above, limits on the increase in contract price or value, and in the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations, the modification must be publicised;
- where there is a change to the contractor or concessionaire as a result of an unequivocal review clause or a corporate restructuring; or
- where the value of the modification is minimal (see further below), provided that the modification does not alter the overall nature of the contract.

In certain specified situations modifications will be considered 'substantial' and may not be made without a new procurement procedure. These situations relate to the scenarios outlined by the CJEU in the *Pressetext* case (Case C-454/06).

It is worth noting that the rules in the Public Sector Regulations and the Utilities Regulations on minor modifications were previously not aligned with the Directives they purported to transpose. The EU directives require the value of the modification to be both below the applicable financial threshold and below a specified percentage of the value of the contract (10 per cent where the contract is for supplies or services and 15 per cent where the contract is for works). In contrast, Ireland's legislation, prior to its amendment, required the value of the change to be below one or other (and not both) of these values. This inconsistency has now been corrected by Regulation 47 and Regulation 48 of the Concessions Regulations to bring the national legislation into line with the EU directives.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

To date, there have been no reported cases in Ireland on the legislation relating to amendments to concluded contracts.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

There is no specific guidance in the Irish domestic procurement legislation on the circumstances in which a privatisation might require a procurement procedure; nor is there any reported Irish case law on this subject. However, the European Commission has issued state aid guidance that suggests that when a company is privatised by a trade sale, an open, transparent and competitive tender process must be held (and other conditions must be satisfied) in order to avoid notification to the Commission. When the privatisation is affected by an IPO or sale of shares on the stock exchange, it is generally assumed to be on market conditions (as the price will be the market price) and not to involve state aid.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The procurement of works, services or supplies by a contracting authority or contracting entity using a PPP contract model will be subject to procurement law where the value of the contract is above the relevant financial threshold and where it is not otherwise excluded from the application of the relevant Regulations. Where the contract to be awarded falls within the definition of a concession as set out in the Concessions Regulations, and has a value equal to or greater than €5.548 million, then it should be procured in accordance with the rules laid down in those Regulations.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the OJEU. The 2014 directives set out in detail the information to be included in the contract notice or concession notice and this is replicated in the domestic legislation.

All public contracts for supplies and services with an estimated value of €25,000 (exclusive of VAT) and above are required to be advertised on the Irish government's eTenders website. For works and works-related services, the threshold for advertising on the eTenders website is €50,000 (exclusive of VAT). Public sector buyers are also encouraged to advertise lower value opportunities on eTenders as part of the drive to facilitate small and medium-sized enterprises' (SMEs) access to government contracts.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The Public Sector Regulations do place limitations on authorities when setting the conditions for participation in a tender procedure. Such

conditions may relate to suitability to pursue a professional activity, economic and financial standing or technical and professional ability. Only specified criteria may be imposed as requirements for participation in a procurement procedure. All conditions imposed must also be appropriate, related and proportionate to the subject matter of the contract concerned. The means of proof of economic or financial standing and of technical ability are also specified in the Regulations.

The Utilities Regulations allow contracting entities to establish objective rules and criteria for participation in a tender procedure but, in contrast to the public sector rules, do not impose any further parameters or restrictions on those criteria. These provisions mirror the provisions in the relevant Directive.

The Concessions Regulations refer to the need for contracting authorities and contracting entities to verify the conditions for participation in a concession award procedure relating to professional and technical ability and financial and economic standing, but do not place any further restrictions on these conditions other than to state that any such requirements must be non-discriminatory and proportionate to the subject matter of the concession contract and related and proportionate to the need to ensure the ability of the concessionaire to perform the contract.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

The Public Sector Regulations permit a contracting authority to limit the number of bidders to be invited to tender where the restricted procedure, competitive procedure with negotiation, competitive dialogue or innovation partnership procedures are being used, but it is not permissible to impose such limitations when using the open procedure. In the restricted procedure, the minimum number is five; in competitive procedures with negotiation, competitive dialogues and innovation partnerships, the minimum number is three. Numbers may only be limited on the basis of objective and non-discriminatory criteria and the number invited must be sufficient to ensure genuine competition.

The Utilities Regulations also allow contracting entities using restricted, negotiated, competitive dialogue procedures and innovation partnerships to establish objective rules and criteria to reduce the number of candidates to be invited to tender or to negotiate. The authority must take account of the need to ensure adequate competition when selecting the number of candidates.

The Concessions Regulations allow authorities to design their own award procedures and to limit the number of candidates or tenderers to an appropriate level, provided this is done in a transparent manner and on the basis of objective criteria. The number invited must be sufficient to ensure genuine competition.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

'Self-cleaning' – the taking of measures to demonstrate reliability, despite the existence of a relevant ground for exclusion – is a concept that Ireland has inherited from the EU directives. The Public Sector Regulations specify that a bidder can regain the status of a reliable bidder in certain circumstances by providing evidence that it has paid or undertaken to pay compensation in respect of any damage caused by its criminal activity or misconduct; clarified facts and circumstances in a comprehensive manner by collaborating with the authorities investigating the matter; and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The same regime applies in the Utilities Regulations and the Concessions Regulations. The Public Sector Regulations, the Utilities Regulations and the Concessions Regulations also allow for the rules on exclusion to be relaxed in other circumstances, for example, where it would be disproportionate to exclude or where there are overriding reasons relating to the public interest.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes, the Public Sector Regulations, the Utilities Regulations and the Concessions Regulations all reiterate the general principles of equal treatment, non-discrimination, transparency and proportionality.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

There are no express provisions in the Public Sector Regulations or the Utilities Regulations that require a contracting authority or contracting entity to be independent or impartial although independence and impartiality would be implied by the general principles of equal treatment, non-discrimination and transparency. In the Concessions Regulations, contracting authorities and contracting entities are required to take appropriate measures to combat fraud, favouritism and corruption. See also question 17.

Conflicts of interest

17 | How are conflicts of interest dealt with?

The Public Sector Regulations, the Utilities Regulations and the Concessions Regulations require contracting authorities to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. 'Conflicts of interest' include any situation where a relevant staff member has, directly or indirectly, a financial, economic or other personal interest that might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure. Where a conflict of interest cannot be resolved by other less intrusive measures, it will constitute a ground for discretionary exclusion of an economic operator.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The participation in a tender process of a bidder that has been involved in the preparation of the procedure is not prohibited per se. The Public Sector Regulations and the Utilities Regulations allow authorities to consult with the market prior to commencing a procurement procedure and to seek or accept advice from market participants (who may later submit bids) in the planning and conduct of a procedure, subject to the proviso that this must not distort competition or breach the principles of non-discrimination and transparency. The legislation specifies the steps that shall be taken by an authority to ensure a level playing field for all bidders in these circumstances. These include providing other bidders with all relevant information exchanged with the consulted bidder and fixing appropriate time limits for tender return.

A bidder with prior involvement should only be excluded from the process where there are no other less draconian means to ensure compliance with the duty to treat economic operators equally. Prior to excluding such a bidder, the bidder must be given the opportunity to prove that its involvement is not capable of distorting competition. Measures taken to deal with the situation must be documented. The Concessions Regulations do not explicitly deal with the prior involvement of bidders in the preparation of a tender procedure.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The choice of procurement procedure is generally made on a case-by-case basis and very much depends on the nature and complexity of the goods, works or services being procured. The open procedure is used most frequently in Ireland, and it is the policy of the Irish government to promote the use of this procedure as much as possible in order to encourage SME participation in public procurement.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

There are no statutory rules in Ireland that would prevent the submission of bids by related bidders in a procurement procedure. This is generally left to contracting authorities to determine in accordance with EU law. The procuring body will generally specify in its published procurement documentation whether it is permitting tenders from related bidders.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Under the Public Sector Regulations, the competitive dialogue and the competitive procedure with negotiation procedures are only available for use in certain specified circumstances. The grounds for use of these procedures are now identical, and are much broader than was previously the case. Both procedures are now available for use where:

- the authority's needs cannot be met by adapting readily available solutions;
- the requirements include design or innovative solutions;
- the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
- technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; or
- where following an open or restricted procedure only irregular or unacceptable tenders are submitted.

Under the Utilities Regulations, competitive dialogue and the competitive procedure with negotiation are generally available without the need to satisfy any such conditions.

In contrast to the Public Sector and the Utilities Regulations, the Concessions Regulations do not prescribe the use of particular procurement procedures, but leave it to the contracting authority or contracting entity to design its own concession award procedure. Where negotiations are held with candidates or tenderers, the Regulations state that the subject matter of the concession contract, the award criteria and the minimum requirements may not be changed during the course of any negotiations.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Negotiation is permitted when using the competitive procedure with negotiation, the competitive dialogue, the innovation partnership and the negotiated procedure without prior publication of a contract notice. Authorities in Ireland rarely used the negotiated procedure without publication process, as they are increasingly aware of the significant negative consequences of using this procedure without satisfying the strict grounds for its use. Innovation partnerships are used very rarely. In the future, it is possible that authorities will elect to use the competitive dialogue procedure more than the competitive procedure with negotiation as the former permits certain negotiations with the successful tenderer.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Under the Public Sector Regulations the term of framework agreements is limited to four years and under the Utilities Regulations, the term is limited to eight years, although in both cases, there is a possibility to extend the term 'in exceptional cases duly justified, in particular by the subject of the framework agreement'. Frameworks and call-off contracts must be procured in accordance with the procedures specified in the legislation, although the Public Sector Regulations (Regulation 33) are more prescriptive than the Utilities Regulations (Regulation 50). Frameworks may be multi-supplier or single supplier and may or may not involve the re-opening of competition. In general, the terms of any call-off contract and the procedures for procuring the same must be consistent with the terms of the framework agreement.

Centralised framework agreements are a commonly used mechanism for purchasing by the public sector in Ireland, and the Office of Government Procurement (OGP) has been successful in establishing a significant number of framework agreements across a number of sectors for use by public bodies in Ireland. A summary of the available frameworks can be found on the OGP's website.

24 | May a framework agreement with several suppliers be concluded?

Framework agreements may be set up with one or several suppliers. Under the Public Sector Regulations, where there are multiple suppliers, a call-off contract can be awarded either:

- directly to a framework supplier where all of the contract terms and the objective conditions for determining which supplier shall be awarded the contract are set out in the framework agreement;
- by re-opening competition in part (where the framework specifies the contract terms and this procedure has been provided for in the framework documents); or
- by re-opening competition among framework suppliers where not all of the contract terms are laid out in the framework agreement.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There are no explicit statutory rules on changes to consortia members although authorities will often include in their tender documents conditions prohibiting changes without the authority's prior consent and reserving the right, where there is a change, to check that this change does not affect the fairness of the selection or tender process.

In the case of *MT Hojgaard A/S, Zublin A/S v Banedanmark* (C-396/14), the CJEU ruled there was no breach of the principle of equal treatment where one of two entities was permitted to continue by itself in a negotiated procedure, provided the single entity, by itself, met the requirements for participation and its continued participation did not place the other tenderers at a competitive disadvantage.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

In April 2014, the Department of Public Expenditure and Reform in Ireland published Circular 10/14 on initiatives to assist SMEs competing for public contracts. This Circular includes a number of measures aimed at promoting SME involvement in public sector procurement, including the requirement for public sector buyers to give consideration to splitting contracts into lots, thereby enabling smaller businesses to compete for opportunities more relevant to their size and capabilities. Other measures include:

- encouraging buyers to engage in market analysis prior to commencing a tender process in order to understand the specific capabilities of SMEs;
- the promotion of electronic tendering;
- greater use of the open procedure;
- encouraging the use of relevant and proportionate requirements for financial and technical capacity, together with the ability for candidates and tenderers to self-declare compliance with the requirements; and
- guidance on appropriate insurance requirements.

Neither the Public Sector Regulations nor the Utilities Regulations mandate the division of contracts into lots; rather, contracting authorities and contracting entities may elect to split their requirements into lots. Under the Public Sector Regulations an authority must indicate in the procurement documents the main reasons why it has not subdivided its requirement into lots. Contracting authorities and contracting entities are required to indicate whether tenders may be submitted for one, for several or for all lots and they may impose limits as to the number of lots that can be awarded to any one tenderer. In such cases, objective and non-discriminatory rules for determining which lots will be awarded to a tenderer who wins more than the maximum number of lots permitted must be included in the procurement documents. The Concessions Regulations acknowledge the possibility of awarding concessions contracts in the form of separate lots, but do not mandate the use of lots and do not otherwise include express rules in relation to lots.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids are permitted under the Public Sector Regulations and the Utilities Regulations provided they meet the minimum requirements specified by the authority. Contracting authorities must indicate, in the contract notice or, where a prior information notice is used as a means for calling for competition, in the invitation to confirm interest, whether or not variants are authorised or required. If they are not permitted by the authority they may not be submitted by the bidders. The authority shall ensure that the chosen award criteria can be applied to variants meeting the specified minimum requirements as well as to conforming tenders that are not variants. There are no express rules in the Concessions Regulations relating to variant bids (although see further in question 28).

28 | Must a contracting authority take variant bids into account?

If the authority has indicated that variant bids are authorised or required, it must take into account any variant bids submitted, provided those bids comply with any minimum requirements specified and are not otherwise disqualified or excluded. Where an unauthorised variant bid is submitted, it should not be considered or evaluated.

Under the Concessions Regulations, it is worth noting that there is more flexibility in relation to the submission of what are termed 'innovative solutions'. Where the authority receives a tender that 'proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent contracting authority or contracting entity', the ranking order of the award criteria can, exceptionally, be modified to take into account that innovative solution.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

There is generally no scope for bidders to change the tender specifications or submit their own terms of business as it is necessary to ensure equal treatment and transparency in the process. Usually, a failure to accept the published specifications or terms will lead to exclusion. There is some flexibility to negotiate the authority's contract terms under the competitive procedure with negotiation and the competitive dialogue procedure, subject always to the application of the fundamental principles.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The Public Sector Regulations and the Utilities Regulations require contracts to be awarded on the basis of the most economically advantageous tender. The award may be on the basis of price or cost alone or on the basis of price together with quality. Contracting authorities and contracting entities do not have unfettered discretion when it comes to devising award criteria. Award criteria must always be related to the subject matter of the contract in question. The Public Sector Regulations and the Utilities Regulations suggest that award criteria may be comprised of (among other things) criteria relating to:

- technical merit;
- aesthetic and functional characteristics;
- accessibility;
- design;
- social and environmental characteristics; and
- the qualifications and experience of staff, where the quality of staff assigned can have a significant impact on contract performance.

Life-cycle costing can now also be assessed as part of the award criteria.

Award criteria must ensure the possibility of effective competition and must be accompanied by specifications that allow the information provided by tenderers to be effectively verified. Concessions must be awarded on the basis of 'objective criteria' that are linked to the subject matter of the concession contract and are listed in descending order of importance in the procurement documents. As indicated in question 28, there is some flexibility, subject to certain safeguards, to adjust the ranking order of the award criteria where a tenderer proposes an 'innovative solution'.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no statutory definition of an 'abnormally low' bid in Ireland. This is generally a matter for each contracting authority or contracting entity to determine based on the circumstances of the tender in question.

32 | What is the required process for dealing with abnormally low bids?

Contracting authorities and contracting entities must require economic operators to explain costs or prices that appear to be abnormally low and must assess the information provided by consulting with the operator in question. An authority may reject a tender where the evidence provided does not satisfactorily account for the low price or costs. Where the low price is due to a failure by the tenderer to comply with applicable obligations in the fields of environmental, social and labour law, an authority must reject the tender.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In Ireland, the courts deal with review applications. There is no specific court or tribunal that is specialised to handle procurement cases exclusively. Judicial review proceedings are generally commenced in the High Court and decisions of the High Court are ordinarily appealed to the Court of Appeal. Appeals to the Supreme Court are now only permitted in exceptional circumstances.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Not applicable.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The length of judicial proceedings can vary significantly depending on the complexity of the case and the attitude of the parties to the litigation. The Irish courts are mindful of the need to progress procurement cases expeditiously; however, judicial reviews will often take between 12 and 18 months to reach full hearing and final judgment. Interlocutory hearings (eg, applications to lift award suspensions) are typically held within two to three months of the legal proceedings commencing.

36 | What are the admissibility requirements?

Judicial remedies are available to a person who has, or has had, an interest in obtaining a reviewable contract and who alleges harm, or the risk of harm, as a result of an infringement, in relation to that reviewable contract, of Irish or EU procurement law. Generally, this means that bidders or potential bidders are entitled to bring review proceedings. Other parties have no entitlement to bring proceedings under the procurement legislation, but those with sufficient interest in the outcome of the procurement (eg, trade unions) may be able to bring judicial review proceedings.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The time limits for application to a court depend on the nature of the application. Where the application is for an order to correct an alleged infringement or prevent further damage to the applicant's interests or for review of the contract award decision, the application must be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the alleged infringement.

Where the application is for a declaration of ineffectiveness, this must be made within six months after the conclusion of the relevant contract. However, where a contract award notice has been published, the time limit for commencing proceedings seeking a declaration of ineffectiveness is reduced to 30 days, beginning on the day after the notice is published in the OJEU. Similarly, where the authority notifies candidates or tenderers of the outcome of the tender process and includes a summary of the reasons for the candidate's or tenderer's rejection, the period for commencing proceedings is 30 days beginning on the day after the authority has provided the notice.

The courts do have discretion to extend the statutory time limits for making an application where the court considers there is good reason to do so. In the case of *Forum Connemara Limited v Galway County Local Community Development Committee* ([2015] IEHC 369), the High Court considered that good reasons existed and permitted the applicant to pursue a challenge outside of the statutory 30-day time limit. The decision to extend the time limit was subsequently appealed to the Court of Appeal, which restored the strict approach in Ireland to time limits in procurement cases. The Court of Appeal held that enabling such an action to proceed would constitute a 'gross impairment of the effectiveness of the implementation of the Community Directives on the award of public contracts' ([2016] IEHC 493).

More recently, in the case of *Newbridge Tyre and Battery Co Ltd v Commissioner of An Garda Síochána* ([2018] IEHC 365), the High Court considered at what point in time the clock began to run against an applicant. The Authority alleged that the proceedings in this case had not been brought within 30 days of the applicant being notified of the decision to award the contract. However, based on the factual situation, which involved the exchange of correspondence between the applicant and the Authority following notification of the award decision, the Court came to the view that time ran not from the date of notification of the award decision but from the date of knowledge of the alleged infringement, which was only revealed to the applicant in the correspondence which followed notification of the award decision. Accordingly, the applicant was not out of time to bring proceedings.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Yes, if legal proceedings are commenced in the High Court, the contracting authority shall not conclude the contract until the Court has determined the matter or the Court gives leave to lift any suspension of the award procedure or the legal proceedings are discontinued or otherwise disposed of.

According to the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 as amended by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015 (and equivalent provisions in the legislation governing utility undertakings and the award of concession contracts), the contracting authority may apply to the High Court to have the automatic suspension lifted. When deciding whether to lift the suspension, the Court is required to consider whether it would

be appropriate to grant an injunction preventing the authority from entering into the contract and only if the Court considers that it would not be appropriate to grant an injunction may it make an order permitting the authority to conclude the contract.

In the case of *Powerteam Electrical Services Limited v Electricity Supply Board* ([2016] IEHC 87), the Irish High Court confirmed that in determining whether it is appropriate to grant an injunction, the principles to be applied were those set out in *Campus Oil Limited v Minister for Industry and Energy (No 2)* ([1983] IR 88).

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Since the law in this area changed in 2015, the courts have tended to permit the lifting of automatic suspensions by contracting authorities (approximately 75 per cent of cases) but it is possible that this could change following the Irish Court of Appeal decision in *WordPerfect Translation Services v Minister for Public Expenditure and Reform* (see question 43).

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Yes. There is a requirement under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (and the equivalent legislation applying to concession contracts and utilities contracts (see question 2)) to notify unsuccessful candidates and tenderers of the outcome of above-threshold procurements before concluding a contract and to observe a standstill period following such a notification.

The award of a contract during the standstill period is prohibited. The length of the standstill period depends on the method used to transmit the notice: where fax or electronic means are used to despatch the notice, the standstill is 14 calendar days beginning on the day after the notice is sent; where the notice is sent by any other method, the standstill period is 16 calendar days beginning on the day after the notice is sent.

In *RPS Consulting Engineers Limited v Kildare County Council* ([2016] IEHC 113) the High Court clarified the debriefing obligations of contracting authorities under Irish Law. More recent cases relating to debriefing include: *Sanofi Aventis Ireland Ltd trading as Sanofi Pasteur v Health Service Executive and Glaxosmithkline Ireland Limited (Notice party)* ([2018] IEHC 566) and *Transcore LP v National Roads Authority operating under the name of Transport Infrastructure Ireland* [2018] IEHC 569.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

Under Regulation 84 of the Public Sector Regulations, contracting authorities are required to prepare a written report containing various information relating to each contract or framework agreement covered by the Regulations. Authorities are also required to maintain documentation to record the progress of procurement procedures. Similar (but not identical) provisions are contained in Regulation 108 of the Utilities Regulations. However, there is no automatic right for a tenderer to have access to any such file or records. There is no requirement in the Concessions Regulations to prepare a written report, although authorities are required to provide for appropriate recording of the stages of the procurement procedure.

Litigants can seek to access the authority's procurement file and records during the course of legal proceedings via the discovery procedures. Members of the public may also seek to obtain information about procurement procedures by means of a request under the Freedom of Information Act 2014 if the contracting authority is subject to this legislation.

Standstill notices are required to contain specified information including, in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of the tender and a description of the 'characteristics and relative advantages of the tender selected'.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

Increasing numbers of unsuccessful bidders are seeking legal advice on their options following notification of the outcome of a competition, but it is not the custom for unsuccessful bidders to file court proceedings and the decision to do so is generally not taken lightly, particularly given the costs involved in bringing review proceedings. There are approximately five to 10 reported procurement decisions of the courts each year.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes. An unsuccessful bidder can make a claim for damages and the court has the power to award damages as compensation for loss resulting from an infringement of procurement law. In the recent *WordPerfect Translation Services* case, the Irish Court of Appeal determined that damages can only be awarded where there has been a 'sufficiently serious' breach (ie, the *Francovich* test).

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes. A concluded contract may be cancelled, or more precisely, the obligations that remain to be fulfilled may be cancelled by the courts in certain limited circumstances – for example, where a contract has been concluded without a requisite contract notice first being published or where there has been a breach of the standstill procedures combined with an infringement of the substantive procurement rules that has affected a tenderer's chances of applying for a review.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

The remedy of ineffectiveness is available where a contract is awarded directly by an authority and there is no lawful basis for such an award. Where the court declares a contract ineffective, all unperformed obligations are cancelled. Obligations already performed are unaffected. No decision of the Irish Courts has yet declared a concluded contract to be ineffective.

In cases where the court declines to make a declaration of ineffectiveness (because, for example, there are overriding reasons in the public interest that require the contract to be maintained), it must impose an alternative penalty. This can be one or both of the following: the imposition on the authority of a civil financial penalty (of up to 10 per cent of the value of the contract) or the termination or shortening of the duration of the contract.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

The costs of a judicial review will vary greatly, depending on the complexity of the case and the time that it takes to conclude matters. Broadly, applicants can expect to pay professional legal fees of at least €200,000 to €300,000 if a case proceeds to full hearing. Should a party lose a case, it may also be liable to pay the costs of the other party to the proceedings.

In the recent case of KPW Business *Forms Ltd t/a KPW Print Management v State Examinations Commission* [2019] IEHC 141 legal proceedings were brought challenging an award decision. The contracting authority subsequently abandoned the competition, rendering the legal proceedings moot. The High Court awarded costs to the applicant as a result of the unilateral decision of the authority to discontinue the competition as a result of the procurement challenge.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

There has been a steady flow of procurement challenges during the past 12 months, a number of which have resulted in full trials. Large infrastructure projects appear to be particularly susceptible to challenge.

Public procurement has featured prominently in the mainstream press and media during this period as a result of significant cost overruns on certain major capital projects (eg, National Children's Hospital). There is currently much public focus on the way in which the public sector procures contracts and establishes pricing in the construction context in particular.

A number of projects have also run into difficulties following reports of bidders liaising inappropriately with the representatives of awarding authorities.

The Office of Government Procurement (OGP) published updated guidance in January 2019 on 'Public Procurement Guidelines for Goods and Services'. Aimed at demystifying some of the more complex rules and procedures around public procurement and making the rules more accessible to contracting authorities and suppliers, the revised guidelines are intended to support contracting authorities when awarding goods and services contracts. The OGP has also published a number of new information notes, including on incorporating social considerations into public procurement and on Brexit and public procurement. All of the above can be found on the OGP's website.

In the recent case of Sanofi Aventis Ireland Ltd trading as Sanofi Pasteur v Health Service Executive and Glaxosmithkline Ireland Limited (Notice party) ([2018] IEHC 566), the Irish High Court considered the adequacy of reasons provided by the contracting authority in a competition for a contract under a framework agreement for the supply of various vaccine products. The judgment is interesting in that it shows the Court following the decision in RPS Consulting Engineers Limited v Kildare County Council ([2016] IEHC 113) in which the High Court expounded the debriefing obligations of contracting authorities under Irish law. In Sanofi, while the Court ruled in favour of the contracting authority on most of the grounds of challenge, the applicant did obtain a declaration that the contracting authority had infringed its rights in relation to the obligation to give reasons in respect of certain sub-criteria. The Court directed the contracting authority to provide full reasons including the characteristics and relative advantages of the successful tender, but stopped short of quashing the decision of the contracting authority on the basis that to do so would be plainly disproportionate – the breach, if remedied, would be insufficient to alter the outcome of the competition.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The provisions of law governing the award of public contracts are contained in Legislative Decree No. 50 of 18 April 2016 (the Code), structured on 220 articles and XXII annexes.

The Legislative Decree is commonly referred to as the Code of Public Contracts. The legal framework also includes some articles from Presidential Decree No. 207 dated 5 October 2017 and a number of decrees (about 50) by the Italian Ministry of Infrastructure and Transport and guidelines of the National Anticorruption Authority (ANAC).

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

The Code drafts the general regulation of public contracts and concessions and the discipline of the 'special sectors' (water, energy, transport and postal services).

The general framework is completed by specific legislation (eg, on public utilities). Moreover, the specific legislation governing the award of public works in the defence and security sectors is also contained in Legislative Decree No. 208/2011, in compliance with directive 2009/81/EU.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

In compliance with the European directives of 2014, the Code makes reference to the obligation of the awarding administrations to reserve to the economic operators of the agreements' states signatories to which the EU is bound – which include the GPA – a treatment that is not less favourable than that reserved for the economic operators of EU countries (article 49 of the Code).

Proposed amendments

4 | Are there proposals to change the legislation?

Legislative Decree No. 50/2016 has already undergone some changes provided by Legislative Decree No. 56/2017 and, recently, Decree Law No. 135/2018.

The Italian government claims to have introduced significant changes to Legislative Decree No. 50/2016 in order to re-launch the economy based on the public contracts sector.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

According to the Code, contracting authorities are the state, all regional and local authorities, bodies governed by public law and associations formed by one or more such authorities or one or more such bodies governed by public law. Private entities could be considered as contracting entities if operating in special sectors or when certain conditions are fulfilled (eg, they hold a concession).

Poste Italiane, which was previously entirely covered by public law, is now subjected to public contract law exclusively for activities carried out in the postal service sector; for other activities (eg, for payment services and money transfer), Poste Italiane has been granted an exemption by the European Commission under article 34 Directive 2014/25, because its activities are directly exposed to competition in a market to which access is not restricted. Other public undertakings, mostly deriving from public entities operating in special sectors (eg, ENI), have been granted similar exemptions by the European Commission under article 34.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Article 35 of the Code indicates the economic thresholds that coincide with those dictated by the EU directives.

Awarding of contracts whose value is higher than the European thresholds is regulated by the Code in accordance with the EU directives.

For public contracts whose amount is lower than the European thresholds, article 36 of the Code dictates more streamlined award procedures.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Contracts may be amended without a new procurement procedure only in the cases established by article 106, paragraphs 1 and 2, of the Code:

- if the amendments have been provided for in the initial tender documents in clear, precise and unequivocal clauses, and do not make any amendments altering the overall nature of the contract;
- for necessary additional activities, in the event that changing the contracting party appears to be infeasible for economic or technical reasons;
- in the event of circumstances that were unpredicted and unpredictable for the awarding administration or the awarding entity

(change orders during works in progress), such as the issuing of new provisions of law or regulations;
- in the event of replacement of the original contractor in the cases provided by article 106, paragraph 1(d); or
- because of project errors or omissions negatively affecting the carrying out of the works or their relevant use, if the value of the change is below the values provided by article 106, paragraph 2. Any substantial amendments are also prohibited (ie, any amendments that considerably alter the originally agreed-upon essential elements of the contract (article 106, paragraph 1(e) and paragraph 4 of the Code)).

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The European Court of Justice (leading case *Fruit Juices*, Court of Justice, 29 April 2004, case C-496/99 P), clarified that the *discrimen* between admissible and inadmissible amendments lies in the substantial nature of the amendment (ie, in its suitability to alter the originally relevant elements of the contract). The Italian Council of the State has ultimately ruled that amendments to the project (from the typological, structural and functional point of view) are permitted in the case of a manifestation of the will of the contracting authority. This faculty must be expressed in a prior provision of the tender regulations, which must also identify the minimum requirements that mark the limits within the which the work proposed by the competitor constitutes something different with respect to that prefigured by the administration (Council of The State, Div. V, sentence No. 269 of 17 January 2018).

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Privatisations usually require a procurement procedure, above all when public powers or public functions (services, works) are transferred to the private sector.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Part IV, Title I of the Code governs public-private partnerships, such as the concession of services, project financing contracts and joint ventures. In all these cases, the choice of private partner takes place through a public tender.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Articles 72 and 73 of the Code provide that all the announcements and calls for tenders relating to contracts in both the ordinary and special sectors are published by the Publications Office of the European Union. Within the territory of the Republic of Italy the announcements and calls for tender are published:
- on the website of the contracting authority and on the ANAC's digital platform of the calls for tender, when the legal effects connected to advertising on a nationwide basis (eg, the submission of the bid) start running from the date of such publication;
- on the ICT service platform of the Italian Ministry of Infrastructures and Transports; and
- through an abstract, in at least one of the principal national and local daily newspapers.

Prior to the date of operation of the ANAC's platform, the legal effects start running from the date of publication in the Official Bulletin of the Republic of Italy and publication in the municipal noticeboard (*Albo Pretorio*) for those works worth less than €500,000.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

In general, public contracts are awarded on the basis of the general requirements laid down by article 80 and the special requirements provided by article 83 of the Code.

The general requirements provided by article 80 – recently emended by Decree Law No. 135/2018 – are mandatory and the contracting authorities are not allowed to require more general requirements than those provided by the applicable legislation.

The requirements provided by article 83 are technical-professional and economic-financial. In this case, in compliance with the principle of proportionality, the contracting authorities have the discretionary power to apply additional requirements in order to ensure the technical and financial reliability of the participants and to anchor the evaluation of the reliability of a company not only to the elements defined by the general provisions of law, but also to the criteria considered relevant to the specific needs of the individual proceeding.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

As provided by article 91, paragraph 2 of the Code, the contracting authorities may limit the number of bidders in the following circumstances:
- in restricted procedures, in which the number of candidates cannot be lower than five; and
- in competitive procedures with negotiation, in procedures with competitive dialogue and in partnerships for innovation, in which the minimum number of candidates cannot be lower than three.

However, if the number of candidates that satisfy the selection criteria and the minimum levels of ability is lower than the minimum number, the contracting authority may continue the procedure by inviting candidates who possess the required skills and abilities.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Article 80 of the Code permits a bidder who is responsible for the irregularities provided by paragraph 1 of the same disposition, to regain the status of a suitable and reliable bidder, through self-cleaning measures. Such measures consist of the operator's obligation to demonstrate that:
- he or she has indemnified or undertaken to indemnify any damage caused by his or her irregularities; and
- he or she has adopted measures of a technical organisational nature, and relating to personnel, that are suitable to prevent further crimes or offences.

Self-cleaning measures cannot be used for all the exclusion events governed by article 80, paragraph 1 of the Code, but only in cases in which the final sentence imposes imprisonment as punishment for a period not exceeding 18 months or has recognised the mitigating factor of collaboration as identified for each individual crime. Moreover, the adoption of self-cleaning measures must have taken place within the limit fixed for the submission of the bids and must be indicated also in the Single European Tender Document.

Of course, the contracting authority is expected to evaluate whether such measures are sufficient to avoid the exclusion of the bidder from the procedure.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Article 30 of the Code lays down the general principles of public contracts legislation: free competition, non-discrimination, transparency and openness. To the latter principles expressly mentioned by the Code, those provided in general by Law No. 241/1990 for any and all activities of the public administration (eg, impartiality) must obviously be added.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The Code, both at the level of general principles (article 30) and at the level of specific rules and regulations, requires that the contracting authority is impartial (ie, equidistant from the bidders involved in the selection procedure of the contractor). The Code also prohibits the adoption of discriminatory conditions for accessing the tenders, requires uniform application of the rules to all the bidders and prescribes the identification of the contractor on the basis of objective and predefined parameters. Conversely, the contracting authority does not need to be independent; it is an administration, not a judge.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Article 42 of the Code defines 'conflict of interest' as a situation in which a subject (from a contracting authority or an economic operator), who could influence in any way the result of a procedure, has a financial, economic or other personal interest. These situations give rise to a situation of conflict of interest and determine an abstention obligation, as provided by article 7 of Decree No. 62 of 16 April 2013 of the President of the Republic. A person who may be in a situation as described above is required to notify the contracting authority thereof and to abstain from participating in the procurement procedure.

Except for cases of administrative and criminal liability, a failure to abstain represents a source of disciplinary responsibility against the public employee.

The rules about conflict of interest also apply to tender commissioners (those who evaluate the bids of competitors). With reference to the tender commissioners, case law has clarified that when a potential conflict of interest can be hypothesised, the commissioner must abstain. The conflict of interest can be expressed not only in terms of serious 'enmity' (article 51, paragraph 3 of the Code of Civil Procedure) against a candidate, but also in all cases of particular 'friendship' or assiduousness in relationships (personal, scientific, working, study), compared to another competitor, to such an extent that it can also lead to concern about a substantial lack of impartiality. Therefore, if it is true that, as a rule, the existence of single and occasional relationships between a candidate and a member of the examining commission does not entail any noticeable alterations in the level playing field between competitors, it is equally true that the existence of a constant (not to say absolute) collaborative relationship necessarily determines a particular bond of friendship between the aforesaid subjects, which is suitable to determine an incompatibility from which the obligation of abstention of the commissioner arises, on pain of failing to spoil in full the insolvency transactions (Regional Administrative Court of Campania, Salerno, Decision No. 706/2018).

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The Code prohibits participation in a tender procedure if there was involvement in its preparation. In the event that such involvement represents one of the situations defined by the law as a conflict of interest (see question 17), the prohibition is absolute, since those events represent conclusive presumptions. In the event that the involvement does not constitute any of the cases expressly governed by provisions of law, it is necessary to ascertain whether the situation represents a wrongful competitive advantage in the framework of the tender (Council of the State, Div. V, Decision No. 3415/2017).

The above situations should not be confused with the participation of the (economic) operators in a market test, often carried out by the contracting authorities before launching a tender in order to draft the procurement requirements and rules.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

Article 59 of the Code provides different procedures – open, restricted, negotiated, competitive dialogue and partnership – subject to the prior publication of a call for tender or notice of call for tender.

In the open procedures the candidates submit their bids in compliance with the procedures and terms provided in the call for tender.

The restricted procedures are characterised by a biphasic structure. At first, bidders provide the information requested by the awarding administration for the purpose of qualitative selection, in compliance with the procedures and terms established in the notice of the call for tender. Later, after an evaluation of the information so provided, only the suppliers invited by the awarding administration may submit a bid.

Negotiated procedures, competitive dialogue and partnership have an exceptional residual import, since it is possible to adopt such procedures only in the presence of certain conditions established by the law (see questions 21 and 22).

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Article 80, paragraph 5(m) of the Code provides an exclusion ground for the case of bidders that are, with respect to another participant in the same procedure, in a control situation pursuant to article 2359 of the Italian Civil Code or in any relation, including a control situation or a relationship that entails that the bids are imputable to a single decision centre. Article 2359 of the Italian Civil Code considers as 'subsidiaries' those companies:

- in which another company possesses the majority of votes that can be exercised in the ordinary shareholders' meeting;

- in which another company has the availability of a sufficient number of votes to exercise a dominant influence in a shareholders' meeting; or
- that are under the dominant influence of another company by virtue of particular contractual bonds with it.

Affiliates are those companies on which another company exercises a significant influence. According to case law, however, it is not possible to penalise the connection among several companies through their automatic exclusion from the selection procedure, since it is necessary to assess whether, in concrete terms, such a situation has affected their respective conduct in the framework of the tender.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Procedures based on negotiations with bidders are the negotiated procedure with or without publication of the call for tender, competitive dialogue and partnership for innovation. Articles 59, 63 and 65 of the Code lay down in a mandatory manner the cases in which one may avail itself of one or other of the above-mentioned procedures.

The competitive procedure with negotiation and competitive dialogue can be applied in the following cases:

- when in the open tender or in the restricted procedure only irregular or inadmissible bids have been submitted;
- when the interest of the administration cannot be satisfied other than through immediate solutions;
- when innovative solutions are necessary;
- when the supply, due to its special nature, cannot be awarded without prior negotiations; or
- when its technical specifications cannot be exactly defined in advance by the contracting authority.

Only the suppliers invited by the contracting authority (five at least) may participate in the negotiated procedure without the preparation of a call for tender; the suppliers are identified on the basis of information concerning their characteristics of economic and financial qualification and their technical and professional characteristics inferred from the market, in compliance with the principles of transparency, competition and rotation.

The procedure negotiated without the prior publication of a call for tender may be used:

- if, upon completion of an open or restricted procedure, no bids or applications for participation have been received or those received are to be considered not appropriate; or
- if the works, supplies or services can be provided exclusively by a certain operator, in the cases specifically provided by the law (article 63, paragraph 2(b).

In the event of public contracts for supplies, the procedure is also allowed:

- if the products forming the subject of the contract are manufactured exclusively for the purpose of research;
- in the event of additional deliveries carried out by the original supplier and intended for the renewal in part or the extension of supplies or plants and systems;
- for supplies that are listed and purchased on the commodity market; or
- for the purchase of supplies or services on particularly advantageous conditions, from an operator that is finally ceasing its activity or from bodies of the insolvency procedures.

Moreover, this procedure can be used for the repetition of works or services already awarded to the successful bidder of the initial contract if such award took place according to the procedure provided by article 59, paragraph 1.

The contracting authorities may avail themselves of a partnership for innovation.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The procedures involving negotiations with the bidders can be used exclusively in the cases provided for under the law.

Italian law provides for different procedures that permit negotiations with bidders, each subject to particular conditions (see question 21). Among these, the procedure that is used most often is the competitive procedure with negotiation, because the preconditions for its application are less rigid.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

A framework agreement is an agreement concluded between one or more contracting authorities and one or more suppliers for the purpose of establishing the clauses relating to the contracts to be awarded during a certain period of time, in particular as far as prices and, should it be the case, the envisaged quantities are concerned.

The Code regulates framework agreements in article 54.

Framework agreements may be used for works, services and supplies. In order to conclude a framework agreement, the contracting authorities are required to launch a procurement procedure provided by the Code. Except in exceptional duly motivated cases, the duration of the framework agreement cannot exceed four years for ordinary sectors and eight years for special sectors.

In any event, the public contracts awarded on the basis of a framework agreement may not provide for substantial amendments to the conditions provided by the agreement.

24 | May a framework agreement with several suppliers be concluded?

As provided by article 54 of the Code, a framework agreement may be concluded with one or more suppliers. Contracts based on framework agreements concluded with several suppliers may be awarded following different procedures, provided by article 54 of the Code.

Competitive procedures, if provided, are based on the same conditions applied to the award of the framework agreement, if expressly laid down on other conditions or if indicated in advance. In particular, the contracting authority is bound to consult, in writing, the suppliers that are able to execute the contract, fixing a reasonable deadline for the submission of the bids, which must remain secret up to the expiration of the term scheduled for the submission. The contracting authorities award the contract to the bidder that submitted the best bid on the basis of the awarding criteria set out in the specifications of the framework agreement.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Article 48, paragraph 9 of the Code prohibits any changes in the composition of bidders (joint ventures and ordinary consortia) with respect to the composition resulting from the undertaking that submitted in the bid. A breach of such prohibition entails the annulment of the award or the nullity of the contract, as well as the exclusion of the bidders, unless some specific conditions are fulfilled (article 48, paragraphs 17, 18, 19, 19-bis and 19-ter of the Code).

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Article 31, paragraph 7 of the Code states that the criteria for participation in tenders must be such as not to exclude micro, small and medium-sized enterprises (SMEs).

Moreover, to incentivise the participation of SMEs, the contract should usually be divided into lots awarded to one or more operators. In this case, the contracting authorities indicate in the call for tender or in the letter of invitation for submitting a bid, whether the bids may be submitted for one single lot, for a certain number of lots or for all the lots, and whether the number of lots that may be awarded to one single bidder is limited.

In order to entrench furthering the use of this instrument, article 51 of the Code provides for an obligation of the administrations to justify in the call for tender or in the letter of invitation and in the single report any decision not to divide the contract into lots.

However, the contracting authorities are prohibited from dividing into lots for the sole purpose of avoiding the application of the provisions of the Code, as well as to award through an artificial aggregation of contracts.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

The candidates may submit variant bids only when expressly allowed by the contracting authorities in the procurement documentation.

As provided by article 95, paragraph 14 of the Code, the contracting authority authorising or requesting variant bids must mention in the tender documentation the minimum requirements that the variant bids must meet, as well as the specific procedures for their submission.

28 | Must a contracting authority take variant bids into account?

As provided by article 95, paragraph 14 of the Code, the contracting authorities must take into account the variant bids submitted by the candidates, if these are expressly requested and if they meet the minimum requirements established by the tender documents. In procedures for awarding public supply or service contracts, contracting authorities that have authorised or required variants shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

As a general rule, which dates back to 1924 (Royal Decree No. 824/1924, article 729), the bidders may not amend the specifications of the bid. The principle has been constantly applied in national administrative case law. If a bidder amends the specifications, then its bid shall be excluded. There are, however, situations in which the bidders are permitted to propose limited adjustments of the specifications (see question 27).

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

According to article 95 of the Code, the award may take place on the basis of two mandatory award criteria: the lowest price criterion and the economically most advantageous bid. In the first instance, the contracting authorities take into account only the economic component of the bid: the contract is awarded to the bidder offering the lowest price. According to the second criterion, the contracting authorities also take into account the qualitative elements of the bid, such as the technical, aesthetic and functional characteristics of the service or supply, the impact on the environment, profitability etc. This criterion permits selection of the bid with the best quality-price ratio.

Compared to the pre-existing legislation, which left to the discretion of the awarding administration the choice of either one or the other, the criterion of the economically most advantageous bid now represents the normal criterion one, while that of the lowest price or cost represents the residual alternative.

In particular, according to article 95, paragraph 4 of the Code, only in some specific cases may a procedure be awarded on the basis of the lowest price criterion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

An abnormally low bid is a bid that cannot ensure to the bidder a profit in relation to the scope of the contract. In order to identify the 'anomaly threshold', the Code (article 97, paragraphs 2 and 3) provides for two separate methods, depending on whether the contract is awarded according to the lowest price criterion or to the economically most advantageous bid criterion.

In the first instance, the bid is considered anomalous if it shows a rebate equal to or higher than an anomaly threshold determined according to one of the methods provided by the Code (article 97, paragraph 2) and it is applied when the bidders are equal to or more than five. Its purpose is to avoid unlawful agreements being reached between the bidders, making it impossible to determine the parameters of the anomaly threshold in advance.

In the case of procedures based on the criterion of the economically most advantageous bid, the anomaly threshold continues to be identified with exceeding, both for the price component and the other evaluation elements, 80 per cent of the maximum score provided by the call for tender (article 97, paragraph 3).

The Code also provides a special discretionary power to the contracting authority, which may also submit to the verification process those bids that, even though they remain below the anomaly threshold, on the basis of 'specific elements' appear at first sight to be abnormally low (article 97, paragraph 6).

32 What is the required process for dealing with abnormally low bids?

When a bid appears to be abnormally low (see question 31), the contracting authority starts an inter partes proceeding with the bidder, granting it a term no shorter than 15 days, for the submission of written explanations of the prices or costs proposed in the bid. The contracting authority excludes the bid only if the elements provided do not sufficiently justify the low amount of the proposed prices or costs, or the same authority has assessed, on the basis of a technical judgement on the adequacy, seriousness, sustainability and feasibility of the bid, that the bid is abnormally low because it does not meet the environmental, social, labour, subcontract and security obligations (article 97, paragraph 5). In particular, no justifications are admitted on the cost of labour, which must comply with the minimum wage set by law and collective bargaining agreements, and the cost of security (article 97, paragraph 6). An additional reason for exclusion is the receipt of state aid, unless its compatibility with the domestic market is proved pursuant to article 107 of the Treaty on the Functioning of the European Union (article 97, paragraph 7).

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In accordance with Directive 2007/66/EC (the remedies directive), the award of contracts and other acts relating to the tender procedures may be challenged exclusively by filing a complaint with the competent Regional Administrative Court (Code of Administrative Procedure, article 120, paragraph 1). The Regional Administrative Court decides in the first instance, and its decision may be challenged by filing an appeal before the Council of the State. The appeal decisions of the Council of the State may be challenged before the Supreme Court of Cassation only for reasons relating to the jurisdiction.

The ANAC is entitled to act directly in court, without prior communication with the Contracting Authority, to challenge calls for tenders, general deeds and provisions relating to contracts of significant impact issued by any contracting authority if it deems that they violate the relevant regulations of public contracts relating to works, services and supplies.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Only administrative courts are empowered to rule on the setting aside of the award procedures and to declare the invalidity of the awarded contract in the cases provided for under the law (Code of the Administrative Procedure, articles 121 and 122). However, it is possible to apply to the ANAC to obtain pre-litigation protection: in these cases the ANAC has the power to express a binding pre-litigation opinion for the parties, which they have agreed to in advance (article 211, paragraph 1 of the Code); the ANAC is also entitled to take legal action to challenge the calls for tenders, the other general acts and the provisions relating to contracts of significant impact, issued by any contracting authority, if it considers that they violate the rules on public contracts relating to them for works, services and supplies (article 211, paragraph 1-bis); then the ANAC, if it believes that a contracting authority has adopted a provision vitiated by serious violations of the Code, issues, within 60 days from the news of the violation, a reasoned opinion in which it specifically indicates the legitimacy flaws found. The opinion is sent to the contracting authority; if the contracting authority does not comply with the deadline set by the ANAC, in any case not exceeding 60 days from the transmission, the ANAC can appeal, within the following 30 days, to the administrative judge, applying the procedure established by article 120 of the code of the administrative process (article 211, paragraph 1-ter).

For the application of the last two paragraphs mentioned, the ANAC, on its own authority, can identify the cases or types of measures in relation to which it exercises its powers (article 211, paragraph 1-quater).

To reduce litigation, it is possible to ask for an arbitration proceeding (articles 209 and 210 of the Code). The decisions and the acts taken by the ANAC, and the arbitration award, may be challenged before the competent Regional Administrative Court.

Timeframe and admissibility requirements

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

All the procedural terms for proceedings in the matter of public contracts are reduced to a half (articles 119 and 120 of the Code of Administrative Procedure). Consequently, the duration of judicial proceedings, after deducting the time for the two instances before the Regional Administrative Court and the Council of the State, is approximately one year. This period may be less in the case of the 'super accelerated' procedure (article 120, paragraph 2-bis of the Code of Administrative Procedure), which concerns the challenge of admission and exclusion measures to public procedures.

36 What are the admissibility requirements?

Within the scope of an administrative procedure, the standing to apply for review in disputes having for their subject public tenders is related to a differentiated situation deserving protection. Such position is identified by legal literature and case law in the bidder's participation in the tender procedure. Consequently, anyone who has abstained from participating in a selection procedure has no standing to apply for its annulment, even claiming an interest in point of fact that the call for tender be repeated.

As a general rule, it is possible to apply for review of the awarding of a contract or other acts relating to a procedure subject to the Code's contract rules that have damaged an operator, if it proves its interest.

The Code of Administrative Procedure has introduced a special procedure for lodging a complaint against a measure that determines the exclusion from the tender or the admission of bidders without the necessary requirements for participation (article 120, paragraph 2-bis).

Economic operators can also apply for review in order to obtain the award of a contract according to the rules of the Code.

37 What are the time limits in which applications for review of a procurement decision must be made?

As a general rule, a review before the competent Regional Administrative Court for the setting aside of the award procedure or acts relating to a public procedure is subject to the term of 30 days after the publication of the notice of award (article 120, paragraph 2 of the Code of Administrative Procedure).

An appeal to the Council of the State against first instance decisions must also be lodged within the halved 30-day term after the service of the decision or within three months after the publication of the decision.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

As a general rule, the sole application for review of the tender document has no suspensive effects blocking the continuation of the procurement procedure or the conclusion of the contract.

However, if an application for review is filed against the award with a request for the application of interim measures, the contract may not enter into force for the subsequent 20 days, provided that within such term at least the interim measure or the publication of the operative part of the judgment is issued ('automatic suspensive effect', article 32, paragraph 11 of the Code).

The conclusion of the contract is also prohibited before 35 five days have elapsed from the last communication of the award measure ('standstill clause', article 32, paragraph 9 of the Code).

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

The most recent survey on the subject dates back to 2016.

In 2016, approximately the 29.10 per cent of applications were upheld. This percentage refers only to the first instance proceedings.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Article 76 of Code provides that the contracting authorities notify, within a term not exceeding five days, the award to the successful bidder, to the runner-up bidder in the classification, to all the bidders who presented a bid admitted to participate in the tender, to those whose candidature or bid have been excluded, if they challenged the exclusion and to those who challenged the call for tender or the letter of invitation. By the same notice, the date of expiration must be notified for the deferral period for the conclusion of the contract.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

In the sector of public contracts the rules for accessing administrative documents are precise and are laid down in article 53 of the Code. The reasons for enabling access are balanced with the need to ensure regular performance of the procedure. Therefore, the disclosure of information is granted according to precise time limits.

Moreover, for the purpose of avoiding bidders exploiting the commercial information to obtain an unfair competitive advantage in the market, there is a prohibition on accessing documentation that contains data relating to the technology and to commercial secrets of the suppliers.

The right of access is allowed in broader terms when the knowledge of some documents is aimed at guaranteeing the right of defence.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

It is customary for disadvantaged bidders to file review applications. The percentage of upheld reviews is not known.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Italian law allows an unsuccessful bidder to claim damages for the failed award in specific form through an application for award of the contract. To have the application upheld, the bidder must demonstrate that had the wrongful measure not been adopted, he or she would have been successful in the tender. A declaration of invalidity of the contract pronounced by a judge is also necessary in the presence of certain conditions provided by the Code (articles 121 and 122; see question 44). If the judge does not set aside the contract, he or she must rule for compensation for damages equivalent to the loss actually suffered by the bidder (article 124, paragraph 1). In this case, the bidder must prove the existence of all the general preconditions for the compensation (wrongfulness of the conduct of the contracting authority, damages suffered by the bidder and causal link between the wrongful conduct and the damages suffered). As far as the subjective element is concerned, recent Italian case law no longer requires evidence of gross negligence or wilful misconduct, unless a private entity may prove the fault of the public administration simply by evidencing the wrongfulness of the injuring measure.

According to case law the recoverable items of damage are the following:

- the actual profit that the candidate would have earned in case of award, based on the bid submitted for tender;
- the 'curricular' damage (ie, the loss of the specific possibility to increase its goodwill for the part relating to its professional curriculum), to be settled in a manner that the Court will consider equitable; and
- the legal interest accrued from the date of conclusion of the contract up to the date of actual compensation of the damage.

Compensation for the costs borne in participating in the tender is conversely excluded. Finally, case law considers that the amount of money granted as compensation may be decreased by the judge if the plaintiff has, however, profitably carried out a similar activity in the period of performance of the contract or did not enforce all the instruments provided under the Italian system for its protection in a timely manner, participating in this way to the causation of the damage, on the basis of the general principle of fault of the creditor (articles 30, paragraph 4 and 124, paragraph 2 of the Code; section 1227 of the Italian Civil Code).

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

An unsuccessful bidder may file an application for review before the administrative court and demand the setting aside of the executed contract, if any.

The court's decision to set aside a contract must take into account the interests of the parties, the actual possibility of the plaintiff obtaining the award in the light of the defects found, the state of progress in the performance of the contract and the possibility to succeed in the event that the defect of the award does not entail the obligation to renew the tender and the request to succeed in the contract has been made (art. 122 Code of administrative procedure).

However, there are events when the judge, pursuant to EU rules (article 2 of directive 2007/66/EC), must necessarily annul the contract:

- if the final award took place without the prior publication of the call for tender, when such publication is required by the Contracts Code;

- if the final award took place according to the negotiated procedure without call for tender or with the works being awarded on a time and material basis outside the cases that are permitted by the law and this determined the omission of the publication of the call for tender or of the tender notice, when such publication is required by the Contracts Code;
- if the contract has been concluded without meeting the deferral term provided for by article 32, paragraph 9, of the Code, if such violation:
  - has taken away the possibility for the plaintiff to avail himself of the means for filing an application for review prior to the conclusion of the contract;
  - by adding to the typical defects of the final award, has affected the possibilities of the plaintiff to obtain the award.

In the cases in which, notwithstanding the violations, the contract is considered effective or the invalidity is temporarily limited, the judge applies the alternative penalties provided by the subsequent article 123 (article 121, paragraph 4, Code of administrative procedure).

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

The Code allows only in exceptional cases, expressly provided for by the law, to directly award a contract without the prior publication of a tender notice. This is the case for contracts under €40,000 (article 36, paragraph 2(a)), for the negotiated procedure below the EU thresholds, for the negotiated procedure without prior publication of a call for tenders regulated by article 63 of the Code, and the negotiated procedure without tender procedure for contracts in special sectors (article 125 of the Code). In all other cases it is forbidden to proceed with any direct award. If a company becomes aware of any direct award in violation of the law, it can file a complaint with the administrative court and request the setting aside of the contract (see question 37).

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Pursuant to article 9, paragraph 1 of the Consolidated Text of laws in the matter of judicial expenses (Presidential Decree No. 115/2002), in the administrative procedure a Consolidated Contribution is due for the registration of the case in the docket, for each procedural instance. In particular, for applications for review filed with the Regional Administrative Court against measures concerning the tender procedures, the contribution payable amounts to €2,000 if the value of the dispute has a value equal to or lower than €200,000; for disputes having a value between €200,000 and €1 million the contribution payable is equal to €4,000; the contribution payable amounts to €6,000 if the dispute has a value higher than €1 million. The wording 'value of the disputes' means the amount that is placed as the auction base identified by the contracting authorities in the records of the tender (article 14, paragraph 3-ter, TU). For appeals filed with the Council of the State the consolidated contribution is increased by 50 per cent, while it is doubled for proceedings before the Supreme Court of Cassation (article 13, paragraph 1-bis, TU).

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UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The current Italian government has announced a forthcoming revision of the Code.

Moreover, the Decreto Sblocca Cantieri (a decree with the objective of unblocking construction sites) is currently being approved. According to the draft of the decree, it will introduce a broader economic threshold (€1 million or €150,000 instead of the €40,000 initially set by the Code) for the direct award of public works. The direct assignment should take place after consultation, where existing, with at least three economic operators.

The decree may leave the contracting authority with the power to evaluate the opportunity to resort to a competition of ideas or a project.

The decree may also take a step back on the Minimum Environmental Criteria (CAM). One of the drafts in circulation proposes that the CAM could be mandatory only in tenders exceeding European thresholds.

In any case, structural changes to the Code are expected during the year, according to the intentions expressed by the government.

Korea

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The representative laws and regulations relating to public procurement in Korea are the Act on Contracts to which the State is a Party (the State Contract Act), the Act on Contracts to which a Local Government is a Party (the Local Government Contract Act), the Government Procurement Act and various regulations issued thereunder (eg, enforcement decrees, enforcement rules etc).

English translations of the above laws and regulations can be found on the website for the Ministry of Government Legislation (www.moleg.go.kr) and the website for the Statutes of the Republic of Korea (http://elaw.klri.re.kr) operated by the Korea Legislation Research Institute.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

In matters relating to the defence industry, the Defense Acquisition Program Act will apply ahead of the State Contract Act. The Act on the Management of Public Institutions, Regulations on Contracts for Public Enterprises and Quasi-Governmental Institutions and the Local Public Enterprises Act will apply to matters relating to contracts to which a public enterprise or a quasi-governmental institution is a party. In addition, the State Property Act and the Public Property and Supplies Management Act will apply to contracts involving the management or disposal of property owned by the central or local government.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The GPA became effective in Korea from 1 January 1997, and the State Contract Act was subsequently amended to implement pertinent aspects thereof. In addition, Regulations on Special Cases for the Enforcement Decree of the State Contract Act for Specified Procurement were established and Regulations on Special Cases for the Enforcement Decree of the State Contract Act for Procurement of Specified Goods were amended to provide special provisions governing international bidding practices.

Article 4 of the State Contract Act provides that the Minister of the Ministry of Strategy and Finance (MOSF) shall prescribe by official notification the scope of government procurement contracts that are open to international bidding. Article 5 of the Local Government Contract Act provides that the Minister of the Ministry of the Interior shall prescribe by official notification the scope of local government procurement contracts that are open to international bidding.

As of March 2019, the minimum value of government procurement contracts and local government procurement contracts open to international bidding has been prescribed as 200 million won and 310 million won, respectively.

Proposed amendments

4 | Are there proposals to change the legislation?

After provisions governing the scope of specified procurement contracts in the Regulations on Special Cases for the Enforcement Decree of the State Contract Act for Specified Procurement were amended on 13 July 2015 to reflect similar amendments to the GPA, no additional amendments thereto have been planned as of March 2019.

After the Regulations on Special Cases for the Enforcement Decree of the State Contract Act for Procurement of Specified Goods were amended on 23 March 2013 to reflect reorganisation measures implemented by the Korean government, no additional amendments thereto have been planned as of March 2019.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The laws and regulations governing public procurement contracts in Korea (collectively, Public Procurement Laws) clearly stipulate which contracting organisations (ie, central government agencies, public enterprises, quasi-governmental institutions, local governments and local public enterprises) are subject to the provisions therein, and thus there are almost no disputes concerning whether such laws and regulations apply to a contracting organisation.

Organisations permitted to conduct international bidding have been set forth in Table 1 of the Regulations on Special Cases for the Enforcement Decree of the State Contract Act for Specified Procurement, Table 1 of the Regulations on Contracts for Public Enterprises and Quasi-Governmental Institutions and the Notification on the Scope of Local Government Contracts for Construction, Goods, and Services Open to International Bidding.

There is no statutory law in Korea defining which organisations are not considered to be public authorities. In addition, because Public Procurement Laws are fairly clear on which entities are caught by the provisions therein, there have been almost no disputes (and hence, no resulting judicial or administrative interpretations) involving the distinction between public and private entities.

Contract value

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Public procurement contracts to which the state, a local government or a public enterprise is a party are required to be awarded, in principle, through a competitive bidding process. However, no-bid contracts are permitted in cases where the estimated value of a construction contract is 200 million won or less or the value of a contract for goods or services is 20 million won or less.

In addition, no-bid contracts are specially permitted in cases where the estimated value of a contract for goods or services is greater than 20 million won but does not exceed 50 million won if the contract relates to academic research, calculation of costs or construction technology and requires special knowledge, technology or qualifications.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Public Procurement Laws do not expressly specify rules for the amendment of a concluded contract. However, adjustments to contract values through the modification of relevant prices, construction plans and other terms or conditions are permitted. In the case of contracts for the purchase of goods, the quantity of goods may be further increased or reduced by up to 10 per cent if deemed necessary by the contracting official.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

In a case (*2009da91811*, Supreme Court decision issued on 13 November 2014) involving a dispute between the state and a private company on whether to reflect increases in the payable value added tax occurring after the effective date of a long-term continuing contract (stipulating a guaranteed maximum price) to develop and supply software programs, the Supreme Court of Korea ruled that it was reasonable to reflect the subsequent increase to the payable value added tax in the value of the contract, as it is likely that the state would have agreed to pay for the increase if it had been foreseeable prior to the effective date of the contract.

In addition, MOSF, the authority responsible for the enforcement of Public Procurement Laws, has previously issued (via the Public Contract and Procurement Policy Division of MOSF on 22 June 2012) an official interpretation stating that in the event that the parties to a public procurement contract seek to implement material changes to the features of the subject property owing to a change in the business purpose, subsequent amendments to the design of the subject property will not be recognised. Rather, in such cases, the existing contract should be cancelled or terminated and a new bidding process for the subject property that is consistent with the changed business purpose should be initiated.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Under the Act on the Management of Public Institutions, the Minister of MOSF is required to establish a plan for the privatisation of a public institution, and the head of the relevant administrative body is responsible for the implementation of the privatisation plan for such public institution. The Act on the Improvement of Managerial Structure and Privatization of Public Enterprises and the State Property Act will apply with priority to matters concerning the privatisation of a public institution. In addition, the State Contract Act and the Commercial Code will apply to any matters concerning the privatisation of a public institution that are not addressed by the foregoing Acts.

Under the Regulations on the Delegation and Entrustment of Executive Authority, the following tasks may be outsourced to a private entity:

- routine administrative actions;
- tasks where efficiency considerations substantially outweigh the public interest;
- tasks requiring special types of expertise and technology; or
- other tasks directly related to public welfare.

In such cases, the outsourcing organisation is required, in principle, to publicly solicit proposals prior to the eventual selection of the private entity.

Upon completion of the privatisation process, the subject institution is permitted to enter into contracts without adhering to the various requirements under Public Procurement Laws.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Through the enactment of the Act on Public-Private Partnerships in Infrastructure, Korea introduced the concept of joint public-private corporations formed by investments from both the public and private sectors (article 2.12). The Act is, in principle, exempt from the application of Public Procurement Laws, and the formation of joint public-private corporations is subject to applicable provisions of the Commercial Code.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

If a bidding process is initiated for a public procurement contract, such information is required, in principle, to be disclosed through an electronic procurement system. However, if deemed necessary, such information may also be published in a daily newspaper.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Public procurement contracts are required, in principle, to be awarded through a competitive bidding process. The contracting authority conducting such bidding process may not restrict the participation of potential bidders by imposing criteria and conditions not prescribed under article 12 of the Enforcement Decree of the State Contract Act or other applicable laws and regulations.

However, the contracting authority may in certain cases, after taking into account the purpose, characteristics and scale of the public procurement contract, additionally restrict the participation of potential bidders (article 21 of the Enforcement Decree of the State Contract Act), select certain bidders to engage in further bidding (article 23 of the Enforcement Decree of the State Contract Act) or execute an at-will contract (article 26 of the Enforcement Decree of the State Contract Act).

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

The head of each central government entity or the contracting official may, after taking into account the characteristics of the contract and the lack of any bidders with special qualifications, select certain bidders to engage in bidding pursuant to article 23 of the Enforcement Decree of the State Contract Act if achievement of the contract purpose appears difficult. In such cases, at least five bidders must be selected, and at least two bidders among those selected must agree to participate in the bidding. In the event that there are fewer than five potential bidders for a bidding process, all of the potential bidders must be selected for the bidding.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The head of each central government entity may restrict the participation of bidders found to have breached a public procurement contract, engaged in collusive practices during a bidding process or offered a bribe to a relevant public official.

The foregoing bid restriction measures may be enforced for a period of at least one month and up to a period of two years. Such periods may not be reduced, in principle, by subsequent remedial actions taken by the affected party. However, a party may still challenge and overturn a bid restriction measure by filing an administrative appeal and obtaining a successful judgment.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Public Procurement Laws stipulate that a public procurement contract should be executed between parties on an equal footing and that each party is required to perform its contractual obligations according to the principle of good faith.

Bidders and parties to a public procurement contract must enter into an integrity pact pledging not to provide illicit offers of money, valuables or entertainment and stipulating that any violations thereof may result in the cancellation of an accepted bid or the termination of an awarded contract.

Public procurement contracts must be awarded, in principle, through an open tender, and any bidder found to have engaged in unlawful activity may be subject to an administrative sanction that prohibits such bidder from participating in public procurement bids for a certain period of time. In addition, the Criminal Code prescribes criminal punishment in cases where a bidder is found guilty of bid interference.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Public Procurement Laws stipulate that the head of each central government entity or the contracting official may not insert special terms or conditions that unfairly limit the legally provided contractual benefits of a counterparty when executing a public procurement contract. Furthermore, in the context of international bidding, it is prohibited under Public Procurement Laws to insert any special terms or conditions that discriminate against citizens or companies of other nations that are signatories to the GPA.

The Supreme Court of Korea has previously ruled (2013da23617, Supreme Court decision issued on 10 November 2016) that a public official in charge of handling a public procurement contract was obligated to provide prior notice to bid participants in the event that preliminary cost estimates had not been calculated in accordance with governmental accounting standards. In addition, the Supreme Court found that the state is liable for any losses suffered by a contractual counterparty owing to its failure to provide such prior notice.

Conflicts of interest

17 | How are conflicts of interest dealt with?

There are as yet no laws or regulations in Korea that prescribe strict obligations or punishments to prevent conflicts of interest. Korea's representative anti-corruption legislation, the Improper Solicitation and Graft Act (also known as the Kim Young-ran Act), originally contained provisions dealing with conflicts of interest when proposed, but such provisions have since been removed prior to enactment.

The Public Service Ethics Act and its Enforcement Decree contain provisions that impose general obligations on public officials to prevent conflicts of interest. According to such provisions, public officials are required to objectively and diligently perform their duties and responsibilities while assigning priority to the public interest in order to prevent situations where considerations for private interests may improperly influence the fair performance of their duties. In certain cases, public officials may be required to avoid partaking in duties involving a conflict of interest or to proceed only after reporting such possibility to their superiors or the head of department responsible for conducting internal audits.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Although Public Procurement Laws prohibit bidders that have engaged in tax evasion, failed to properly pay subcontractors or been punished for engaging in inappropriate business practices from participating in a tender procedure, no such prohibitions apply, in principle, to bidders that have been involved in the preparation of a tender procedure.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

Public procurement contracts in Korea are concluded through an open tender, limited open tender, selective tender or no-bid procedure. Among the foregoing procedures, open tender is the most widely utilised.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Under Public Procurement Laws, if the same bidder submits two or more bids in one bidding, all submitted bids will be deemed invalid. If the same person is the representative director of two or more corporations, all such corporations, in addition to the representative director (and any other legal entity owned by such representative director), will be deemed the same bidder.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

Under Public Procurement Laws, the head of a central government entity or contracting official is permitted to conclude a public procurement contract for goods or services through negotiations with a bidder if deemed necessary owing to the urgency, specialised knowledge and technical expertise required for the performance of the contract, the safety of public facilities or other national security reasons, or if such contract involves a knowledge-based business relying on the convergence of information, science and technology to create highly valuable business solutions.

In the event that the head of a central government entity or contracting official decides to conclude a public procurement contact through negotiations with a bidder, the parties must comply with the criteria for negotiated procedures prescribed by the Minister of MOSF when establishing detailed rules for negotiated procedures, and such detailed rules must be viewable by each party.

However, negotiated procedures for contracts related to the defence industry shall comply with the specific criteria and procedures prescribed by the Minister of the Defense Acquisition Program Administration.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

There is only one procedure prescribed by Public Procurement Laws permitting negotiations with bidders, described in detail in question 21.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

Public Procurement Laws permit the following types of contracts to be executed as long-term continuing contracts with stipulated unit prices:

- service contracts for transportation, storage, testing, studies, research, measurements, facilities management etc, or leases;
- contracts for the supply of electricity, gas or water; and
- contracts for maintenance of equipment, information systems and software.

Performance of such long-term continuing contracts must be within the scope of the contracting authority's budget for the applicable fiscal year.

In addition, a framework agreement may be concluded with multiple suppliers, as explained further in question 24.

24 May a framework agreement with several suppliers be concluded?

Under the Government Procurement Act and its Enforcement Decree, the Administrator of the Public Procurement Service may permit the execution of a contract with two or more suppliers when purchasing goods or services that public entities need in common, and multiple suppliers are deemed necessary to meet the diverse demands of such public entities so that they may select categories of goods or services of equal or similar quality, performance and efficiency.

In such cases, the contracting authority may conduct negotiations with bidders satisfying the criteria prescribed by the Administrator of the Public Procurement Service (in consultation with the Minister of MOSF) after evaluating each bidder's financial condition and past performance record in order to select the eventual winning bidders.

In the event that a public entity wishes to purchase goods or services pursuant to a contract with multiple suppliers in excess of a certain amount, it may request two or more suppliers to submit proposals and select the eventual supplier after evaluating such proposals.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Once a public procurement contract is executed, changes to the membership of the consortium, the capital contribution ratio and the divided work assignments among members are not permitted unless there has been an amendment to the contract, a consortium member is the subject of a bankruptcy, dissolution, insolvency, court receivership, workout or early withdrawal from the consortium and the remaining consortium members jointly decide that such changes are necessary.

In cases where a consortium has appointed a primary contractor to represent its interests, such primary contractor may decide to change the members of a consortium, the capital contribution ratio or the divided work assignments among members in the event that a consortium member fails to perform, or is delinquent in performing, the contract absent a justifiable reason.

Participation of small and medium-sized enterprises

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Under Public Procurement Laws, bidding for a public procurement contract may be restricted to small and medium-sized enterprises in cases where the contract involves the manufacture and purchase of goods designated and publicly notified by the Administrator of the Small and Medium Business Administration or the contract involves the manufacture and purchase of goods or services below the designated threshold value.

There are no provisions under Public Procurement Laws that specifically regulate the division of a public procurement contract into lots. Nevertheless, it may still be prohibited to subcontract the obligations of a contractual counterparty to a third party pursuant to other applicable laws and regulations.

Variant bids

27 What are the requirements for the admissibility of variant bids?

Public Procurement Laws permit the submission of variant bids for:

- large-scale construction projects where the total estimated construction cost is 30 billion won or more; or
- construction projects where the submission of variant bids is deemed advantageous to the interests of the contracting authority, even though the total estimated construction cost is less than 30 billion won.

The head of each central government entity may invite variant bids following a review by the Central Construction Standards Commission, and in such cases, the tender specifications must specify matters on variant bids.

28 | Must a contracting authority take variant bids into account?

A contracting authority is not required to take variant bids into account.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Unless the submission of variant bids has been permitted as per the requirements in question 27, a bid will most likely be dismissed if the bidder changes tender specifications or requests acceptance of its own standard terms and conditions.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

Public Procurement Laws prescribe general terms and conditions for each type of public procurement contract (eg, purchase or manufacture of goods, provision of services, construction etc). Contracting officials may not insert special terms and conditions that limit the contractual benefits of a counterparty more than the levels under applicable general terms and conditions. Any such special terms and conditions that have been inserted in violation of the foregoing shall be deemed invalid.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

In the case of construction contracts, the criteria for 'abnormally low' bids that may not be accepted by a contracting authority have been specified in the bid evaluation standards prescribed by the MOSF. The appropriate bid amounts for public procurement contracts for goods or services are decided by the head of each central government entity in consultation with the Minister of the MOSF.

32 | What is the required process for dealing with abnormally low bids?

In the event that a bid constitutes an abnormally low bid under the prescribed criteria, such bid will not meet the minimum bid requirements for the bid amount, and thus will not be able to pass a proper bid evaluation.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

A bidder that has suffered a disadvantage during the bidding for a public procurement contract may file a review application with the head of the government entity that conducted the bidding to request a nullification or rectification of the bid results. If the results of such a review are unsatisfactory, the aggrieved bidder may file a second review application with the State Contract Dispute Resolution Commission (SCDRC). In addition to the foregoing appeal options, the bidder may also petition the Central Administrative Appeals Commission (CAAC) for an administrative judgment or initiate an administrative lawsuit in court.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

As explained in question 33, an aggrieved bidder may simultaneously file a review application, a petition for administrative judgment or an administrative lawsuit. If the aggrieved bidder achieves a successful result in any one of the foregoing proceedings, any other ongoing proceedings are required to be dismissed.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Upon receiving a review application, the head of the relevant government entity is required to take necessary measures and notify the results of the review to the applicant within 10 days. The applicant may then file a second review application with the SCDRC within 15 days of receiving the results of the initial review application from the head of the relevant government entity. Thereafter, the SCDRC is required to review the second application within 50 days of its receipt.

If a petition has been filed with the CAAC for an administrative judgment, the CAAC is required, in principle, to render a decision within 60 days. After an administrative lawsuit has been initiated, it may generally take, depending on the circumstances, at least several months for a court to render a judgment on the merits.

36 | What are the admissibility requirements?

Review applications are subject to the following admissibility requirements:

- the review application must address matters related to the scope of public procurement contracts open to international bidding, eligibility of bidders, bidding notices, determination of the successful bidder or violations of international procurement treaties;
- the value of the underlying contract must satisfy certain prescribed thresholds (eg, 3 billion won for a construction contract, 150 million won for a contract for goods or services) except in cases where the contract is open to international bidding; and
- the review application must be filed within legally prescribed submission deadlines.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Review applications must be filed with the relevant head of the central government entity within 15 days of the occurrence of the relevant incident or within 10 days of becoming aware of the occurrence of such an incident. In addition, an applicant must file a second review application with the SCDRC within 15 days of receiving the results of the initial review application from the head of the relevant government entity.

Petitions for an administrative judgment must be filed with the CAAC within 180 days of the imposition of the relevant administrative measure or within 90 days of becoming aware of the imposition of such measure. An administrative lawsuit must be initiated within 90 days of becoming aware of the imposition of the relevant administrative measure, and if the administrative lawsuit seeks to nullify the relevant administrative measure, it must be initiated within one year of the imposition date.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The filing of a review application (or second review application) will not, in principle, automatically suspend the bidding procedure or the execution of the contract. However, the SCDRC may, pursuant to its discretionary authority, order a suspension of the bidding procedure or the execution of the contract.

Similarly, the filing of a petition for administrative judgment or the initiation of an administrative lawsuit will not automatically suspend the bidding procedure or the execution of the contract. However, the applicant may obtain a separate court order for a suspension of execution or a suspension of validity to suspend the bidding procedure or the execution of the contract.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

As explained in question 38, the filing of a review application (or second review application), a petition for administrative judgment or the initiation of an administrative lawsuit will not, in principle, automatically suspend the bidding procedure or the execution of the contract. As such, we do not have any information on the percentage of applications for the lifting of an automatic suspension that are successful in a typical year.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

In cases where procurement is conducted through an electronic procurement system, the bid results are posted immediately to the system so that they are viewable by all bid participants. In addition, bid results are usually disclosed immediately on the website home page of the relevant government entity that conducted the bid. In the case of international bidding, bid results must be disclosed through an electronic procurement system for a certain period.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Public notice is made on all matters related to a bid that are required to be notified under applicable laws and regulations. Potential bidders may download the public notice and obtain the necessary information. In addition, bidders may monitor the progress of bidding in real time through an electronic procurement system.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

In Korea, it is not customary for bidders to file review applications. As explained previously, bidders are entitled to file a review application, file a petition for administrative judgment or initiate an administrative lawsuit if they believe a disadvantage has been suffered or the bidding process was improper, and it is up to each bidder to exercise such rights.

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Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

In the event that an applicant is found to have suffered a disadvantage by the SCDRC at the conclusion of its review, the liable party or parties may be ordered to compensate any damage or losses incurred by such applicant owing to such disadvantage. However, the amount of awarded damages or losses may be limited to the actual costs incurred by the applicant during the course of preparing for the bid and filing the review application.

In addition, a bidder may obtain compensation for damage through a court judgment. In such cases, the bidder would need to establish that the defendant or defendants intentionally or negligently committed an illegal act and that the commission of such illegal act proximately caused the bidder to suffer damages.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Public Procurement Laws prescribe the criteria for determining if a bid is invalid (eg, the same bidder has submitted two or more bids). If a successful bidder is found to have submitted an invalid bid, then the bid result (and the concluded contract based on such bid result) will also be deemed null and void. On the other hand, if a successful bidder submitted a valid bid, but is found to have violated regulations governing the bid process, the bid result (and the concluded contract based on such bid result) will not necessarily be deemed null and void.

The Supreme Court of Korea has previously ruled (2001da33604, Supreme Court decision issued on 11 December 2001) that a concluded contract may only be cancelled or terminated in cases where such cancellation or termination is necessary to avoid an outcome that is contrary to the purpose of the State Contract Act, such as when the wrongful activity is serious enough to substantially harm the public interest and fairness of the procurement process and such wrongful activity was known or should have been known by the other party, or

when it is clearly obvious that the procurement result was obtained and the contract concluded through morally reprehensible activity that disturbs the public order.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Interested parties to a contract may file a civil complaint if they believe its direct award was illegal, and the government entity receiving the complaint is required to investigate such complaint and notify the interested parties of the investigation results.

In addition, if the legal interest of an interested party is recognised, such interested party may initiate an administrative lawsuit to invalidate a direct award alleging its illegality and claim compensation for any damages proximately caused by such illegal direct award.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

When filing a review application with the SCDRC, the applicant is responsible for payment of the following:

- costs related to conducting appraisals, diagnostic checks and testing;
- costs related to securing witnesses and evidence;
- costs related to inspections and investigations; and
- other costs related to the proceeding, such as recording, stenography, interpretation etc.

When initiating an administrative lawsuit in court, the applicant is initially required to pay applicable litigation expenses, but such expenses may be later reimbursed after obtaining a favourable judgment. There are no separate costs typically involved when petitioning the CAAC for an administrative judgment.

North Macedonia

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

A new Public Procurement Law (PPL) was adopted on 1 February 2019. It was published in the Official Gazette No. 24/2019 and entered into force on 9 February 2019. It was implemented on 1 April 2019. The PPL is prepared in accordance with:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC, CELEX number 32014L0024;
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the procurement of entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, CELEX number 32014L0025; and
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/665/EEC and Council Directive 92/13/EEC to improve the effectiveness of review procedures when awarding public contracts, CELEX number 32007L0066.

The PPL, as a law governing specific subject matter, governs the terms and procedures for awarding public procurement contracts, the authorisations of the Public Procurement Bureau and the authorisations of the State Appeals Commission. In the absence of any specific provision on issues related to the review procedures in public procurements, the PPL prescribes that the Law on General Administrative Procedure is a subsidiary law.

The supervision and the enforcement of the public procurement system in Macedonia are under the jurisdiction of the Ministry of Finance and the Public Procurement Bureau, as well as the State Appeals Commission as an independent body authorised to rule on the review procedures in public procurements.

The bylaws under the new PPL will be adopted within six months from the day of implementation of this law, until when the existing bylaws will be applicable.

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

The general rules of the PPL are not applicable to procurement contracts that include aspects of defence and security, as stipulated in the PPL in the field of defence and security and in other specific cases.

In addition to the exemptions in the field of state defence, the PPL also does not apply to public service contracts that involve the following:

- the selection of conceptual solutions that the contracting authority implements or organises in accordance with procedures that differ from the procedures established in the PPL and which are determined by a legal instrument that creates international legal obligations;
- the selection of conceptual solutions implemented or organised by the contracting authority according to the rules of an international organisation or international financial institution, when the contract or competition is fully funded by the international organisation or the international financial institution;
- the acquisition or rental of land, buildings or other immovable property or the rights thereon;
- the purchase, development, production or co-production of programme material by radio or TV broadcasters and to the broadcasting time of TV and radio programmes;
- arbitration and conciliation services;
- financial services related to the issuance, trading or transfer of securities or other financial instruments in terms of the material regulations governing the capital market and the operations of the National Bank of the Republic of North Macedonia;
- loans and credits, whether related to the issue, sale, purchase or transfer of securities or other financial instruments;
- services provided by non-commercial organisations or associations covered by the Common Glossary on Public Procurement codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3, except for services for the transportation of patients by ambulance;
- public passenger transport services for passengers or transport of passengers by subway;
- services that the contracting authority awards to another contracting authority or association of contracting authorities if they have an exclusive right on the basis of a law, by-law or administrative act published in the Official Gazette of the Republic of North Macedonia or in the municipal official language to provide the services;
- research and development services, except those covered by the codes from the Common Glossary on Public Procurement from 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 in cases where the benefit from them is exclusively for the contracting authority for its own use in carrying out its activities and fully paid for the receipt of those services;
- public procurements and design contests, if implemented by a contracting authority providing postal services;
- value-added services related to electronic means and which are fully performed by electronic means (including secure transmission of encoded documents using electronic means, management services and transmission of registered email);

- financial services covered by the ZIP code codes from 66100000-1 to 66720000-3, in particular postal money orders and postal cashless operations;
- philatelic services;
- logistics services, including services that combine for physical delivery or storage with other non-resident functions;
- public procurements in the sectoral activities that are performed for further sale or renting to third parties, provided that the contracting authority does not have any special or exclusive rights to sell or lease the subject of procurement, and other entities be free to sell them or rent under the same conditions;
- public procurements and contests for the selection of conceptual solutions that the contracting authorities implement in order to perform sectoral activities abroad;
- public procurement the subject of which is the supply of water, if awarded by a contracting authority that carries out one or more sectoral activities;
- public procurement the subject of which is the purchase of energy or fuel for energy production, if awarded by a contracting authority that carries out one or more sectoral activities;
- notary services;
- lawyers' services; and
- employment contracts.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Macedonia currently has the status of a candidate state for membership of the European Union (EU). Achieving EU membership is the major goal of Macedonian state politics. Therefore, Macedonia is continuously working on the harmonisation of its national legislation with EU rules. The harmonisation of national legislation on public procurement with EU rules is considered to be one of the most powerful instruments for the improvement and development of the Macedonian market.

The new PPL is prepared in accordance with:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, CELEX number 32014L0024;
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the procurement of entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, CELEX number 32014L0025; and
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/665/EEC and Council Directive 92/13/EEC to improve the effectiveness of review procedures when awarding public contracts, CELEX number 32007L0066.

Proposed amendments

4 | Are there proposals to change the legislation?

The mission and priority goal of the public procurement system in Macedonia is to continuously follow and harmonise with EU rules on public procurement and the good practice of EU member states in the field of public procurement by further adoption of EU directives related to public procurement, especially green procurement, and their implementation in the national procurement system.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

There is no certain definition given within statutory law defining which organisations are not considered to be public authorities.

The PPL explicitly defines the entities that are covered by the provisions of the PPL and that constitute contracting authorities; thus any other entity not recognised within the definition given by the PPL does not constitute a contracting authority.

On the other hand, the government of Macedonia has made a decision to set out an indicative list of entities that constitute contracting authorities; any entity that is not included in this list does not come under the PPL.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The PPL applies to any contracts in which the total amount (based on the middle exchange rate published by the National Bank of Macedonia and excluding value added tax) exceeds the equivalent of:

- €1,000 in denars for goods or services or design contests;
- €5,000 in denars for works; and
- €10,000 in denars for special services.

The PPL shall not apply to utilities contracts (water supply, energy, transport, postal services and other covered activities) if the estimated value of the contract is below:

- €2,000 in denars for goods or services or for design contests for public enterprises, joint stock companies and limited liability companies as contracting authorities, including state bodies and bodies of the local self-government units; legal entities established for a specific purpose for meeting the needs of public interest that are not of industrial or commercial character and that are mostly financed by the state bodies and bodies of the local self-government units or are subject to control of the work by the same; as well as associations established by one or more of the contracting authorities, have a dominant direct or indirect influence over ownership (ie, if they hold a majority of the capital of the company, hold majority votes of the shareholders or appoint more than half of the members of the management or supervisory board of the enterprise or the company and which perform one or more sectorial activities), in cases when awarding public procurement contracts or concluding framework agreements for the purpose of performing the respective activities;
- €10,000 in denars for works for the bodies in the preceding item;
- €20,000 in denars for special services, except for the services covered by the code of the Public Procurement Agency 79713000-5 for the bodies in the first item;
- €400,000 in denars for goods or services or for a design contest for any legal entity as a contracting authority other than those stated in the preceding paragraphs that performs one or more sectoral activities, on the basis of a special or exclusive right, in cases when it grants contracts for public procurements or concludes framework agreements in order to carry out appropriate activities;
- €5,000,000 in denars for works with any legal entity as a contracting authority other than those specified in the preceding paragraphs which performs one or more sectoral activities, on the basis of a special or exclusive right, in cases when it awards public contracts or concludes framework agreements in order to carry out appropriate activities; and

- €1,000,000 in denars for special services with any legal entity as a contracting authority other than those specified in the preceding paragraphs that performs one or more sectoral activities, on the basis of a special or exclusive right, in cases when it awards public contracts or concludes framework contracts agreements for the purpose of performing appropriate activities.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The PPL stipulates amendment of a concluded contract without a new procurement procedure in the following cases:

- if the changes, regardless of their monetary value, are provided in the tender documentation in a clear, precise and unambiguous manner, such as price correction or options;
- for the procurement of goods, services or works from the original purchaser that are not included in the basic contract and that, owing to unforeseen circumstances, are necessary, and if the replacement of the holder of the procurement:
  - is not possible for economic or technical reasons, such as requirements regarding interchange ability or interoperability with existing equipment, services or installations procured under the initial procedure; and
  - will cause serious difficulties or a significant increase in the costs of the contracting authority;
- if the change is necessary owing to circumstances that the contracting authority could not foresee and essentially does not change the nature of the public procurement contract or the framework agreement;
- if the initial purchaser is replaced by another economic operator who meets all initially certain conditions in the tender documentation of the conducted procedure and who is the legal successor of the initial holder of the procurement after the restructuring of the enterprise, including acquisition, merger or bankruptcy, if this does not include other significant changes to the contract and thus does not avoid the application of this law; and
- if the change, regardless of its value, is not essential.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There is no case law that could clarify the application of the legislation in relation to amendments to concluded contracts.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Privatisations are not the subject of regulation in the PPL. Privatisations in Macedonia are governed by the Law on Privatisation on State Shares in Companies and fall under the jurisdiction of the government of Macedonia (ie, the government decides on privatisations). The privatisation procedure must generally be conducted by public announcements for soliciting purchase offers.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

A separate Law on Concessions and Other Types of PPP governs PPPs. A PPP contract refers to services on projecting (designing), financing, contracting and maintenance of infrastructure projects, equipping, and other types of public services that the private partner shall provide to the public partner for certain financial benefit.

The PPL applies to procedures for awarding PPP contracts, except for certain issuances of PPP contracts for which the Law on Concessions and Other Types of PPP provides special rules.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

The contracting authority shall advertise the notice for the tender procedure to be conducted, in the form of a law value procedure, simplified open procedure, an open procedure, restricted negotiated procedure, competitive dialogue, innovation partnership, negotiated procedure without prior publication of a notice and negotiated procedure with publication of a notice, on the Electronic System for Public Procurement (ESPP) and in the Official Gazette of Republic of North Macedonia.

The contracting authority mandatorily publishes notifications of concluded contracts (but not the whole contract) on the ESPP. This is a comprehensive online system, for the purpose of enabling greater efficiency and effectiveness in the field of public procurement.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The general rule of the PPL related to defining criteria for the qualification of interested parties to participate in the tender procedure provides that the contracting authority may not define criteria for qualification that are disproportionately discriminatory, not adequate to or not related to the subject matter of the procurement. Furthermore, the PPL provides mandatory criteria for interested participants, such as that the participant shall not be undergoing a bankruptcy or liquidation procedure or that the participant shall have no outstanding tax obligations.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

One of the main principles when conducting tender procedures that fall under the PPL is the favouring of a wider pool of bidders that can participate in a tender procedure by imposing a prohibition and penalty provision on state administrations for limiting the number of bidders.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Macedonia's law does not recognise the principle of 'self-cleaning'.

A bidder that has a negative reference owing to irregularities in public procurement procedures is excluded from all further contract award procedures for a period of six months from the day of publication of the negative reference. The period of exclusion shall be extended for an additional three months for every subsequent negative reference, but will not exceed one year. After expiry of the period of exclusion the bidder shall regain the status of suitable bidder. The Public Procurement Bureau keeps the records of negative references.

However, the contracting authority shall exclude any bidder from the procedure, no matter that the bidder has no registered negative reference for past irregularities, if that bidder at the moment of submission of the bid:

- is in a bankruptcy or liquidation procedure;
- has unpaid due taxes, contributions and other public duties;
- has been convicted of a misdemeanour resulting in prohibition against performing any professional activity or duty (ie, temporary prohibition against performing professional activity);
- has been prohibited from participating in public procurement procedures; or
- presents false information or does not present the information required by the contracting authority.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The basic principles of public procurement as set out in the PPL are:

- competition between the bidders;
- equal treatment and non-discrimination of the bidders;
- transparency and integrity in the process for awarding contracts;
- proportionality; and
- rational and efficient utilisation of funds in public procurement.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PPL stipulates the impartiality of the contracting authority through various provisions, starting from the general provisions setting forth that equal treatment of and non-discrimination between the bidders is one of the basic principles of public procurement.

In this context the PPL provides that the contracting authority shall not define the technical specifications of the subject matter of the procurement – such as indicating a specific manufacturer, production method (a particular process), or trademarks, patents, types or a specific origin that may have the effect of favouring or disqualifying certain economic operators or certain products.

Furthermore, the impartiality of the contracting authority is also covered by the provisions related to preventing conflicts of interest between the contracting authority officers managing the procedure and the bidders participating in the procedure (see question 17).

Conflicts of interest

17 | How are conflicts of interest dealt with?

According to the PPL, a person from the contracting authority that participated in public procurement procedures where the total value of the contracts awarded to a particular purchaser in the last year before the termination of the function or the employment relationship is greater than 5 per cent of the total value of all contracts that the contracting authority concluded within that period, or persons connected thereto, shall not be allowed within two years from the termination of the employment with the contracting authority:

- to establish an employment relation, to conclude an agreement for a certain deed or in any other way to be engaged with that purchaser or entities related to the holder of the procurement;
- to directly or indirectly receive monetary compensation or make any other benefit from the purchaser or related entities; or
- to acquire a stake or shares with the purchaser or an entity related to the purchaser.

Persons participating in the preparation of the tender documentation cannot be bidders or members of a group of bidders in the public procurement procedure.

Participation in the technical dialogue shall not be considered as participation in the preparation of the tender documentation.

For any other purpose in preventing conflicts of interest the PPL refers to the Law on Prevention of Conflicts of Interest, which shall accordingly apply to the contract award procedures.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The PPL explicitly provides that persons who have participated in the preparation of the bid documentation cannot participate as bidders or members of a joint group in the contract award procedure. Such bids shall be rejected from the contract award procedure.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The most frequent type of procurement procedure practised by the contracting authorities, based on the current PPL, which comes into force on 1 April 2019, is the procedure with request for collecting bids. According to the last annual report on the procurement system in Macedonia, referring to 2017, published by the Public Procurement Bureau, most of the procurement procedures were conducted as procedures with requests for collecting bids.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The PPL law does not contain any explicit provisions referring to the participation of related bidders in one procurement procedure. Generally, related bidders can submit separate bids in one procurement procedure, but no specific requirements are provided within the PPL.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The PPL recognises three types of negotiated procedures.

Competitive procedure with negotiations

The contracting authority may use a competitive procedure with negotiations only for public procurement in the classical public sector in the following cases:

- for the supply of goods, services or works, provided that:
  - the needs of the contracting authority cannot be realised without the adjustment of already available solutions;
  - the subject of procurement includes design or innovative solutions;
  - owing to specific circumstances regarding the type, complexity or legal and financial framework or due to the associated risks, the public procurement contract cannot be awarded without prior negotiations; or

- the contracting authority cannot accurately determine the technical specifications in accordance with the requirements of this law;
- for the supply of goods, services or works, for which in a simplified open, open or restricted procedure, at least two bids have been submitted and all:
  - are not in accordance with the tender documentation;
  - arrived with a delay;
  - have an unusually low price; or
  - exceed the funds provided by the contracting authority. In the cases referred to in this point, the contracting authority shall not be obliged to publish a contract notice if it includes in the procedure all bidders that meet the conditions for participation and for which there are no reasons for exclusion and which submitted a tender in the previous simplified open procedure, open procedure or restricted procedure in accordance with the formal requirements of the public procurement procedure.

In a competitive negotiated procedure, any interested economic operator may submit an application for participation on the basis of the announced public call for bids.

Negotiated procedure with prior publication of a contract notice

The contracting authority may use the negotiated procedure with the publication of a contract notice for public procurement of sectoral activities. In the negotiated procedure with the announcement of a contract notice, any interested economic operator may submit an application for participation on the basis of the announced public call for bids. In addition to the application for participation, the documentation for determining ability shall be submitted.

Negotiated procedure without prior publication of a contract notice

The contracting authority shall apply the negotiated procedure without prior publication of a contract notice in the following cases:

- when after two previously conducted open procedures or simplified open procedures, no bid or any suitable tender was submitted (ie, if after two previously implemented restricted procedures no application for participation or no proper application for participation in the first phase has been filed), provided that the conditions of the tender documentation are not significantly changed. The total price of the final offer proposed in the negotiated procedure must not exceed the bid price of the same bidder submitted in the previous unsuccessful public procurement procedure;
- if the public procurement of sectoral activities aims only for research, experimentation, study or development and does not aim to make a profit or to reimburse research and development costs, provided that the award of such an agreement does not affect competitiveness in the award of subsequent public procurement contracts for those purposes;
- if goods, services or work can only be provided by a particular economic operator for the following reasons:
  - the purpose of the public procurement is to create or obtain a unique work of art or artistic performance;
  - when, owing to technical reasons, there is no competition for the subject of procurement; or
  - protection of exclusive rights, including intellectual property rights; or
  - if, owing to the extreme urgency caused as a result of events that the contracting authority could not have foreseen, the deadlines for the other proceedings cannot be applied. The circumstances justifying the ultimate emergency must in no way be such as to be attributed to the contracting authority.

The negotiated procedure without publication of a notice may be used for public procurement of goods in the following circumstances:

- where goods are manufactured exclusively for research, experimentation, study or development, but not for goods in series production to generate profits or to recover the costs of development or research;
- where the contracting authority must obtain additional deliveries from the original purchaser for the purpose of partial replacement of the usual goods or installations or the extension of existing supplies or installations, whereby the change of the tenderer would oblige the contracting authority to purchase material with different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of the additional purchases must not exceed three years after the conclusion of the initial contract, and their value must not exceed 20 per cent of the value of the original contract;
- that are quoted and that the contracting authority acquires from the stock exchange;
- that are procured under particularly favourable conditions from a tenderer that closes its business activities (liquidation or bankruptcy), from a bankruptcy trustee or liquidator, upon prior agreement with the creditors; or
- in sectoral activities, by using some special favourable opportunity that is only available for a very short time at a price significantly lower than the usual market price.

The negotiated procedure without publication of a notice may be used for public procurement of services:

- that are procured under particularly favourable conditions from a tenderer that closes its business activities (liquidation or bankruptcy), from a bankruptcy trustee or liquidator, upon prior agreement with the creditors; or
- when the contract in question is followed by a design contest and is awarded to the best ranked participant or one of the best ranked participants. If the contract is awarded to one of the best ranked participants, the contracting authority invites all of them to participate in the negotiations.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

According to the last annual report on the procurement system in Macedonia, published by the Public Procurement Bureau, in 2017 the negotiated procedure with prior publication of a contract notice was used more regularly in practice. There were no negotiated procedures without prior publication of a contract notice used that year.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

The contracting authority may conclude the framework agreement by carrying out one of the available proceduresunder the PPL. The term of validity of the framework agreement in the classical public sector may not be longer than three years, and in the sectoral activities it must not be longer than five years, except in exceptional justified cases directly related to the subject of procurement and which the contracting authority describes them in the public procurement decision.

Individual public procurement contracts shall be awarded on the basis of the framework agreement in a manner that is clearly stated for this purpose in the public procurement notice or in the invitation

to confirm the interest, to economic operators that are parties to the framework agreement.

Individual public procurement contracts shall be concluded before the expiry of the framework agreement.

When awarding individual contracts, the basic conditions laid down in the framework agreement must not be changed.

24 May a framework agreement with several suppliers be concluded?

The contracting authority may conclude framework agreements with several economic operators.

If the framework agreement is concluded with several economic operators, the individual contracts are awarded in one of the following ways:

(i) without re-bidding, if the agreement determines all conditions for procurement of goods, provision of services or performance of works, as well as objective conditions for selection of one of the economic operators that are parties to the framework agreement, that were specified in the tender documentation for concluding a framework agreement;

(ii) re-bidding between economic operators parties to the framework agreement, unless the framework agreement determines all the conditions for the procurement of goods, the provision of services or the performance of works; or

(iii) partially without re-bidding in accordance with (i) and partly with re-bidding, in accordance with (ii), if the framework agreement determines all the conditions for procurement of the goods, the provision of the services or performance of the works, and if the contracting authority has specified this option in the tender documentation for the conclusion of the framework agreement, it has established objective selection criteria whether a re-collection of tenders will be conducted or the contract will be awarded without the same, and conditions may be subject to reappointment of bids.

The framework agreement with several economic operators does not oblige the parties to conclude an individual public procurement contract, and the framework agreement with one economic operator obliges the parties to conclude an individual contract if the contracting authority foresees this in the tender documentation.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

A member of a bidding consortium cannot withdraw from the consortium until the conclusion of the public procurement contract if:

- it is the holder of the consortium;
- the consortium cannot prove the fulfilment of the criteria for determining the competence required in the procedure without that member; or
- the remaining members of the consortium do not jointly take over the obligations of the member of the consortium who wants to withdraw.

Withdrawal from the consortium contrary to the above stated shall be deemed to be withdrawal from the group bid.

After the selection of the most favourable bid, the contracting authority may ask the group of economic operators to join in an appropriate legal form for the purpose of executing the contract.

Participation of small and medium-sized enterprises

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The PPL does not provide any specific mechanisms to directly encourage the participation of small and medium-sized enterprises (SMEs) in the procurement procedure. The participation of SMEs may be facilitated in the procedures where the contracting authority, at its own discretion, has decided to divide the complex subject matter of the procurement into several lots, so the smaller entity may submit a bid only for a single lot according its business capacities. The contracting authority shall specify in the tender documentation if the bids can be submitted for one, more or all lots.

The contracting authority may limit the number of lots that can be awarded to one bidder if, in the invitation to confirm the interest or in the invitation to tender, it determines the maximum number of lots per tenderer in the contract notice. In such case, the tender documentation shall state the non-discriminatory criteria or rules that will be used in deciding which parts will be assigned to a particular bidder if by applying the criteria for selecting the most favourable bid that bidder is most favourable for more parts than the maximum number.

Where one tenderer may be awarded more than one lot, the contracting authority may award the contract by joining several or all lots, if in the contract notice, the invitation to confirm the interest or the invitation to tender submitting offers has stated that it retains the ability to determine parts or groups of parts that can be joined. If the procurement subject is composed of several items within one lot, the contracting authority may not form the lot in a way that unjustifiably limits the competition to only one economic operator, regardless of whether the subject of the contract has been formed in one or in more lots.

Variant bids

27 What are the requirements for the admissibility of variant bids?

The contracting authority may allow or request the tenderer to submit variant bids, which will be specifies in the public procurement announcement or in the invitation to confirm the interest. If variant bids are not allowed or requested, they are not allowed to be submitted.

Variant bids must be related to the subject of the procurement.

The contracting authority that permits or requests submission of variant bids in the tender documentation defines the minimum mandatory conditions that these bids must meet, as well as any special requests for their submission, and in particular whether the variant bids can be submitted only if it is submitted an offer that is not alternative.

28 Must a contracting authority take variant bids into account?

If a contracting authority allows the submission of variant bids it shall consider and evaluate all alternative bids that meet the minimum requirements referred to in the technical specifications.

If the contracting authority has allowed the submission of variant bids, it may not reject a variant bid if it is selected as the most favourable only because:

- the contract for public procurement of goods according to the variant bid selected as the most favourable will be transferred into a public service contract; or
- the contract for public procurement of services according to the alternative offer selected as the most favourable will be transferred into a contract for public supply of goods.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The bidders shall prepare and submit their bids in compliance with the requirements and specifications provided by the contracting authority in the tender documentation, even in the forms provided by the contracting authority. Bids that do not comply with the requirements, criteria, formalities and other terms and conditions specified within the tender documentation may be disqualified as non-acceptable bids and shall not be evaluated.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The contracting authority shall be obliged to specify in the contract notice the contract award criteria, which once established shall not be changed during the contract award procedure. A contract award criterion may be the lowest price or economically most advantageous bid.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no explicit definition of an 'abnormally low' bid. The abnormally low bid shall be considered the bid that has an unusually low price for the subject matter of the contract compared to the estimated value of the supplies, works or services to be provided.

32 | What is the required process for dealing with abnormally low bids?

When a bid has a price that appears to be unusually low compared with the estimated value of the supplies or the works or services to be provided, the contracting authority shall require the bidder to explain in an appropriate time period not less than five days, to explain the price or the cost stated in the bid if it considers that the bid contains an unusually low price in relation to the goods, services or works that are the subject of the procurement or if there is a doubt that the contract will be executed. The contracting authority shall, in any case, require an explanation of the price if the bid value is more than 50 per cent lower than the average price of the eligible bids and is by more than 20 per cent lower than the next ranked bid, in case it has received at least three acceptable bids.

The explanation shall in particular apply to:

- cost-effectiveness of the production process, the provision of services or the manner of construction;
- the chosen technical solutions or any other particularly favourable conditions that the bidder has at their disposal for the provision of the goods or services or for the performance of works;
- the originality of the goods, services or works offered by the bidder;
- the fulfilment of the obligations;
- the fulfilment of requirements for subcontractors; and
- the possibility for the bidder to use state aid.

The contracting authority shall reject the offer only if the explanation or the submitted evidence is insufficient to justify the low offered price or costs, taking into account the elements stated above.

The contracting authority shall reject the offer if it determines that it has an unusually low price because it fails to meet the applicable obligations for environmental protection, social policy and labour protection arising from the regulations in the Republic of North Macedonia, collective agreements and international agreements, and conventions ratified in the Republic of North Macedonia.

If the contracting authority determines that the price is unusually low because the bidder has received state aid, the offer can be accepted if, on request, additional clarifications, the bidder proves that he or she has been granted state aid within three days from the day of receipt of the request.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Each economic operator that has a legal interest in the public procurement procedure, and which has suffered or could suffer damage by an alleged infringement of the provisions of the PPL, may initiate an appeals procedure against the decisions, actions and failures to undertake actions by the contracting authority during the public procurement procedure.

The appeal procedure (review procedure) is ruled by the State Commission for Appeals in Public Procurements.

The decisions of the Appeals Commission may be challenged in judicial procedure before the Administrative Court competent for resolving administrative disputes.

The decision of the Administrative Court may also be challenged in certain appeals before the Higher Administrative Court as regulated by the Law on Administrative Disputes.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

According to the PPL, only one authority may rule on a review application and that is the State Commission for Appeals in Public Procurements.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

After receiving the appeal, the contracting authority is obliged within five days to make available for the Appeals Commission, through the ESSP, the appeal with all attachments, the response to the appeal, the bids and other evidence.

If the contracting authority does not act in accordance to the above, the Appeals Commission shall oblige it to submit all documents within an additional five days. The Appeals Commission shall decide on the appeal after receiving all required documents or after the expiry of the additional time of five days in case when the contracting authority does not provide the necessary documents. In practice, the decision-making process is usually completed 15 to 20 days after submitting the appeal.

Judicial proceedings before the Administrative Court (administrative court procedures) concerning public procurement procedures, although considered as urgent, may last longer than six months after initiating the procedure.

36 | What are the admissibility requirements?

The PPL provides mandatory information that must be included in the appeal in order for the appeal to be accepted and reviewed by the Appeals Commission. Such information includes:

- the appellant's name, address or residence and seat;
- information for the representative or legal proxy;

- name and address of the contracting authority;
- number and date of the contract award procedure and information on the contract notice;
- number and date of the contracting authority's decision;
- other information about actions or failures to undertake actions by the contracting authority;
- description of the actual situation;
- description of the irregularities and infringements of the PPL;
- proposal for evidence;
- appeals request or request for compensation of the procedural costs; and
- signature and seal of the appellant.

The appellant shall also be obliged to provide evidence that it has paid the appeals tax.

Even if all the formalities stated above are complied with, the appeal will not be accepted if it is submitted out of time.

37 What are the time limits in which applications for review of a procurement decision must be made?

In an open procedure, an appeal may be filed within 10 days, while in the simplified open procedure and the procurement of a small value within five days from the day of:

- publication of the contract notice in relation to the content of the advertisement or the tender documentation;
- publication of the notification of changes and additional information regarding the content of the amendments and additional information;
- opening the bids, regarding the failure of the contracting authority to adequately respond to the timely questions or requests for clarification or modification of the tender documentation; or
- adoption of the decision for selection of the most favourable bid or for annulment, regarding the procedure for evaluation and selection of the most favourable bid, or the reasons for annulment of the procedure.

In a restricted procedure, including a dynamic procurement system, a competitive negotiated procedure, a negotiated procedure with the announcement of a notice, a competitive dialogue and an innovation partnership, the complaint may be filed within 10 days from the date of:

- publication of the contract notice in relation to the content of the advertisement or the tender documentation;
- publication of the notification of changes and additional information regarding the content of the amendments and additional information;
- adoption of the decision for selection of qualified candidates, regarding the reasons for the election (ie, the non-selection of the candidates);
- acceptance of the invitation to submit a bid, participation in the dialogue or negotiations, or for submitting additional documentation regarding the failure of the contracting authority to adequately respond to the timely questions or requests for clarification or modification of the tender documentation, as well as the content of the invitation or the additional documentation, unless the same documentation was made available simultaneously with the publication of the public procurement announcement;
- acceptance of the decision for rejection of the initial bid or decision, regarding the evaluation of the initial offer or decision;
- opening of tenders or final offers, regarding the failure of the contracting authority to adequately respond to timely questions or requests for clarification or modification of the tender documentation; or
- acceptance of the decision for selection of the most favourable bid or annulment, regarding the procedure for evaluation and selection of the most favourable bid, or the reasons for the annulment of the procedure.

In the negotiated procedure without publication of a notice, the appeal may be filed within 10 days from the day of publication of the notification of voluntary pre-transparency in relation to the cases and the fulfilment of the conditions for the selection of the procedure, the content of the tender documentation and the evaluation and the selection of the bids.

If the contracting authority does not publish a notification of voluntary preliminary transparency, the complaint may be filed within 10 days from the day of receipt of the decision on selection or annulment, regarding the tender documentation, the evaluation and the selection of the bids, or the reasons for annulment of the procedure.

In the procedure for public procurement of special services, the appeal may be filed within 10 days from the date of:

- publication of the contract notice in relation to the content of the advertisement or the tender documentation;
- publication of the notification of modifications and additional information regarding the content of the changes and additional information; or
- acceptance of the decision for selection of the most favourable bid or for annulment, regarding the failure of the contracting authority to adequately respond to the timely questions or requests for clarification or modification of the tender documentation, as well as with regard to the evaluation procedure and the selection of the most favourable bid, or the reasons for the annulment of the procedure.

The deadline for appeal in the case of a contract that is concluded without prior public procurement procedure is 60 days from the knowledge of such agreement, and it can be stated no longer than the expiration of the six-month period from the date of conclusion of the contract.

The deadline for appeal in the case of an individual contract on the basis of a framework agreement with several economic operators is three days from the date of receipt of the selection decision in relation to the procedure for awarding the individual contract on the basis of a framework agreement.

The deadline for appeal in the case of signing a contract for amending a public procurement contract during its validity is 10 days from the date of publication of a notice of amendment of the contract during its validity, in respect of the cases and circumstances justifying the amendment of the contract.

In all other cases, the time limit for lodging an appeal is 10 days from the date of receipt of the notification or decision deciding on the individual right of the applicant, that is, from the expiration of the deadline for undertaking the action in relation to the actions, decisions, procedures and omissions undertaking actions by the contracting authority, which according to the provisions of this law should have been undertaken (ie, other actions that violated the applicant's subjective right).

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The application of an appeal shall automatically suspend the signing of the public contract and its execution until the decision on the appeal by the Appeals Commission becomes final.

Notwithstanding this, the Appeals Commission may approve the continuation of the public procurement procedure upon request of the contracting authority. The Appeals Commission must decide within three

days of the submitted request. If the public contract is signed contrary to these terms, it shall be deemed void. The request for continuation of the procedure for awarding a public procurement contract may be granted for reasons that may incur damages if the procedure is not conducted, and which are disproportional to its value.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

According to the last annual report on the procurement system in Macedonia, published by the Public Procurement Bureau, in 2017 a total of seven applications for lifting the automatic suspension were submitted. All of them were rejected.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority shall notify all bidders, in writing, of the selected bidder a public contract has been awarded to. The notice shall be sent within three days from the day the respective decision was made, and a copy of the decision must be attached to the notice.

The contracting authority is obliged in the notice to inform the rejected bidders of the reasons why their bid was considered unacceptable, and to inform bidders who submitted an acceptable tender that was not selected as winner as to the reasons for selecting the winning bidder.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

The right to access the entire procurement file during the public procurement procedure is not explicitly provided by law.

The bidders that participated in the procedure are entitled to review the whole public procurement documentation, including the filled bids and applications, except for documents that are classified as business secrets. The participant may exercise the right to review the documentation as of the moment of receipt of the decision of the contracting authority until the day of expiry of the period for filing an appeal.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Generally, disadvantaged bidders in Macedonian public procurement procedures frequently take remedial action.

In the past, remedial actions were even more frequent, since no fees were charged for appeal applications. After the adoption of the current law and the establishment of fees for appeal applications, fewer disadvantaged bidders have decided to appeal.

According to the annual reports on the procurement system in Macedonia, published by the Public Procurement Bureau, in 2010 the relevant authority dealt with approximately 900 review applications, in 2011 with approximately 700 applications, in 2012 with approximately 650, in 2013 with approximately 550, in 2014 with approximately 600, in 2015 with 626, and in 2016 with approximately 623 review applications. The last publicly available report does not contain any information related to the number of review applications for 2017.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

If a violation of procurement law is established, the disadvantaged bidders are entitled to claim damages in certain civil court procedures. The bidder claiming damage shall prove that, in the absence of an established violation, it would have been awarded the contract and that its bid is the most favourable. The damages claimed are usually related to the lost profit (contract price minus the costs of implementing the contract).

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Theoretically this is possible, but in practice it is not enforceable since the signing and execution of the public contract is suspended by force of law only until the Appeals Commission decides upon the submitted appeal.

Usually, the time required for enforcement of all possible remedies by the unsatisfied applicant, namely the appellant, and obtaining a definitive court decision confirming that the conclusion of the contract violated the procurement law exceeds the time required for enforcement and fulfilment of the concluded contract itself; thus termination or cancellation of the contract after it has been fulfilled is not possible. The only option that the dissatisfied applicant then has is to ask for compensatory damages.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Contracting authorities are not allowed to enter into procurement contracts without conducting the procurement procedure, in accordance with the provisions of the PPL, thus all contracts concluded contrary to the provisions of the PPL are be deemed void. Therefore, each interested party may ask for a legal remedy, namely cancellation of the contracts in a civil court procedure, or may bring criminal charges against the contracting authority representatives for breaching or abusing their official authorisations.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

In the procedure before the State Commission, the appellant, in addition to the administrative fee, shall pay a fee, in Macedonian denars, for conducting the procedure, which depends on the value of the tender, as follows:

- up to €10,000, a fee equivalent to €50 in denars;
- from €10,000 to €70,000, a fee of €100;
- from €70,000 to €130,000, a fee of €150; or
- greater than €130,000, a fee of €200.

Where there is no tender, the amount of the fee for conducting the procedure shall be calculated on the basis of the estimated value of the public procurement contract, and the State Commission shall inform the appellant of the fee amount payable and the deadline by which the appellant should submit proof of payment.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

Following the trend to harmonise Macedonian and EU legislation, at the beginning of 2019, a new Public Procurement Law was adopted, which should strengthen the transparency and control of procedures, while at the same time making them simpler and easier to implement. A mandatory obligation to publish contracts and other documentation from each individual public procurement via the Electronic System for Public Procurement has been introduced. In accordance with European rules and practice, the new law provides an opportunity for quality to be valued in addition to price. In doing so, the contracting authority may, depending on the subject of the procurement itself, be able to determine whether it will use the lowest price, cost-effectiveness based on the product's lifetime or the best relationship between price and quality.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The European Union (EU) has established a complex body of laws regulating the acquisition of all necessary goods, works and services by contracting authorities in its member states, including primary legislation, namely the Treaty on the EU (TEU) and the Treaty on the Functioning of the EU (TFEU), and, in specific cases, secondary legislation, namely a number of directives.

The EU procurement law has been transposed into Maltese law. This consists mainly of four key Directives:

- the Public Sector Directive (Directive 2014/24);
- the Utilities Directive (Directive 2014/25);
- the Concessions Directive (Directive 2014/23);
- the Remedies Directives (Directive 1989/665 as amended);
- the Utilities Remedies Directive (Directive 1992/13 as amended); and
- the Electronic Invoicing in Public Procurement Regulations (Directive 2014/55/EU).

The principal piece of legislation that formed Malta's legal framework for public procurement is the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta). The framework was revamped in 28 October 2016 to transpose the 2014 EU directives on public procurement. The key applicable regulations are the following:

- Public Procurement Regulations of 2016 (Subsidiary Legislation 174.04) (the Public Sector Regulations);
- Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations of 2016 (Subsidiary Legislation 174.06) (the Utilities Regulations);
- Concession Contracts Regulations of 2016 (Subsidiary Legislation 174.10) (the Concessions Regulations); and
- Emergency Procurement Regulations of 2016 (Subsidiary Legislation 174.09) (the Emergency Regulations).

Collectively, these pieces of legislation are known as the Malta Regulations.

The Director of Contracts has also issued rules entitled the General Rules Governing Tendering. These are usually included in the procurement documents published by contracting authorities. The bidders must abide by these rules. These rules are periodically amended, the latest version being 2.5, which was published in January 2019.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

As indicated in question 1, there are specific regulations on the utilities sector and concession contracts.

The Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations of 2011 (Subsidiary Legislation 174.08) regulates public procurement relating to defence and security.

Prior to the coming into force of the Concession Contracts Regulations of 2016, two specific regulations were enacted that provided for a remedies procedure for competitive tender processes issued for services or works concessions, namely the Procurement (Health Service Concessions) Review Board Regulations of 2015 (Subsidiary Legislation 497.13) – to our knowledge, this applied to a specific competitive tender process for a health-related service concession – and the Concessions Review Board Regulations of 2015 (Subsidiary Legislation 497.15), which apply to any works or services concessions issued by the government of Malta or any contracting authority on an opt-in basis.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The Malta Regulations are applicable when a public contract falls within their scope, whether by way of subject matter or value threshold, even if the contract is not of cross-border interest.

However, there are instances where a public contract – in particular, one for the purchase of works, services and supplies – that does not fall within the scope of either of the Malta Regulations may still be classed as a public contract to attract interest from economic operators based outside Malta, and therefore, the provisions of the TEU and TFEU, as interpreted by the European Court of Justice (ECJ), will apply. This means that a procurement process is required which observes the general principles of EU public procurement law.

Proposed amendments

4 | Are there proposals to change the legislation?

The national Legislative framework
Relevant legislation was overhauled on 28 October 2016, with the introduction of the Malta Regulation to transpose the 2014 EU Directives. The Public Sector Regulations have been amended a few times since then, but those amendments were mostly immaterial.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The Public Sector Regulations do list the contracting authorities subject to those regulations in Schedule 1, but this list is not meant to be exhaustive. Several wholly and partially government-owned limited liability companies are on that list such as Enemalta Plc, Gozo Channel (Operations) Ltd and WasteServ Malta Ltd.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The Malta Regulations apply irrespective of the estimated value of the public contract to be awarded, but naturally different procurement processes and requirements may apply, depending on the estimated value.

A public contract with an estimated value up to €144,000, in the case of the Public Sector Regulations, and up to €443,000, in the case of the Utilities Regulations, is specifically regulated by a relatively light-touch regime loosely referred to as 'departmental tender procedures', which varies from open or restricted calls for tenders, calls for quotes, and direct orders that are managed by the contracting authority itself. A contracting authority may not use the following forms of procurement in case of department tenders: competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure without public notice.

Once the value of a public contract exceeds €144,000, in the case of the Public Sector Regulations, or €443,000, in the case of the Utilities Regulations, then the procurement process is generally managed by the Director of Contracts and must be in any of the procurement procedures in the law, the preferred option being the open/restricted procedure. Naturally, there are exceptions. Specific contracting authorities identified in the law are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

Public sector regulations.

If the estimated value of the public contract exceeds €5.548 million in the case of works, €144,000 in the case of supplies and services and €750,000 in the case of services for social and other specific services (the public sector value thresholds), then other requirements will apply in terms of publications and remedies, among other things.

Utilities regulations.

If the estimated value of the public contract exceeds €5.548 million in the case of works, €443,000 in the case of supplies and services and €1 million in case of services for social and other specific services (the utilities value thresholds), then other requirements will apply in terms of publications and remedies, among other things.

The expeditious award procedure under the Emergency Regulations can only be resorted to if the value of the public contract for works, services or supplies is less than €135,000.

The Concessions Regulations apply irrespective of the value of the concessions contract, but if the estimated value is above €5.548 million, a number of procedural guarantees apply, mainly, prior information concession notices and contract award notices.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Contractual modifications to public contracts are allowed, subject to restrictions. The principle is that any substantial modifications that alter the overall nature of the public contract must not be consented to by the contracting authority and a new procurement process should be pursued. The Malta Regulations contain detailed rules as to when contractual modifications are allowed without the need to pursue a new procurement process. These rules vary depending on the value of the public contract.

Public sector regulations

If the value of the public contract exceeds €144,000, then a contracting authority can consent to a contract modification only with the prior approval of the Director of Contracts and in any of the following cases:

- where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the public contract;
- for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor:
  - cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
  - would cause significant inconvenience or substantial duplication of costs for the contracting authority:
  - provided that, any increase in price shall not exceed 50 per cent of the value of the original contract and that notice of such modification must be published in the Official Journal of the EU (OJEU);
- where all of the following conditions are fulfilled:
  - the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
  - the modification does not alter the overall nature of the contract;
  - any increase in price is not higher than 50 per cent of the value of the original public contract;
  - provided that notice of such a modification is be published in the OJEU;
- where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:
  - an unequivocal review clause or option in conformity with the first paragraph; or
  - universal or partial succession into the position of the initial contractor, following corporate restructuring (such as a takeover, a merger, an acquisition or insolvency) of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Public Sector Regulations; or
  - in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors; and

- where the modifications, irrespective of their value, are not substantial, that is, if the modification renders the public contract materially different in character from the one initially concluded. Any contractual modification that is less than 10 per cent (for a service/supply contract) or 15 per cent (for a works contract), as applicable, of the initial contract value is not substantial, and therefore, the public contract may be modified without the Director of Contract's approval. The law indicates four situations that automatically presume that there is a substantial modification, and therefore a new procurement procedure is required.

The law now establishes a specific procedure regulating the Director of Contracts' evaluation of requests for modification by contracting authorities.

Any contractual modification that is agreed to without the approval of the Director of Contracts or against the Director of Contracts' refusal is illegal and any compensation paid to the economic operator may be clawed back. Such illegal contractual modifications (including where the Director of Contracts should not have given his or her approval) may be subject to a challenge by other interested parties.

Utilities regulations

The same grounds and prior approval procedure apply, except that all public contracts within its scope are affected, irrespective of the contract value.

Emergency regulations

Any public contract awarded through these provisions cannot be modified, and if the contract cannot be executed without modification then the public contract is cancelled and a new award procedure initiated.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There has been no Maltese jurisprudence on the modification of public contracts. Based on our experience, economic operators do not usually have the appetite to spend time, energy and cost to challenge such changes. There have been a number of notable judgments delivered by the ECJ on modification of contracts and it is clear that the 2014 EU directives have amended the provisions on modification of contracts to align the law closer to those judgments.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

The Malta Regulations do not regulate privatisations specifically. The assessment of the proposed privatisation must be focused on the substance of the structure and mechanics of the deal, rather than its form. A competitive award procedure is statutorily required if the privatisation entails the purchase of works, supplies or services from an economic operator or the grant of a concession to an economic operator (in particular, where there is transfer of a function).

If the privatisation is a pure disposal of government-owned assets against consideration, then it is likely that the Malta Regulations would not apply. Even if a competitive award process is not strictly required by the Malta Regulations, the market economy operator principle under EU state aid law and the general principles of non-discrimination and equal treatment that emerge from the TEU and TFEU may be satisfied by such a competitive award process so long as it is open, non-discriminatory and transparent.

The government of Malta has consistently, although there are exceptions, launched and managed competitive award processes for privatisations. This is generally tasked to the Privatisation Unit which was set up in June 2000.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The Malta Regulations do not regulate PPPs specifically. The assessment of the proposed PPP must be focused on the substance of the structure and mechanics of the deal, rather than its form. A competitive award procedure is statutorily required if the PPP entails the purchase of works, supplies or services from an economic operator or the grant of a concession to an economic operator.

Even if a competitive award process is not strictly required by the Malta Regulations, the market economy operator principle under EU state aid law and the general principles of non-discrimination and equal treatment that emerge from the TEU and TFEU may be satisfied by such a competitive award process so long as it is open, non-discriminatory and transparent.

The government of Malta has, in the past decade, organised competitive award processes for PPPs. In 2013, Projects Malta Ltd, a specific private limited liability company fully owned by the government of Malta was set up to coordinate and facilitate PPPs.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

The publication requirements depend on the value and nature of the public contract. The key notices possible under the Malta Regulations are the following:

- prior-information notice: this is completely voluntary and generally indicates a planned procurement by contracting authorities;
- contract notice: this is mandatory for all procurement process for public contracts with an estimated value exceeding €144,000 (in the case of the Public Sector Regulations) and €443,000 (in the case of the Utilities Regulations), except for the negotiated procedure without a prior call;
- contract award notice: this is also mandatory and contains the results of the public procurement, and must be published within 30 days from the decision to award or conclude the procurement process; and
- voluntary ex-ante transparency notice: this is also a voluntary notice, which may be resorted to within the context of the negotiated procedure without a prior call.

These notices are subject to a prescribed form issued by the Publications Office of the EU and must contain a minimum standard of information as per the Malta Regulations.

Public sector regulations

Public contracts with an estimated value exceeding €144,000 shall be published through eTenders, the government of Malta's e-procurement platform. If the estimated value of the public contract exceeds the Public Sector Value Thresholds, then the notices are to be submitted to the Publications Office of the EU for publication on the Tenders Electronic Daily (TED) website.

Utilities regulations

Public contracts with an estimated value exceeding €443,000 shall be published through eTenders. If the estimated value of the public

contract exceeds the Utilities Value Thresholds, then the notices are to be submitted for publication on TED.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

In principle, a contracting authority has a wide margin of discretion to set the selection criteria and administrative requirements for the eligibility of an economic operator to participate in a procurement process.

However, these criteria and requirements must be in line with specific limitations set in the Malta Regulations and also respect the general principles of public procurement law. In particular, the administrative requirements should ideally be objective, rather than subjective, and must guarantee equal treatment and fair competition.

There are three broad categories of permitted selection criteria: the suitability of a bidder to pursue the professional activity; the economic operators' economic and financial standing; and its technical and professional ability.

The contracting authority is also obliged to exclude an economic operator which is subject to a mandatory ground of exclusion – in particular, a conviction of the economic operator for participation in a criminal organisation, corruption, fraud or money laundering.

The contracting authority is also obliged to exclude an economic operator that the Director of Contracts has ordered to be blacklisted (ie, debarred from taking part in public procurement operations). An economic operator that is subject to a mandatory ground of exclusion or a blacklisting decision may undergo 'self-cleaning' (see question 14) to be able to participate in procurement processes.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

The number of potential economic operators invited to participate in a procurement process can be limited only when the following procedures are used:

- a restricted procedure;
- a competitive procedure with negotiation;
- an innovation partnership; and
- a competitive dialogue.

This limitation is subordinate to the general principle of promoting genuine competition.

A contracting authority that wishes to award a public contract governed by the Public Sector Regulations and with its estimated value exceeding €144,000, may limit the number of candidates when opting for restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships as per selection criteria, but at least five (restricted procedure) or three (competitive procedure with negotiation, competitive dialogue procedure and innovation partnership) candidates must have qualified. This is not an absolute rule: in fact, the contracting authority may proceed with the procurement process even if the number of qualified candidate is below the statutory minimum.

Moreover, the contracting authority may in certain prescribed and exceptional circumstances opt for the negotiated procedure without prior call with one or a limited number of economic operators.

If a public contract is governed by the Utilities Regulations, then the contracting authority may limit the number of candidates, but there is no minimum number of qualified candidates that is required. Again, the principle of promoting genuine competition is the guiding principle.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

An economic operator may undergo 'self-cleaning' to remove the effects of a ground for exclusion. The economic operator can achieve this by showing, in its bid or offer, that it took 'sufficient measures to demonstrate its reliability'.

This is presumed where the economic operator proves that:

(i) it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
(ii) it has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
(iii) it has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators indicated in (iii) shall be evaluated by contracting authority taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the contracting authority shall send the economic operator a statement of the reasons for that decision.

The economic operator shall not be entitled to make use of the possibility to remove the exclusion as provided in this regulation if the period of exclusion from participating in procurement award procedures has been established by a final judgment.

The 'self-cleaning' procedure applies to the mandatory grounds of exclusion, but may also be used as a defence before the Commercial Sanctions Tribunal, if an economic operator appeals a blacklisting decision of the Director of Contracts. The Commercial Sanctions Tribunal is an independent review board set up in 2016 to hear applications from contracting authorities to blacklist economic operators.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The Malta Regulations impose an express statutory obligation on contracting authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. The design of procurements should not be made with the intention of narrowing competition either.

Contracting authorities remain bound by the general principles of EU public procurement law where the public contract is of a certain cross-border interest.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The general principle of equal treatment of economic operators necessarily requires that a contracting authority must act independently and impartially during the pre-procurement stage, throughout that procurement process up to the award and performance of the public contract.

Conflicts of interest

17 | How are conflicts of interest dealt with?

A contracting authority must exclude an economic operator in case of a conflict of interest.

A conflict of interest is widely defined to capture any person acting on behalf of the contracting authority, who is involved in the conduct of the procurement procedure or who may influence the outcome of that procedure, and has a financial, economic or other personal interest that might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure.

The contracting authority is vested with a wide margin of discretion if it is of the view that the exclusion can be avoided by imposing 'other, less intrusive measures'.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

A contracting authority must exclude an economic operator that has been involved in the preparation of the procurement procedure. The contracting authority is vested with a wide margin of discretion if it is of the view that the exclusion can be avoided by imposing 'other, less intrusive measures'.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

This varies from sector to sector and according to a contract's value, but the open procedure appears to be preferred.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

This very much depends on the terms of procurement documents. The Malta Regulations do not provide specific requirements on such an option other than the equal treatment of bidders. The General Rules Governing Tenders do allow an economic operator to submit multiple tender offers, but there are restrictions to avoid conflicts of interest. An economic operator may not, in particular, submit an offer in its individual capacity and also as a member of a joint venture or consortium.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

There are a number of procurement procedures that allow a degree of negotiation with bidders, such as the competitive dialogue and the competitive procedure with negotiation.

The use of these procedures requires the approval of the Director of Contracts, which may be granted if any of the following circumstances exist:

- the needs of the contracting authority cannot be met without the adaptation of readily available solutions;
- the works, services or supplies require designing or innovative solutions;
- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, complexity or legal and financial make-up of the circumstances or the risks attached to them;
- the technical specifications cannot be established with sufficient precision by the contracting authority; and
- only irregular or unacceptable tenders were submitted in response to an open or a restricted procedure.

While the specific procedure is flexible, the Malta Regulations require that the contracting authority establish, at the outset, a minimum framework for the procedure that is known to all participating bidders to guarantee equal treatment throughout the procurement procedure. There may be subsequent stages where bidders are disqualified and negotiations or dialogue with remaining bidders intensify, until there is the submission of the final offer for adjudication.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The competitive procedure with negotiation appears to be regularly used, in particular within the utilities sector.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

A framework agreement may be concluded with one or several economic operators that have successfully participated in the call for competition or the invitation to confirm interest. The duration of the framework cannot, in principle, exceed four years.

24 | May a framework agreement with several suppliers be concluded?

A framework agreement can be structured in such a way that any subordinate agreements concluded within the context of the framework agreement are subject to competition (or no competition at all) between the economic operators party to the agreement. The law also allows for a hybrid framework agreement that may, in respect of certain prescribed public contracts, be subject to a competitive process and, in respect of other prescribed public contracts, not subject to a competitive process. The law provides a minimum structure for such subordinate competitions within the context of framework agreements.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The General Rules Governing Tenders require that all partners in a joint venture or consortium remain part of it until the conclusion of the procurement process, and, in principle, that the same members to perform the public contract.

The General Rules require this as the members of a joint venture or consortium 'as a whole' must satisfy the selection criteria indicated in the procurement documents.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The Malta Regulations provide for a number mechanisms to enable small and medium-sized enterprises to participate in procurement processes more effectively, whether intentionally so or by effect. These

mechanisms range from flexible selection criteria and performance-oriented and functionally equivalent technical specifications, to the prohibition of abnormally low tenders.

We have also noticed an increasing trend where contracting authorities do not insisting on the submission of a bid bond in procurement procedures for public contracts with values that are not significant.

The Malta Regulations allow contracting authorities to award public contracts in the form of separate lots and may determine the size and subject matter of such lots. Contracting authorities frequently use this option.

Contracting authorities are now required to indicate in the procurement documents the main reasons for their decision not to subdivide a contract into lots when the estimated value of the public contract exceeds €144,000, in the case of the Public Sector Regulations, and €443,000, in the case of the Utilities Regulations.

It is up to the contracting authority to elect whether one bidder may bid for one, several or all lots.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids are allowed where, in the Public Sector Regulations, the estimated contract value exceeds €144,000, and in the Utilities Regulations the estimated contract value exceeds €443,000.

The contracting authority's procurement documents must clearly state the minimum requirement to be met by the variants and any specific requirements for their presentation. The technical specifications and the award criteria must be such that can be applied to both the bid and the variant, as applicable.

28 | Must a contracting authority take variant bids into account?

A contracting authority must take into account variant bids if they were allowed in the procurement documents. However, the contracting authority must disqualify a bidder submitting variant bids, if such bids were not allowed.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The consequences naturally depend on the nature of the procurement procedure and terms of the tender. In principle, any bidder that puts forward an offer that is not compliant with the tender specifications or insists that their terms of business are adopted will be disqualified in the interests of equal treatment.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

A contracting authority possesses a considerable margin of discretion in law when setting the award criteria, so long as it is connected with the subject matter of the public contract and in line with the general principle of public procurement law.

A contracting authority must base the award criteria using the 'most economically advantageous tender' basis. In practice, this means that award criteria may take into account the cheapest offer or the cost along with clearly indicated quality criteria (the best-price-quality ratio).

A contracting authority may also set award criteria that are defined by labour, environmental and social aspects.

The law indicatively provides for three key categories of criteria:

- quality: technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- organisation: qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; and
- after-sales service and technical assistance: delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The contracting authority must demand an economic operator to explain the price or costs proposed in the tender if the offer 'appears' to be abnormally low. This obligation applies in the Public Sector Regulations where the estimated value of the public contract exceeds €144,000 and in the Utilities Regulations where the estimated value of the public contract exceeds €443,000.

Although the law imposes an obligation on the contracting authority, this obligation only kicks in when it 'appears' to the contracting authority that the offer is abnormally low. The words 'abnormally low tender' are not defined at law and it seems that the word 'appear' defeats the imposition of an obligation in the first place. If the contracting authority does not take the view that the cheapest offer submitted is abnormally low, it is difficult for an aggrieved competing bidder (which was not selected) to challenge it.

An aggrieved competing bidder generally learns of the price offered by other bidders immediately upon the issue of the opening tender report. This is accessible on the eTenders website or on the physical notice board of the Department of Contracts. Having said that, we have observed that bidders tend not to draw this to the attention of the contracting authority during the evaluation stage, but rather it is raised as a ground for objection in any challenge to an award decision. We have observed that the Public Contracts Review Board is generally open to consider such claims, in particular, when there is a risk of a successful bidder underpaying employees.

32 | What is the required process for dealing with abnormally low bids?

As highlighted in question 31, the contracting authority must demand an explanation if it 'appears' that a bidder's offer is 'abnormally low'. The economic operator must send its explanations and supporting evidence to the contracting authority, otherwise the latter will be entitled to assume that the tender is 'abnormally low'. The contracting authority may reject the tender where the explanations and evidence submitted does not satisfactorily account for the low level of price or costs proposed.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The Public Contracts Review Board (PCRB) is the only judicial body vested with competence to hear appeals by interested parties or aggrieved bidders in connection with procurement processes and public contracts.

Any interested party may file an appeal at any time before the close of the call for competition to challenge any discriminatory technical, economic or financial specifications, any ambiguities in the procurement

documents or clarifications, or generally any illegal decisions taken by the contracting authorities. The estimated financial value of the prospective public contract value is immaterial to this procedure.

Secondly, following the close of the call for competition, any bidder or any interested party may file an appeal against any decision of the contracting authority (eg, rejections or awards) within 10 days. The law only allows appeals in respect of prospective public contracts whose estimated financial value exceeds €5,000 (excluding VAT).

Thirdly, any bidder or interested party may also file an application to declare a concluded public contract ineffective, if it was concluded without following a procurement process or in default of the standstill period. The law only allows applications in respect of prospective public contracts whose estimated financial value exceeds the amounts indicated in question 6.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The PCRB is solely competent to rule on appeals in connection with a procurement process.

A recent amendment to the Public Sector Regulations has vested the PCRB with the same powers of a court of civil law (ie, the First Hall, Civil Court). It is not clear exactly how the PCRB intends to exercise these powers, but it is envisaged that it will be able to compel witnesses to appear before it, to issue interim orders and also to fine any defaulting party if it fails to adhere to any of the PCRB's decisions.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

An appeal hearing is scheduled within approximately one month from the filing of the appeal and all submissions and evidence will be heard in one hearing. Following the conclusion of the hearing, the PCRB must deliver the decision within a span of six weeks, but in general, it is delivered within one week.

Following the delivery of the PCRB's decision, the interested party may lodge an appeal before the Courts of Appeal. The hearing will be scheduled within a span of two months from the date of filing of the appeal. There will be only one hearing where oral legal submissions (and usually no further evidence) are made. Following the conclusion of the oral hearing, the Court of Appeal must deliver its judgment within a span of four months.

36 | What are the admissibility requirements?

Bidders are expressly indicated in the law as having standing to file appeals against decisions of contracting authorities and applications to declare a public contract ineffective.

However, appeals and applications may also be filed by interested persons.

In the case of an appeal filed before the close of a call for competition, any interested person has standing to file the appeal, since presumably no offers or tenders were submitted at that stage. In the case of an appeal filed against a decision of the contracting authority, the interested person must show that: he or she has or had an interest in, or he or she has been harmed or risks being harmed by, a decision of the contracting authority.

The same test should apply in respect of applications to declare a concluded public contract ineffective.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The time limits applicable depend on whether the deadline for the submission of interest or offer has lapsed. An interested party may lodge an appeal before the PCRB at any time before the close of the call for competition, if the objection relates to the procurement process. Following the close of the call for competition, an interested party may lodge an appeal against a decision of the contracting authority before the PCRB within 10 days from the date of that decision.

The interested party may lodge an appeal before the Courts of Appeal from a decision of the PCRB within 20 days of its delivery.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Any appeal lodged by an interested party whether before the PCRB or before the Courts of Appeal will suspend the procurement process, including the conclusion of the public contract in line with the standstill obligation. There are no exceptions to this rule.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

This is not applicable.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Unsuccessful bidders must be notified of the award prior to the conclusion of the contract. If the bidders are not notified of the award decision, then the standstill period does not start running and the public contract cannot be concluded.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Owing to issues relating to confidentiality, trade secrets, sensitive commercial information and bid-rigging risks, contracting authorities generally turn down such requests. Similarly, we are not aware of any instance in which the PCRB has allowed such access to a bidder either during challenge proceedings.

To our knowledge, no application for such information under the Freedom of Information Act (Chapter 496 of the Laws of Malta) has been successful to date.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

We would say that there is a culture of challenging decisions by contracting authorities before the PCRB, but this naturally varies from sector to sector. The PCRB delivered 106 decisions in 2017 and 134 decisions in 2018. Some of these decisions are in turn challenged before the Courts of Appeal. We have also observed an increase in review applications filed before the lapse of the deadline for submissions of offers, the pre-contractual remedy, in the past few months.

We did not observe a similar culture or appetite in procurement processes in connection with concessions, privatisations and PPPs.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

This claim for damages is based on a claim based on the institute of pre-contractual responsibility and it may only be exercised once the remedies reviewing a contracting authority's decision is exhausted.

A recent case, *Norcontrol IT Limited et v Department of Contracts* delivered by the Court of Appeal on 29 April 2016, awarded damages for the preparation of a submitted offer and for judicial costs incurred for lodging the appeal; no loss of profits were awarded. A more recent case in the names *Costruzioni Dondi S.p.A. v Department of Contracts et* delivered by the First Hall, Civil Court on 9 November 2018 rejected a claim for damages suffered in connection with a bid submitted for procedural reasons, mainly, that a specific limitation period of six months (which the Court deemed applicable) had lapsed.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

An interested party or a bidder may apply to the PCRB to declare that a public contract is ineffective. This right applies to the Public Sector Regulations where the estimated value of the public contract exceeds the Public Sector Value Thresholds and to the Utilities Regulations where the estimated value of the public contract exceeds Utilities Value Thresholds.

This right may be resorted to when a contracting authority:

- awards a public contract without the publication of the contract notice in the OJEU, unless permitted under the Malta Regulations; and
- concludes a public contract in default of a standstill obligation.

This demand may be accompanied by a claim for compensation of damages suffered by the aggrieved party.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

See question 44.

In addition, since October 2016, the Director of Contracts has been empowered to issue a decision to terminate a public contract, if the award of that contract is in breach of the Public Sector Regulations. This decision needs to be in writing, properly detailed with findings and reasons, and communicated to the awardee. The awardee is then entitled to challenge such a decision before the PCRB. We are aware of at least one instance in which the Director of Contracts has exercised this power and the case remains pending before the PCRB.

Therefore, it is not to be excluded that an interested party draws the attention of any such illegal public contracts to the Director of Contracts with a view that such power is exercised in that context.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

This very much depends on the particular circumstances of the case.

Any appeal lodged before the PCRB and before the lapse of the deadline for the submission of tenders is without charge.

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Any appeal lodged before the PCRB and after the submission of tenders has closed is subject to the payment of a deposit, the amount of which is calculated on the basis of 0.5 per cent of the contract's estimated value, but will be no less than €400 and no more than €50,000. This deposit may be refunded at the discretion of the PCRB. Professional legal fees are not recoverable in the case of a successful challenge.

Any appeal lodged before the Court of Appeal is subject to approximately €500 in court registry fees and judicial costs. Again, this excludes professional legal fees, which are only recoverable in part in the case of a successful challenge.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

We continue to see a drive to move away from award criteria based on 'cheapest offer that is administratively and technically compliant' and more towards a best price-quality ratio (BPQR) approach. Contracting authorities are getting more comfortable with BPQR-based formulae. On the other hand, bidders are getting to grips with these formulae, and challenges before the PCRB have increased in this respect. A recent decision by the PCRB has in fact ruled that the contracting authority should provide aggrieved bidders with a detailed comparative scoring sheet showing the scores obtained by the successful bidder (and the reasons thereof) and the scores obtained by the aggrieved bidder (and the reasons thereof).

The Department of Contracts remains focused on facilitating the submission of bids, and in fact it will be rolling out a more expansive programme on the European Single Procurement Document and the e-Certis system.

The Government of Malta remains clearly committed to promoting concessions and public private partnerships.

Mozambique

Ana Marta Castro and Raul Mota Cerveira
Vieira de Almeida

LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The law on the procedures for the award of public works contracts, supply of goods contracts and provision of services contracts (the Regulation on the Award of Public Contracts (RPC)), approved by Decree 5/2016 of 8 March, is considered the key legislation regulating the award of public contracts. It sets out the rules for the award of public works contracts, supply of goods contracts and provision of services contracts in Mozambique. The RPC is also applicable to the award of public lease contracts, consulting services contracts and granting of concessions.

Furthermore, Law 15/2011 of 10 August and Decree 16/2012 of 4 June establish, respectively, the legal framework for public-private partnerships (PPPs) and the applicable rules to procurement processes, implementation and monitoring of PPPs.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Depending on the sectors, there are different public procurement laws supplementing the general regime.

Law 21/97 of 1 October, establishes the use of public tender for the award of concessions in the electricity sector, and Decree 31/96 of 16 July provides for a special legal framework applicable to the award of toll roads and bridge concessions. Decree 38/97 of 4 November allows for the inclusion of specific contractual clauses whenever toll roads and bridge concessions imply the involvement and intervention of other states and governments.

Ministerial Order 14/2019 of 22 January has come into force very recently, approving administrative procedures and complementary guidelines regarding the implementation of tenders according to segments for the award of supply of goods contracts and provision of services contracts.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Mozambique is not a European Union (EU) member. However, Mozambique has been a member of the World Trade Organization since 26 August 1995, but is not a signatory of its Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets among its parties.

Nevertheless, the Portuguese legal framework has a major influence on the RPC, as well as on the other relevant legislation regarding the award of public contracts and, for that reason, the RPC follows a framework like the EU's.

Proposed amendments

4 | Are there proposals to change the legislation?

The RPC was approved in 2016 in order to ensure greater transparency and the effective implementation of public procurement procedures. To our knowledge, no proposals to change the legislation are envisaged.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Contracting authorities under the RPC are the following, in accordance with its article 2:

- the Mozambican state and services of the direct and indirect administration, including embassies and missions abroad;
- municipalities and other public legal entities; and
- public companies and companies where the government has a shareholding.

The RPC is not applicable to contracts entered into between state organisms and institutes. However, the official formal drafts of public contracts are still applicable.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The RPC provides for three distinct legal regimes:

- the general regime;
- the special regime; and
- the exceptional regime.

The general regime is applicable to the award of all public works contracts, supply of goods contracts and provision of services contracts that do not fall within the special regime or the exceptional regime. In the general regime, contracts are awarded by means of a public tender, a procedure in which any interested party may participate, provided it complies with the requirements established in the tender documents.

The special regime is applicable to the award of contracts in the following situations: contracts arising from any international treaty, or any other type of international agreement, and signed between Mozambique and any other state or international organisation, whenever its conclusion requires the adoption of a specific legal regime; and contracts concluded in the scope of public financed projects with

resources originating from an official foreign cooperation agency or a multilateral financial body, whenever the adoption of a specific regime is a condition of the respective agreement or contract.

The specific rules to be applicable in procurement procedures launched under the special regime shall be previously approved by the Minister of Finance and must be stated in the contract notice and in the tender documents.

Finally, there is the exceptional regime, applicable to the award of contracts that, for reasons relating to the public interest, cannot fall within the general or special regimes. In this exceptional regime, contracting authorities can select any of the following pre-contractual procedures:

- tender with prior qualification;
- limited tender;
- tender with two stages;
- tender according to segments;
- small-scale tender;
- tender according to quotes; and
- direct award.

All procurement procedures foreseen under the exceptional regime have specific rules, but are regulated on a subsidiary basis in accordance with the public tender rules.

Regarding to thresholds, article 69 of the RPC establishes that a limited tender may be launched whenever the estimated value for public work contracts and supply of goods contracts or provision of services contracts does not exceed, respectively, 5 million meticais or 3.5 million meticais.

The tender according to quotes has a threshold equivalent to 10 per cent of the threshold applicable to the limited tender, meaning that this specific procedure may be applicable whenever the estimated value for public work contracts, and for supply of goods contracts or provision of services contracts does not exceed, respectively, 500,000 meticais or 350,000 meticais.

Lastly, the small-scale tender, exclusively available for the award of contracts to individual people and micro or small companies has a threshold equivalent to 15 per cent of the threshold applicable to the limited tender, meaning that this specific procedure may be applicable whenever the estimated value for public work contracts, supply of goods contracts or provision of services contracts does not exceed, respectively, 750,000 meticais or 525,000 meticais.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

It is possible to amend concluded contracts, provided the amendments have the appropriate grounds.

Public contracts may exclusively be amended whenever there is the need to alter:

- the ongoing project or its specifications to improve its adequacy to the contract's main object;
- the value of the contract, owing to the increase or decrease of the quantities required for the contract's main object and aim;
- the implementation scheme of the public works or the provision of services or the supply of goods, owing to the unenforceability of the original contracting terms; or
- the payment conditions, owing to supervening circumstances.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

No, there has been no case law clarifying the application of the legislation in relation to amendments to concluded contracts.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Under the Mozambican legal framework, privatisation processes do not fall within the scope of the RPC and are regulated by specific legislation – Law 15/91 of 3 August, amended by the Resolution 11/92 of 5 October – which provides for the general principles, criteria, methods and procedures applicable to privatisation processes.

The general rule is for privatisation processes to be held through a public tender or a public offering. Nonetheless, privatisation processes can also be held through a limited procedure or a direct sale if certain specific conditions are fulfilled.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Law 15/2011 of 10 August and Decree 16/2012 of 4 June govern the procedure and awarding of PPPs.

The main issues surrounding PPPs are financial impact and risk-sharing between public and private parties.

Law 15/2011 of 10 August establishes the guidelines of the awarding process, implementation and monitoring of the three modalities of involvement of the private sector in the promotion of development: public-private partnerships (PPPs), large-scale projects (LSPs) and business concessions (BCs).

On the other hand, Decree 16/2012 of 4 June defines in greater detail the rules laid down in the aforementioned law and establishes the procedures applicable to the contracting implementation and monitoring of PPPs, LSPs and BCs, namely referring to:

- the powers of the sectoral and financial supervisor, the regulatory authority and the implementing entity;
- the precontractual stages of the projects;
- the types of public contracting procedures;
- the financial guarantees and incentives to investment;
- the contracts and respective revisions or amendments;
- the execution of contracts, redemption, causes of termination, among other thing;
- the prevention and mitigation of risks in PPP; and
- the sharing of benefits.

In accordance with Law 15/2011 of 10 August, the setting up of a PPP usually follows the public tender regime and the RPC is applicable on a subsidiary basis.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the National Gazette and in other media.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

All interested parties, from Mozambique or abroad, are eligible to participate in a tender procedure, provided the parties comply with the tender's obligations relating to the payment of taxes and can demonstrate their legal, economic/financial and technical qualifications. Articles 23, 24, 25 and 26 of the RPC establish how bidders may demonstrate they meet those requirements. The public procurement legislation does not allow for a shortlisting of bidders in the general regime.

However, contracting authorities may assess whether an interested party shall be qualified to submit a bid in a tender procedure whenever they launch a tender with prior qualification.

In the first phase of the tender with prior qualification, bidders are invited to submit the documents that demonstrate their compliance with the technical and financial qualification requirements referred to above.

Subsequently, qualified bidders are short-listed and invited to participate in the second phase of the procedure and to submit a bid. In this phase, the procurement process follows the public tender rules.

Finally, in the specific tender launched for the award of consulting services contracts, contracting authorities may select a minimum of three and a maximum of six consultants to participate in the competitive selection procedure.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

There are two ways to limit the number of bidders that can participate in a tender procedure:

On the one hand, as referred to in question 12, it is possible for such a limitation to occur in the tender with prior qualification and in the specific tender launched for the award of consulting services contracts.

On the other hand, whenever a contracting authority launches a direct award for the award of a specific contract, the selection of bidders that will participate in the procedure depends on a discretionary decision of said authority.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not established under the Mozambican legal framework.

Economic operators that fall within any of the exclusion situations foreseen in the RPC must wait for the lifting of the respective sanctions. They cannot participate in tender procedures until then.

The RPC expressly provides a list of situations on which bidders are restrained to participate in procurement procedures, such as:

- a private person convicted of an offence concerning his professional conduct, as long as the penalty lasts;
- a private person punished for serious misconduct regarding professional matters, as long as the sanction lasts;
- a private or legal person sanctioned by any body or institution of the Mozambican state, with the prohibition to participate in procedures, due to the practice of unlawful acts in a procurement procedure, as long as the sanction lasts;
- a private person who controls, directly or indirectly, legal persons within the situations mentioned in the previous bullet;
- a representative of the contracting authority responsible for the decision to be rendered;
- a legal person controlled, directly or indirectly, by a person within the situation referred in the previous bullet;
- a private or legal person who has defrauded the Mozambican state or who has been involved in fraudulent enterprises bankruptcies; and
- a private or legal person whose capital has a proven illegal provenance.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. The RPC states that the fundamental principles for tender procedures are the principles of legality, purpose, reasonableness, proportionality, pursuit of public interests, transparency, publicity, equal treatment, competition, impartiality, good faith, stability, motivation, responsibility, sound financial management and celerity, among other applicable public law principles.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. The relevant legislation demands that contracting authorities defend public interests throughout the procurement procedure. In addition, contracting authorities must provide equal conditions to all interested parties, treating all bidders according to the same criteria and ensuring that the most advantageous tender is carefully selected by providing equal opportunity to interested parties and fair competition among tenderers.

Also, the evaluation team (the jury), which is composed by, at least, three members, must act in accordance with the principles of independence, impartiality and exemption.

The RPC also provides rules regarding the selection of contracting authorities' representatives, to prevent conflicts of interest, such as the following:

- if the representative has an interest in the contract, on its own or as the representative or manager of someone else's businesses;
- if the representative's spouse, or a member of its family, or a person with whom the representative lives, has an interest in the contract;
- if the representative, or the people referred to in the previous bullet, is a shareholder of a company that is interested in the contract; and
- if the representative owns a bond of any nature with the bidder, or has maintained a bond in any matter related to the procurement procedure, or its object.

In the above-mentioned situations, the contracting authority's representative is forced to declare and argue its impediment, excuse or suspicion, under the Operating Rules of Public Administration Services.

The above-referred impediments also apply to the jury, its members being equally restrained from taking position in that body in any of the above situations.

Conflicts of interest

17 | How are conflicts of interest dealt with?

See question 16.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a bidder, directly or indirectly, in the preparation of a tender procedure constitutes an immediate ground for exclusion.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure used by contracting authorities is the public tender, which is the procedure to be followed under the general regime.

The public tender procedure is divided into the following phases:

- preparation and launching;
- submission of bids and qualification documents;
- evaluation of bids and qualification documents;
- evaluation, classification and recommendations of the jury;
- announcement of the ranked tenderers;
- award, cancellation or invalidation;
- notification to tenderers;
- complaints and appeals, if applicable; and
- contract's signature.

On the other hand, the direct award is only applicable when contracting by means of any other procurement procedure is unfeasible or inconvenient, and when very specific circumstances defined in the RPC, such as in situations of extreme urgency, occur.

The direct award procedure involves the following phases:

- solicitation of proposals;
- receipt of proposals;
- acceptance of proposals;
- verification of the qualification's adequacy to fulfil the procedure object;
- award, cancellation or invalidation; and
- contract's signature.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

No. Bidders may participate in procurement procedures as a consortium or association, but individual members of a consortium or association cannot bid separately, or as part of another consortium or association, in the same tender.

For purposes of participation in tenders, the documents constituting a consortium must state:

- the name and qualification of each member of the consortium and the indication of the participation of each one;
- the nomination of the representative member of the consortium before the contracting authority, with powers to assume obligations and to receive notifications on behalf of all the consortium members; and
- the assumption of joint and several liability of the members of the consortium for all its obligations and acts.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The only procedure that may involve negotiations between contracting authorities and bidders is that for the award of consulting services contracts. The establishment of a negotiation phase is not mandatory and takes place before the award of the contract to the selected bidder. Nonetheless, only the first ranked bidder is invited to participate in the negotiation phase. Negotiations cover discussions on the terms of reference, methodology, personnel, expenses and contractual conditions. All negotiations must be noted in minutes and signed by both parties.

In case negotiations are not satisfactory, the contracting authority may terminate the negotiations and invite the following ranked bidder to negotiate.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

There are no specific rules regarding the conclusion of framework agreements.

24 | May a framework agreement with several suppliers be concluded?

See question 23.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The RPC states that consortia must be composed by the same entities in the course of a procurement procedure. However, it would be difficult not to accept a change in the members in case of a merger or a spin-off of one of the members of the consortium.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Yes. The RPC establishes that only individuals and small and medium-sized enterprises (SMEs) are allowed to participate in small-scale tenders and limited tenders.

The RPC does not have any specific provision that regulates the division of contracts into lots.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

The RPC admits the submission of variant bids. In procurement procedures in which the submission of variants bids is admitted, the tender documents and the evaluation criteria must be adapted for that purpose.

28 | Must a contracting authority take variant bids into account?

See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders are not allowed to change the tender specifications. The RPC establishes that bids that do not comply with the tender specifications, or that contain unenforceable or abusive conditions, shall be disqualified.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

According to the RPC, the award of public works contracts, supply of goods contracts and provision of services contracts shall be decided based on the lowest price criterion. Exceptionally, whenever a decision based on the lowest-price criterion is not viable, the RPC allows the contracting authority to use a combined criterion, under which the evaluation of bids is based on the technical evaluation of the bid submitted and on the price offered, provided that the decision to choose this combined criterion results from a well-founded assessment.

Decisions based on the lowest price criterion must always ensure that the selected bid has the necessary level of quality to pursue the public interest goals, in accordance with the tender documents.

In the event of a tie arising from the adoption of the lowest-price criterion, the final selection is determined by a sweepstake during a public session.

With regard to the award of public work concessions or services concessions, the RPC stipulates that the contracting authorities may evaluate proposals based, individually or jointly, on the following criteria:

- the highest price offered for the concession;
- the lowest tariff or price to be charged to users;
- the best quality of services or goods available to the public;
- the best service and clients' satisfaction; and
- the bidder holding a valid certificate with the stamp '*Orgulho Moçambicano*. Made in Mozambique'.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The RPC does not contain any specific provision regarding abnormally low bids.

32 | What is the required process for dealing with abnormally low bids?

See question 31.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

According to the Mozambican legal framework, it is possible to challenge qualification and disqualification decisions, as well as award decisions through administrative review proceedings.

Complaints must be filed within five business days of the notification of the challenged decision. This administrative review proceeding is assessed by the contracting authorities, that must decide whether to accept or reject such complaint within 10 business days of receipt. The filing of a complaint does not require the payment of any fees.

Until the final day to file a complaint, all tenderers have free access to the tender's administrative documents.

Furthermore, it is also possible to challenge the above referred decisions through a hierarchical appeal. The hierarchical appeal must be filed within three business days of the notification of the challenged decision. The hierarchical appeal is assessed by the minister supervising the contracting authority, the provincial governor or the district administrator. Regardless of the entity at stake, a decision whether to accept or reject such hierarchical appeal must be taken within 30 business days of the filing date.

Filing a hierarchical appeal requires the payment of a fee. The tenderer must submit a guarantee that does not exceed 0.25 per cent of the estimated contract's value (up to a maximum of 125,000 meticais), which may be financially updated by the Minister of Finance. This guarantee is reimbursed if the appeal is accepted, otherwise, it reverts to the state.

Finally, the decision rendered under the hierarchical appeal may be judicially reviewed in accordance with the procedures regulated under Law 7/2014 of 28 February.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

See question 33.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Regarding administrative proceeding, see question 33.

In relation to judicial proceedings, there are no provisions that require judges to render decisions within a determined time frame.

36 | What are the admissibility requirements?

All procurement procedures decisions may be challenged through complaints and appeals. According to the RPC, it is possible to challenge qualification and disqualification decisions, as well as award decisions (see question 33).

A hierarchical appeal can be filed on the following grounds:

- a violation of the RPC;
- a violation of the tender rules; or
- a breach of procedure, including for lack of or inadequate reasoning, which affects the legality of contracting authorities' decisions.

37 What are the time limits in which applications for review of a procurement decision must be made?

See question 33.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Yes. Both mechanisms of complaint and hierarchical appeal suspend the tender's course. All tenderers are notified of such suspension.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

The RPC does not provide for the possibility to lift an automatic suspension.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders are simultaneously notified of the award decision.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

All documents related to the procurement procedure can be publicly accessible and analysed, free of charge, from the date of publication of the tender announcement until 60 days after the procurement procedure's conclusion.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

Although there are cases of disadvantaged bidders filing review applications, especially in the cases in which the value of the contract or its strategic relevance is high, most disadvantaged bidders abstain from such practice.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, disadvantaged bidders can claim for damages.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, those situations are not very common.

In cases where judicial decisions determine the cancellation of an executed contract, contracting authorities usually appeal such decisions, and when final and non-appealable decisions are finally issued, contracts are almost completed.

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Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Legal protection is still available in these situations.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

Filing a complaint does not require the payment of any fees. Nevertheless, the filing of a hierarchical appeal requires the tenderer to provide a guarantee as security, the amount of which cannot exceed 0.25 per cent of the contract's estimated value, up to a limit of 125,000 meticais.

Netherlands

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

On 1 July 2016, the amended Dutch Public Procurement Act (DPPA) entered into force. The amended DPPA implements the latest European Union (EU) procurement directives (2014/23/EU, 2014/24/ EU and 2014/25/EU). The DPPA applies to both national and European procurement procedures.

The structure of the DPPA has changed since the implementation of the latest EU procurement directives. On 1 July 2016, Part 2a (the award of concession contracts) was added to the DPPA. The DPPA now consists of the following sections:

- Part 1: General provisions;
- Part 2: Procurement procedures that meet EU thresholds;
- Part 2a: Award of concession contracts;
- Part 3: Award of special sector contracts; and
- Part 4: Final provisions (including legal review).

Some provisions of the DPPA are further elaborated in the Public Procurement Decree. The Works Procurement Regulations 2016 (mandatory for contracts below the EU threshold), the European Single Procurement Document and the Proportionality Guide form parts of the Public Procurement Decree.

In the Netherlands public procurement law is enforced through litigation. The Dutch Public Procurement Experts Committee (PPEC) accepts complaints about procurement procedures, but the PPEC's advice is non-binding.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Yes. In the fields of defence and security, the Public Procurement Act supplements the general regime. This Act implements Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

Further, the Works Procurement Regulations 2016 describes the procedures for the award of works contracts, and the Utilities Procurement Regulations 2016 may be applicable (under certain circumstances) to special sector procurement procedures.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The Public Procurement Decree states that the Proportionality Guide is to be considered as a mandatory directive. The Proportionality Guide further elaborates on the proportionality principle and how it should be applied in procurement procedures.

Proposed amendments

4 | Are there proposals to change the legislation?

There are currently no proposals to change the legislation, except for a proposal to make some minor amendments to repair or clarify existing legislation.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The definition of a contracting authority, as laid down in the EU procurement directives, has been implemented in the DPPA. Therefore, case law of the European Court of Justice (CJEU) regarding the definition of 'contracting authorities' is also relevant for the interpretation of the Dutch definition of a 'contracting authority'.

Central government authorities and bodies governed by public law that meet the following cumulative criteria are considered to be contracting authorities. The criteria are that:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- they have legal personality; and
- they:
  - are financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law;
  - are subject to management supervision by those authorities or bodies; or
  - have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

The question whether an undertaking constitutes a contracting authority depends on the circumstances of the case and must be assessed on a case-by-case basis.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Even when the value of a contract falls below the relevant EU threshold, EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply.

Where the contracting authority considers that a contract is likely to attract cross-border interest it is obliged to publish a sufficiently accessible advertisement to ensure that economic operators in other member states can have access to appropriate information before awarding the contract.

The relevant EU thresholds are:

Government authorities

- Works contracts, concessions for works or services contracts: €5.548 million.
- All services concerning social and other specific services: €750,000.
- Supplies and services contracts and design contests for local government: €221,000.
- Supplies and services contracts and design contests for central government: €144,000.

Contracts awarded by contracting authorities operating in the field of defence

- Works: €5.548 million.
- Supplies and services: €443,000.

Special sectors

- Works contracts, subsidised works contracts special sectors: €5.548 million.
- All services concerning social and other specific services special sectors: €1 million.
- All other service contracts, all design contests, subsidised service contracts, all supplies contracts: €443,000.

If the EU thresholds are not exceeded, national procurement legislation may apply. The Proportionality Guide provides guidance on which procurement procedure should be applied if the EU threshold is not exceeded. Relevant considerations are:

- the size of the contract;
- the transaction costs of the contracting authority and economic operators;
- the number of potential economic operators;
- the desired outcome;
- the complexity of contract; and
- the type of contract/sector.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Yes. Contracts and framework agreements may be modified without a new procurement procedure in accordance with Chapter 2.5 of the DPPA (articles 2.163a–2.163g), in any of the following cases:

- where the value of the modification is below the EU thresholds, 10 per cent of the initial contract value for service and supply contracts, and below 15 per cent of the initial contract value for works contracts;
- where the modifications have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses;
- for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement;
- the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- where a new contractor replaces the one to which the contracting authority had initially awarded the contract; or
- where a modification of a contract or a framework agreement does not render the contract materially different in character from the one initially concluded.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The CJEU ruled in various judgments on the admissibility of modifications of concluded contracts, without a new procurement procedure (eg, *Succhi di Frutta* (C-496/99); *Commission v Italy* (Case C-340/02); *Pressetext* (C-454/06); *Wall* (C-91/08) and *Commission v Germany* (C-160/08). Article 72 of Directive 2014/24/EU is implemented in Chapter 2.5 of the DPPA and can be considered as the codification of these judgments.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

There are no specific rules for privatisations. It follows from Recital 6 of Directive 2014/24/EU that the Directive should not deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

There are no specific rules for the selection of private parties in PPP projects. Whether a public procurement procedure must be followed must be assessed on a case-by-case basis.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

Contracts that exceed the EU thresholds must be advertised in the Official Journal of the EU and the Tenders Electronic Daily website. The DPPA also requires that the procurement contracts are advertised on the Dutch electronic publication system, TenderNed.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Yes, there are limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure.

Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of small and medium-sized enterprises (SMEs) in public

procurement. Any such requirements should be related and proportionate to the subject matter of the contract. In particular, contracting authorities are not normally allowed to require economic operators to have a minimum turnover that would be disproportionate to the subject matter of the contract; the requirement should normally not exceed, at the most, twice the estimated contract value. However, in duly justified circumstances, it should be possible to apply higher requirements. Such circumstances might relate to the high risks attached to the performance of the contract or the fact that its timely and correct performance is critical, for instance because it constitutes a necessary preliminary stage for the performance of other contracts.

Requirements must be limited to economic and financial standing, technical ability and/or professional ability. The grounds for exclusion (both facultative and mandatory) are specified in the DPPA.

The Proportionality Guide further elaborates on the proportionality of requirements to meet minimum capacity levels.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Yes, it is possible to limit the number of bidders that can participate in a tender procedure. In restricted procedures, competitive dialogues, competitive procedures with negotiation and innovation partnerships, contracting authorities may limit the number of suitable candidates they will invite, provided that a sufficient number of suitable candidates are available.

The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number. For the restricted procedure at least five bidders must be invited, and for the competitive dialogues, competitive procedures with negotiation and innovation partnerships, at least three bidders must be invited.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Any economic operator that is excluded from a tender procedure because of past irregularities may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability, despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The DPPA specifically states the fundamental principles of equal treatment and transparency. The principle of effective competition is referred to throughout the DPPA, for example by stating that the design of the procurement shall not be made with the intention of excluding it from the scope of the DPPA or of artificially narrowing competition.

In the case *Succhi di Frutta* (C-496/99), the CJEU ruled that the principle of equal treatment aims to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. It follows from (new) article 1.10b DPPA that contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures, so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who is involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Conflicts of interest

17 | How are conflicts of interest dealt with?

Article 1.10b DPPA stipulates that contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. Contracting authorities can take appropriate measures by, for example, implementing a code of conduct in the event of a conflict of interests.

A conflict of interest can ultimately result in an invalid procurement procedure or the exclusion of an economic operator.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer

concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

In principle, open or restricted procedures are used by contracting authorities. Under specific circumstances the competitive dialogue, competitive procedure with negotiation, innovation partnership or the negotiated procedure without publication can be applied. With regard to special sector procurement procedures, the negotiated procedure is most commonly used.

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

The case law of the CJEU (*Asitur*, C-538/07) disallows an:

> *absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.*

This implies that economic operators must be given an opportunity to demonstrate that, in their case, there is no real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

Yes, the use of procedures involving negotiations with bidders is subject to special conditions. The competitive dialogue, the competitive procedure with negotiation, and the negotiated procedure with prior publication, are all subject to special conditions.

A competitive procedure with negotiation or a competitive dialogue can be applied if:

- the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- it includes design or innovative solutions;
- the contract cannot be awarded without prior negotiations; or
- the technical specifications cannot be established with sufficient precision.

These procedures can also be applied if only irregular or unacceptable tenders are submitted in response to an open or restricted procedure.

The negotiated procedure without publication can only be applied in accordance with the criteria stipulated in section 2.2.1.7 DPPA. This procedure can, for example, be used in the event that no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, or if the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The competitive dialogue is commonly used for complex infrastructure projects or information technology projects. This procedure allows the contracting authority and economic operator to discuss the best solution for the contracting authority. It is particularly useful if there are no easy solutions for the need of a contracting authority (eg, a design or innovative solution).

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in the DPPA. The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

The procedures in relation to framework agreements may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded. The specific requirements for the conclusion of a framework agreement depend on whether the framework agreement is concluded with a single economic operator or with multiple economic operators. In the event of a single economic operator the criteria of article 2.142 DPPA must be complied with. In the event of multiple economic operators, article 2.143 DPPA is applicable.

24 May a framework agreement with several suppliers be concluded?

A framework agreement may be concluded with several suppliers (article 2.46 and 2.47 DPPA). If the value of the purchases that can be made under the framework agreement exceeds the EU threshold, the contracting authority must launch a European procurement procedure.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There are no specific rules with regard to changing the members of a bidding consortium because of, for example, insolvency, a merger or a spin-off, as long as the principle of non-discrimination is honoured. In practice, contracting authorities often prohibit changes in the members of bidding consortia in the tender documents.

Participation of small and medium-sized enterprises

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

As a general principle in public procurement, contracting authorities are not allowed to favour SMEs. To further the participation of SMEs (within the legal limits) contracting authorities can limit the (amount of) requirements. Also, contracting authorities can try to lower the costs and difficulty of the procurement procedure in order to minimise the administrative costs for SMEs (eg, allowing the use

of 'self-certification' to assess whether the bidder meets the bid's requirements).

Further, contracting authorities should not bundle public contracts so that SMEs cannot fulfil the requirements on their own. Public authorities are obliged to divide a contract into lots and may only deviate from this rule in the event that such a division is not considered to be suitable for that specific public contract.

There are no specific rules limiting the maximum or minimum amount of lots single bidders can be awarded.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

A contracting authority can allow or ask bidders to offer different solutions in the same procedure. The contracting authority must explicitly state the possibility of variant bids in the publication of a contract notice. In the tender documents, the contracting authority further determines the criteria for variant bids. Variant bids must be connected to the subject matter of the contract.

28 | Must a contracting authority take variant bids into account?

A contracting authority can allow variant bids or can ask explicitly for variant bids. The contracting authority will only take those variant bids into account that meet the requirements set out in the tender documents.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The contracting authority must exclude bids that change the tender's specifications. This also applies when bidders submit their own standard terms of business, if those terms conflict with the tender requirements. A particular procedure, such as the negotiated procedure, can allow companies to submit changes.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

In the Netherlands, contracting authorities may choose from three award criteria:

(i) best quality-price combination;
(ii) lowest price using a cost-effectiveness approach (life cycle costs or total cost of ownership); or
(iii) lowest price.

Contracting authorities must publish the award criteria (including weighting factors) in the publication of a contract notice. The choice for criteria (ii) and (iii) must be substantiated in the tender documents. Published award (sub)criteria must be transparent and proportional. The criteria cannot be changed after publishing.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The DPPA states in article 2.116 that it must be determined whether the bid is abnormally low in respect of the works, supplies or services that need to be performed. To establish whether a low bid constitutes an abnormally low bid, three methods can be used:

- the relative method;
- the absolute method; or
- a combination of both the relative and absolute methods.

The relative method looks at the difference between the winning bid and the average price of the bids. In order to value the outcome of this method and to avoid manipulative bids, there must be a mini- mum number of bidders. The absolute method looks at the difference between the winning bid and the estimated value of the contract. For this method, it is key that the estimated value is correct based on information from the relevant market. The two methods can also be combined in order to establish an abnormally low bid.

32 | What is the required process for dealing with abnormally low bids?

Before dismissing an abnormally low bid, the common procedure is to ask the bidder for a clarification of the bid. The contracting authority can ask for clarification through questions or in a meeting. A clarification cannot lead to an amendment of the bid. When the bid is dismissed as abnormally low, a new winner can be established.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In the Netherlands, there is no specialised court for procurement cases. Civil courts may rule on claims for infringements of public procurement law. The competent court is the court of the place where the contracting authority resides. Parties may also choose to submit a dispute to arbitration.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Most public procurement litigation is conducted in interim procedures. Given the nature of these procedures, the measures are provisional. Depending on whether an agreement has been concluded between parties, the remedies can differ. In interim procedures it is not possible to have a contract annulled by the court nor is it possible to claim damages (asking for an advance is possible). This can be claimed in regular proceedings.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The duration of interim procedures is approximately one or two months. Regular proceedings may take up to 18 months.

36 | What are the admissibility requirements?

With respect to interim procedures, the Dutch Code of Civil Procedure applies and requires a plaintiff to have sufficient and urgent interest in the matter.

37 | What are the time limits in which applications for review of a procurement decision must be made?

A bidder can successfully ask for suspension of a procurement procedure of review of an award decision in interim procedures within 20 days

of the announcement of the winner (Alcatel period; article 2.127 DPPA). The deadline for appeal against an interim judgment is four weeks.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

An application for review before civil courts does not generally have an automatic suspensive effect, blocking the continuation of the procurement procedure. However, the plaintiff can request a suspension of a pending procurement.

Interim procedures do have a suspensive effect on the conclusion of the contract. Article 2.131 DPPA explicitly states that a contract may not be concluded during the Alcatel period nor while interim procedures are pending and the court has not yet ruled on the request for interim measures.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

We are not aware of any official statistics relating to the percentage of applications for successfully lifting an automatic suspension in a typical year.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority must notify all bidders. After this formal notification the Alcatel period commences, during which the contracting authority may not conclude a contract with the winning party.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Contracting authorities must make the tender documents available to applicants free of charge (article 1.21 DPPA). Tender documents are defined in the DPPA as all documents submitted to the procedure by the contracting authority. The DPPA does not explicitly grant access to the procurement file but states that, without prejudice to the provisions of the Act, the contracting authority shall not disclose information that has been provided by a company as confidential information (article 2.57 DPPA).

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

It is customary for disadvantaged bidders to take legal action against contracting authorities. The Dutch courts deal with approximately 200 review applications each year.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

A violation of procurement law constitutes a wrongful act under Dutch civil law. Disadvantaged bidders can claim damages in regular proceedings (see question 34). The damages can entail a claim for expenditure incurred by the plaintiff or a claim for the loss of profit. In the latter case, the plaintiff must prove that the contract would have been concluded with them, if the contracting authority had not violated procurement rules.

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44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A violation of procurement law does not result in the concluded contract being void. However, interested parties may request a court to annul the agreement within six months after the contract was awarded. In some cases a contracting authority may be ordered by the court not to execute the contract or to terminate the contract.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

In the event that a contract is wrongfully awarded without any procurement procedure, parties can take legal action and request a court order compelling the contracting authority to follow a public procurement procedure. In the event that a contract has already been concluded, parties can request a court order to terminate the agreement and possibly claim damages.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

The fee for a judicial complaint can be up to €3,903, depending on the type of procedure and the value of the matter. As civil courts rule on claims for infringements of public procurement law, objectors need to engage a lawyer to have the matter examined and argued before a court. It is very difficult to estimate the total costs involved in the litigation proceedings, as this differs strongly from case to case and also depends on whether a party appeals or not, but it can be costly.

* *The content of this chapter is accurate as at April 2018.*

Norway

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

Norwegian legislation on public procurement is, to a large extent, based on and implements European Union (EU) directives in accordance with Norway's obligations under the European Economic Area (EEA) Agreement. Norway's original implementing legislation has been in force since 1994. The new directives on public procurement, utilities and concessions were implemented into Norwegian legislation during 2016 and entered into force on 1 January 2017.

The current legislation is found in:

- the Act on Public Procurement of 17 June 2016, No. 73 (LOV-2016-06-17-73) (the Act); and
- in three regulations adopted on 20 December 2016:
  - the Regulation on Public Procurement of 20 December 2016, No. 1744 (FOR-2016-12-20-1744), implementing Directive 2014/24/EU;
  - the Regulation on Procurement Rules in the Utilities Sectors (FOR-2016-12-20-1745), implementing Directive 2014/25/EU; and
  - the Regulation on Concessions Contracts, (FOR-2016-12-20-1746), implementing Directive 2014/23/EU.

In addition, there is a set of rules supplementing the legislation implementing the procurement directives:

- regulations on time limits (FOR-1992-12-04-910), implementing Regulation (EEC, Euratom) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits;
- regulations on salary and work conditions in public contracts (FOR-2008-02-08-112);
- regulations on apprentices in public contracts (FOR-2016-12-17-1708);
- regulations on fines to enforce compliance with administrative orders in accordance with the Public Procurement Act, in order to ensure compliance with Norway's obligations under the EEA Agreement, World Trade Organization's Agreement on Government Procurement (GPA) or other international agreements (FOR-2016-12-22-1842);
- regulations on requirements regarding energy and environment when procuring road transport vehicles (FOR-2017-12-11-1995), implementing Directive 2009/33/EC of the European Parliament and of the European Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles; and
- regulations on the complaints board for public procurement (FOR-2016-08-12-977).

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

Defence

The Ministry of Defence is obliged to comply with the general Norwegian procurement legislation (ie, the Act and the Public Procurement Regulation). Pursuant to section 2 of the Act, however, the Act does not apply in respect of procurements that may be exempted pursuant to article 123 of the EEA Agreement, corresponding to article 346 of the Treaty on the Functioning of the EU (TFEU), or other exemptions provided for by regulation. Directive 2009/81/EC on contracts in the field of defence and security has been implemented by the Regulation on procurement in the field of defence and security of 4 October 2013, No. 1185 (FOR-2013-10-04-1185).

In addition, the revised Regulation on Procurement for Defence of 25 October 2013, No. 1411 (FOR-2013-10-25-1411) contains rules and procedures for defence procurements, the application of the Act, the Public Procurement Regulation and the Defence and Security Regulation. This is supplemented by detailed rules governing classified procurement in the new Security Act of 1 June 2018, No. 24 (LOV-2018-06-01-24).

Transport

The Public Procurement Act and the Public Procurement Regulation do not apply to public passenger transport procurement, for which specific rules are provided by the Act on Professional Transport by Motor Vehicles and Vessels of 21 June 2002, No. 45 (LOV-2002-06-21-45), and Regulation of 17 December 2010, No. 1673 (FOR-2010-12-17-1673) implementing Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007, setting out conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred or grant exclusive rights in return for the discharge of public service obligations.

International legislation

3 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The implementing regulation supplements the directives by establishing certain minimum rules (eg, on documentation and protocols) and basic principles (eg, on competition) applicable for contracts with an estimated value equal to or above 100,000 Norwegian kroner (excluding VAT) and below the EU/EEA thresholds. Under the Public Procurement Regulation, contracting authorities, other than central government, are obliged to apply similar, but somewhat simpler, procedures to contracts with an estimated value equal to or above 1.3 million kroner (excluding VAT), similar to the EU/EEA threshold for central government, and below the EU/EEA thresholds. Such contracts should be published in Doffin,

the Norwegian national database for public procurement. Threshold values were adjusted on 6 April 2018. It is possible to publish voluntary simple notices for contracts of low value on Doffin.

Furthermore, contracting authorities must comply with the basic principles of competition, equal treatment, non-discrimination on basis of nationality, transparency, accountability and proportionality.

Moreover, national rules fill out and supplement the procedures. For instance, section 1 of the Act reflects that the purpose of the procurement rules is to ensure efficient use of society's resources, and also to ensure the integrity of public entities as well as public confidence and trust.

In order to fight crime in the workplace, in particular social dumping, the contracting authority is obliged to limit subcontracting to only two subcontractor levels in the contract chain in contracts concerning work, as well as in cleaning contracts with an estimated value of 1.3 million kroner for central government contracts, and 2 million kroner (excluding VAT) for other contracting authorities subject to the Public Procurement Regulation, and 4.1 million kroner (excluding VAT) under the Utilities Regulation.

All contracts with an estimated value below 100,000 kroner (excluding VAT) are exempted from the procurement rules.

Proposed amendments

4 | Are there proposals to change the legislation?

On 28 August 2018 the Ministry published its proposal for amendments to the public procurement regulations to allow reserving certain social and health services to ideal or non-profit organisations in line with the judgment in case C-113/13 (*Spezzino*). (In 2017 the ESA informally informed Norway that it had opened an own-initiative case concerning a possible breach of EEA rules on public procurement in connection with the award of public contracts concerning the construction and operation of nursing homes, by limiting the procedures to such organisations, and followed this up by a request for information by letter of 18 June 2018.)

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

In line with the definitions in Directive 2014/24/EU and EU case law, publicly owned companies having an industrial or commercial character do not constitute 'contracting authorities'. In its decision of 31 January 2011 (Case 2010/278), the Complaint Board for Public Procurement (KOFA) considered, in light of cases C-373/00 (*Truley*), C-380/98 (*University of Cambridge*) and C-237/99 (*Commission v France*), whether the biggest student welfare organisation in Norway, established by law, should be regarded as a 'body governed by public law' and found that it did not satisfy the condition of control.

In its decision of 30 April 2012 (Case 2011/262), the KOFA found, in particular in light of Case C-18/01 (*Korhonen*), that a company collecting industrial waste, and which was a subsidiary of an intermunicipal waste disposal company considered to be a body governed by public law, was exposed to competition and operated for profit, and was considered as having a commercial character.

In its decision of 21 January 2014 (Case 2012/95), the KOFA confirmed and consolidated case law in this respect.

In its decision of 15 January 2007 (Case 2006/12), the KOFA found that a sheltered workshop had an industrial or commercial character and thus was not subject to the procurement rules. The Ministry of Trade, Industry and Fisheries had come to the opposite conclusion in a letter of 2 September 1999. The KOFA underscored that it had been in doubt, and that it had reached its conclusion based on the particular facts of the case.

In its decision of 19 June 2018 (Case 2017/131), the KOFA found, with reference to C-567/15 (*LitSpecMet*) and C-373/00 (*Truley*), that The Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF), an umbrella organisation that organises all national sports federations in Norway, does not constitute a body governed by public law because, despite it depending largely on public financing, it is a voluntary organisation serving the interest of its members, and thus not established for the specific purpose of meeting needs in the general interest.

Utilities activities exempted

Article 34 of the Utilities Directive 2014/25/EU provides, in line with the previous article 30(1) of Directive 2004/17/EC, that activities covered by the Directive shall not be subject to the procurement rules, if the member state or the contracting entities, having introduced a request pursuant to article 35, can demonstrate that, in the member state in which it is performed, the activity is directly exposed to competition in markets to which access is not restricted and the participants in that market are operating in a competitive manner. On this basis the EFTA Surveillance Authority (ESA) has granted three exemptions.

By its decision of 22 May 2012 (189/12/COL), the ESA decided that the Utilities Directive shall not apply to contracts awarded by contracting entities and intended to enable the activities of production and wholesale of electricity in Norway. The decision does not concern the activities of transmission, distribution and retail supply of electricity in Norway.

By its decision of 30 April 2013 (178/13/COL), the ESA granted exemptions for contracts intended to enable the following services to be carried out in Norway and, in particular, on the Norwegian Continental Shelf:

- exploration for crude oil and natural gas;
- production of crude oil; and
- production of natural gas.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

All contracts with an estimated value below 100,000 kroner (excluding VAT) are exempted from the procurement rules. Such contracts may still be the subject of internal instructions, policies or routines on finance, purchasing, good governance etc, establishing similar principles and procedures.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The amendment of a concluded contract or framework agreement without a new procurement procedure is permitted under the following conditions, in accordance with the directives implemented by the new regulations:

- amendments in accordance with price revision clauses;
- other amendments resulting in price increases within certain limits, not altering the overall nature of the contract or the framework agreement;
- necessary additional works, services or supplies by the original contractor, provided certain conditions are met;
- where the need for modification has been brought about by unforeseen circumstances;
- in the case of a change of contractor as a consequence of corporate restructuring – including takeovers, mergers, acquisitions or

insolvency – provided it does not entail substantial modifications and is not aimed at circumventing the procurement rules; and
- in case of other amendments that are not considered substantial.

Amendments that render the contract or the framework agreement materially different in character from the one initially concluded are considered substantial and are prohibited.

An amendment shall in any event be considered to be substantial in the following cases:
- the amendment results in conditions that could have led to other parties participating in the procedure;
- the amendment changes the economic balance in favour of the contractor;
- the amendment extends the scope considerably; and
- in the case of a change of contractor in other cases than those specifically allowed.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

In practice, the KOFA has accepted quite extensive amendments, in respect of both prices and the range of goods covered by a framework agreement, where such amendments are 'foreseen' by the contract. In its decision of 20 July 2009 (Case 2008/217), concerning an alleged illegal direct award of contract due to amendments in line with the terms of a standard construction contract, the KOFA found, with reference to Case C-454/06 (*Pressetext*), paragraphs 34 to 35, that a reduction of the works that did not affect the price was not considered substantial and therefore did not require a new procurement procedure.

In its decision of 18 November 2013 (Case 2011/349), the Norwegian Public Roads Administration awarded two contracts for a new road for pedestrians and cycles, treating asphalt work as an amendment to an asphalt contract recently awarded in the same area, and the construction work as an amendment to a contract for operation and maintenance of roads in that area. The construction work was found to be of a different character and outside the scope of the maintenance contract, and, thus, constituted an illegal direct award. The estimated value of the asphalt work amounted to 4.7 per cent of the value of the asphalt contract and was deemed to be within limits for legal additional work.

In its decision of 25 September 2017 (Case 2016/196), concerning a complaint by the railroad workers' union against NSB (Norwegian Railroads) for contracting, as a change order in 2016, maintenance work worth 73 million kroner, approximately 0.7 per cent of the value of the original contract for purchase of trains in 2008, according to which NSB could carry out maintenance themselves or by third party, or by separate contract with the contractor according to an option which terminated in 2011, the KOFA, applying the Utilities Regulation of 2006, referring to both *Pressetext* and C-160/08, paragraphs 98-101, concluded that an illegal direct award had taken place.

A case decided on 30 June 2015 (Case 2015/27) concerned repeated breaches of contract. The KOFA found that by not ensuring compliance with the contract, the contracting authority had passively accepted a substantial amendment and thus implicitly committed an illegal direct award of contract.

In a case decided on 20 June 2017 (case 2016/68) the KOFA considered a settlement agreement in light of the judgment in C-549/14 (*Finn Frogne*), but found that the payment of substantial compensation for a contract for the establishment of nursing homes which had been cancelled following a previous complaint did not constitute a 'public works contract' in the meaning of the procurement rules.

In its decision of 18 August 2008 (Case 2008/37), the KOFA dealt with a case where a contractor, after having been awarded the contract, wanted to cancel due to lack of personnel. The contracting authority did not accept this, instead accepting the contract's transfer to a subcontractor. Since the subcontractor had not submitted a bid, and could not be regarded as part of, or otherwise identified with, the contractor, the KOFA found that the transfer was illegal, that the contract should have been awarded in accordance with the procurement procedures, and that the contracting authority, by accepting the transfer, had committed an illegal direct award of a contract. A transfer of the contract could only be accepted if the initial contractor continued to assume responsibility for compliance with the contractual obligations.

In contrast, the KOFA found, in its decision of 29 April 2013 (joined cases 2011/259 and 2012/235), with reference to Case C-454/06 (*Pressetext*), paragraphs 35 and 43, that the transfer, which occurred six months after the terrorist attacks on 22 July 2011, of the contract for the Norwegian Public Safety Network (Nødnett, a digital emergency network for police, health services and fire and rescue services) from Nokia Siemens Network Norge AS (NSN) to the subcontractor Motorola Solutions Norway AS, did not constitute an illegal transfer, when the special circumstances taken into account. These contracts were long-term, up to 20 years, and implied significant investments and were continued on the same conditions as before, with personnel and equipment being transferred, together with the contracts. Motorola as subcontractor was an essential supplier. NSN was in default both towards the contracting authority and Motorola, which had given notice of termination, in which case NSN would no longer be able to fulfil its obligations. This would have resulted in further delays and costs, and increased risk of loss of life. Thus, the KOFA regarded the transfer not as a substantial amendment, but as a continuation of the contract.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Procurement legislation contains no specific provisions on privatisations as such. Privatisations are considered to require a procurement procedure in accordance with the procurement legislation, where the privatisation is realised by way of awarding a contract falling within the scope of the procurement legislation. Other legislation may apply to the restructuring, reorganisation or transfer of assets, for example, to ensure market price and so as not to breach rules on state aid.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPPs are considered as requiring procurement procedures, in accordance with the procurement legislation, where such a project is realised by way of awarding a contract falling within the scope of the procurement legislation. The new Directive 2014/23/EU on concessions has been implemented by the Regulation on concession contracts, (FOR-2016-12-20-1746), which entered into force on 1 January 2017.

The regulations contain no specific provisions on PPPs. Specific sectors, such as public passenger transport procurement, are subject to award procedures similar to the procurement rules. (See question 2.)

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the Doffin, which forwards notices for publication on Tenders Electronic Daily (TED) – the EU's online procurement database – where relevant.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

In general, qualification criteria should be proportionate and relevant. According to the Public Procurement Regulation, the minimum yearly turnover that economic operators are required to have shall not exceed twice the estimated contract value, except in duly justified cases.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

The procurement rules implement the directives with regard to the possibility of limiting the number of bidders. According to the Public Procurement Regulation, the number of bidders shall be sufficient to ensure genuine competition, but not fewer than five in the restricted procedure, and not less than three in the competitive procedure with negotiation, in the innovation partnership and in the competitive dialogue procedure, provided the minimum number of qualified candidates is available.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The provisions of the EU directives in respect of 'self-cleaning' measures have been implemented in the new procurement legislation. The Public Procurement Regulation provides that a contracting authority may not exclude a contractor that can prove it has taken the following measures to demonstrate the required integrity:

- payment of compensation for any damage caused;
- active cooperation with relevant authorities in order to clarify facts and circumstances; and
- appropriate technical, organisational and personnel measures to prevent repeated offences.

In 2011, the Ministry of Trade, Industry and Fisheries published a 21-page guidance on exclusion, acknowledging that only the courts were competent to give binding decisions, and recalling that the rules had not yet been considered by the European Court of Justice (ECJ), nor had the Commission yet provided any guidance on the rules. Referring to an article by Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton in *Public Procurement Law Review* 2009, issue 6, pages 257–282 on 'Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law', the Ministry argued that it follows from the principle of proportionality that contracting authorities, in the case of exclusion on the basis of article 45, should take self-cleaning measures into account.

The complexity of these issues is illustrated by a case dealt with by the KOFA and Norway's courts over several years. In its decision of 3 March 2013 (Case 2011/206), the KOFA found that the chosen contractor should have been excluded due to its identification with an employee responsible for providing the services who had been sentenced for corruption and had a 25 per cent holding in the company. The contractor argued it had taken self-cleaning measures, but this was dismissed by the KOFA, regarding it as merely formal measures designed to avoid exclusion, and not concrete steps to prevent corruption in the future. Exclusion was not found disproportionate in respect of time passed since judgment – in this case two years and three months, six years after the crime was committed by the-then managing director – also taking into account the managing director's long sentence and the seriousness of the offence.

The same parties were involved in the KOFA's decision of 28 October 2014 (Case 2013/111), where it was found that sufficient measures had been taken, among other things, to end the employee's attachment to the company, and that there was therefore no longer reason to reject the bidder that had been awarded the contract.

Based on KOFA's findings in Case 2011/206 the complainant later claimed damages. Both the District Court and the Appeal Court (LH–2015–83824) considered the facts and evidence differently and disagreed with the KOFA, taking into account the provision on identification in article 57(1) of Directive 2014/24/EU, and found that the employee did not have such 'powers of representation, decision or control' that would justify identification. Consequently, there was no basis for damages.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. The fundamental principles are included in the list of fundamental requirements laid down in section 4 of the Public Procurement Act.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Among the express purposes of the procurement legislation, it shall ensure the integrity of the contracting entities and ensure public confidence and trust. In addition, the general rules in the Act on Public Administration regarding conflicts of interest also apply in public procurement. Although the regulations do not explicitly require the contracting authority to be independent and impartial, these principles are implicit, in accordance with general principles of good governance and administration.

Conflicts of interest

17 How are conflicts of interest dealt with?

The general rules of the legislation relevant to public administration, including rules on conflicts of interest, also apply in respect of public procurement (ie, sections 6 to 10 of the Act on Public Administration of 10 February 1967 and section 40 of the Act on Municipalities of 25 September 1992). A person may not take a decision, or prepare a decision, if he or she is employed by, or is a member of, the board of directors of an economic operator having an interest in the outcome of the case, or if other particular circumstances may weaken the public's confidence that the case is being handled impartially. Furthermore, a person cannot participate in a tender procedure if the contracting authority employs him or her, nor can such a person act as a consultant or representative for a bidder.

The KOFA has found conflicts of interest in breach of the procurement rules in several cases, owing to employment, personal relationships and business or commercial interests, such as a bidder receiving and juxtaposing offers, a jury member being a member of a trade union that has expressed its opinion on the choice of bidder, a case handler being the brother of the owner and the employee of the winning bidder, to mention just a few. In its judgment of 21 June 2007 (Rt 2007 983), conflict of interest was among the faults on which the

Supreme Court established liability for loss of profit. In its decision of 13 September 2010 (Case 2010/54) the KOFA ruled, with reference to Supreme Court practice, that the provisions on conflict of interest should be given a strict interpretation in competitive situations.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

In accordance with Directive 2014/24/EU, the previous provision has now been amended. Where a bidder or an undertaking related to a bidder has provided advice to the contracting authority before the competition, the Public Procurement Regulation provides that the contracting authority shall take appropriate measures to ensure that the bidder does not get an unfair advantage if taking part in the competition. The same applies if the bidder has otherwise been involved in the preparation of the competition. Such measures may include the communication to the other bidders of the same relevant information exchanged with the bidder involved in the preparation of the competition, and the fixing of adequate time limits for the receipt of bids in order to even out possible advantages. In line with the Directive, this should mean that the bidder concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Previous case law should still be relevant when interpreting this provision. According to this case law, the prohibition on participation in this context is not absolute, but qualified. One must therefore make an overall assessment based on the facts of the case. In its decision of 5 June 2003 (Case 2003/74), the KOFA accepted that an architect's office, which had prepared a draft project for the building of a nursing home (a form of a feasibility study, sketching a possible layout of the planned rooms and functions), could participate in the subsequent tendering procedure for the project.

In similar cases decided on 8 September 2015 (Case 2015/69) and 22 September 2015 (Case 2015/60), the KOFA found that possible advantages were evened out by giving potential bidders access to background documents.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The majority of published contract notices above the EU/EEA thresholds indicate the use of the open tender procedure.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The procurement rules contain no specific provisions regarding related bidders. Bidders must, however, comply with applicable competition rules, in particular the prohibition of agreements or collusive behaviour restricting competition.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The procurement regulations implement the EU directives with regard to conditions for the use of procedures involving negotiations in respect of contracts above the EU/EEA thresholds. The Public Procurement Regulation provides that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue where:

- the contracting authority's needs cannot be met without adaptation of readily available solutions;
- the procurement includes design or innovative solutions;
- the nature of the contract, the complexity or the legal and financial make-up or attached make negotiations necessary;
- the contracting authority cannot establish technical specifications with sufficient precision by reference to a standard, European Technical Assessment, common technical specification or technical reference; or
- where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

Contracting authorities may apply a negotiated procedure without prior publication of a call for competition only in the specific cases and circumstances provided for in accordance with the strict conditions of Directive 2014/24/EU.

In innovation partnerships, contracting authorities shall negotiate with bidders within the limits established by the Directive (ie, not the final bid, and not the minimum requirements and the award criteria).

With regard to contracts below the EU/EEA thresholds, the contracting authority is normally free to choose negotiations.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

It seems that the competitive procedure with negotiation with prior publication of a call for competition is used for complex or high-value contracts. Competitive dialogue seems to be much more widely in use than innovation partnerships.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

For the conclusion of a framework agreement, the award must have been made in accordance with the procurement procedures and fulfil the conditions of a contract in the meaning of the procurement legislation, namely written and mutually binding, and establish the terms, in particular with regard to prices, governing the contracts to be awarded during a given period.

24 | May a framework agreement with several suppliers be concluded?

The Public Procurement Regulation provides for the possibility of concluding a framework agreement with several suppliers, and in such cases to award contracts by the application of the terms laid down in the framework agreement or by reopening competition in accordance with a simple procedure.

In a case decided on 18 August 2015 (Case 2015/59), the KOFA found that a framework contract with several suppliers did not establish sufficient criteria for the award of contract in line with the regulations, and concluded that a subsequent call-off consequently constituted an illegal direct award of contract.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

A change of members of a bidding consortium in the course of a procurement procedure is not specifically dealt with in the legislation.

However, the new regulations implement the provisions in the new directives with regard to the entities on whose capacity the economic operator intends to rely, including subcontractors. Among other things, where an economic operator relies on others' capacity to perform the contract, the contracting authority may require certain critical tasks to be performed by that specific economic operator.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

In accordance with Directive 2014/24/EU, the Public Procurement Regulation provides the contracting authority with the possibility to divide a contract into lots, combined with an obligation to give reasons for not choosing this option. It also allows contracting authorities to limit the number of lots single bidders can be awarded, but there is no rule or case law limiting the number of lots single bidders can be awarded. However, the general principle of competition could come into play. Contracting authorities should not use procurement improperly or in such a way as to prevent, restrict or distort competition. In its decision of 13 February 2004 (Case 2004/16), the KOFA found that a framework agreement on ICT infrastructure, with options for prolongation up to eight years, and an estimated value of 500 million kroner, because of its presumed effects on the market, was in breach of the principle of competition.

It can be argued that small and medium-sized enterprises (SMEs) are the principal beneficiaries of simpler procedures applying to procurements below EU/EEA thresholds, as they do not have the same resources available as larger enterprises to tackle the more demanding procedures above. Contracts with an estimated value of less than 100,000 kroner (excluding VAT) are exempted from the procurement rules. It can be argued that this also benefits SMEs. Even below the EU/EEA threshold, procurements (except for contracts less than 100,000 kroner (excluding VAT)) are subject to the fundamental requirements of competition, non-discrimination, transparency etc.

Moreover, there is a possibility for contracting authorities to publish a voluntary ('simplified') contract notice in Doffin calling for competition. Thus, contracts that may be of interest even for SMEs are subject to public and non-discriminatory procedures. The Ministry of Trade, Industry and Fisheries encouraged the use of voluntary ('simplified') notices in its letter dated 14 March 2017, following up on previous similar policy measures. Furthermore, the Ministry urged contracting authorities to consider dividing contracts into lots, to make use of proportionate requirements, and to use balanced standard contracts. (See also question 12.)

Variant bids

27 | What are the requirements for the admissibility of variant bids?

The contracting authority shall indicate in advance (eg, in the contract notice) whether or not variant bids are authorised. Variants shall be linked to the subject matter of the contract. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

28 | Must a contracting authority take variant bids into account?

The contracting authority may authorise or require bidders to submit variant bids (see question 27). The contracting authority may require that variants may be submitted only where a bid that is not a variant has also been submitted.

A variant shall not be rejected on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Contracting authorities shall reject bids with major deviations from the procurement documents (eg, a bid in the form of the bidder's own standard business terms) and may reject bids with deviations from the procurement documents or which are unclear.

In its decision of 14 November 2003 (Case 2003/187), the KOFA found that, where an economic operator in an open procedure had expressed the need to discuss the amount of the daily penalty in case of late delivery, its bid should be rejected.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The new Public Procurement Regulation implements the new provisions of Directive 2014/24/EU with regard to award criteria. The contracting authority shall award the contract on the basis of the lowest price, the lowest cost or the best price-quality ratio, using a cost-effectiveness approach, such as life-cycle costing, or competition on quality criteria only on the basis of fixed price or cost.

The award criteria must be linked to the subject matter of the contract and must be accompanied by requirements that permit the information provided by the bidders to be effectively verified. Award criteria should not confer on a contracting authority unrestricted freedom of choice regarding the award of the contract to a bidder, and must not include criteria that are not aimed at identifying the bid that is the most economically advantageous, but are linked to evaluating the bidders' ability to perform the contract in question.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The new procurement rules implement the provisions of the new directives on abnormally low bids. The legislation does not provide a definition of an 'abnormally low' bid. However, in accordance with Directive 2014/24/EU, the Public Procurement Regulation provides that if a bid appears abnormally low in relation to the contract, the contracting authority shall be entitled to reject the bid if the bidder cannot provide a sufficient explanation.

In its decision of 30 March 2005 (Case 2005/57), the KOFA found that a bid could be rejected if the low price indicated a risk of low quality or a risk of non-performance. In its decision of 8 March 2015 (Case 2015/135), a rate a little lower than the public salary rate of attorneys was not considered abnormally low.

32 | What is the required process for dealing with abnormally low bids?

The new regulations implement the provisions of the new directives on abnormally low bids.

If a bid appears to be abnormally low, the contracting authority must request in writing details of the constituent elements of the bid,

taking into account the explanations received. The contracting authority may take into consideration explanations that are justified on objective grounds, including:

- the economy of the method by which the contract is carried out;
- the technical solutions chosen;
- the exceptionally favourable conditions available to the bidder;
- the originality of the proposal;
- compliance with the provisions relating to employment protection and working conditions; and
- the possibility of the bidder obtaining state aid.

The contracting authority may only reject the bid where the low level of price or costs cannot be satisfactorily explained. In the case of state aid, the Regulation on Public Procurement allows its rejection if the bidder cannot, within a reasonable amount of time, prove that the aid is legal. The contracting authority must communicate to the ESA the rejection of bids that it considers to be too low because of state aid.

In its decision of 26 August 2013 (Case 2011/265), the KOFA considered 'tactical pricing'. The Public Roads Administration had rejected a bid that was not compliant with its requirement that prices for work on the basis of time and material should reflect actual costs and that hourly prices should include a markup covering indirect costs, risk and profit. Some of these cost items had been priced at one krone and others were priced much too high. The KOFA accepted that the purpose was to avoid tactical pricing. It noted, however, that this could result in unnecessary high prices, and could prevent an economic operator that would be willing to price low entering the market. In this particular case, the KOFA found that the price format was transparent and the affected cost items were of limited value. Thus, the requirement was legal and the rejection was accepted.

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In Norway, applications for review may be brought before the ordinary courts and the KOFA. In addition, it is possible to bring cases before the ESA in Brussels.

In implementing the EU/EEA Remedies Directives, the ordinary courts have been chosen as the national review mechanism. Decisions taken by the District Court (first instance) may be appealed to the Appeal Court and then to the Supreme Court.

In addition, since 2003, it has been possible to complain to the KOFA, the decisions of which are normally only advisory and not legally binding on the contracting authority and are therefore not subject to appeal (with the exception of appeals to the chair of the board of summary decisions taken by the secretariat to reject complaints as unfounded or unfit for review by the board, for example, because of the need to hear witnesses). The KOFA may also impose administrative penalties in the case of illegal direct awards of contract in breach of the procurement rules of up to 15 per cent of the contract value. Such decisions are binding and could be appealed to the ordinary courts.

In the case of an alleged breach of the EEA Agreement, it is also possible to lodge a complaint with the ESA in Brussels. The ESA may bring proceedings before the EFTA Court. In light of ECJ case law (joined cases C-20/01 and C-28/01, *Commission v Germany*) and the infringement policy adopted by the Commission, the ESA announced in July 2011 that, in principle, it intends to pursue infringement cases as long as the contract concerned continues to produce effects and the state concerned has not taken suitable corrective measures to rectify the breach. Decisions by the ESA may be appealed to the EFTA Court.

In July 2016, the ESA delivered a reasoned opinion to Norway for breach of EEA rules on public procurement in connection with the award of a contract for the construction and operation of an underground parking facility in the Municipality of Kristiansand. The ESA considered that the subject matter of the contract was a 'works concession', while Norway maintained that it constituted a 'service concession', and thus at the time outside the scope of the previous legislation implementing the previous directives. On 15 March 2017, the ESA decided to bring Norway before the EFTA Court. On 21 March 2018, the EFTA Court ruled (Case E-4/17) that the main object of the contract was public works and that it constituted a public works concession within the meaning of Directive 2004/18/EC. The EFTA Court held that Norway had failed to publish an EEA-wide contract notice, use common procurement vocabulary (CPV) codes correctly and respect the minimum time limit for the submission of applications in an award procedure.

Although not specifically provided for in the legislation, it is always possible to submit a complaint to the contracting authority itself. Some contracting authorities have a policy of granting the complainant a new possibility to bring the case to a complaint body (preferably the KOFA) if it upholds its decision.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The courts may impose interim measures until the contract has been signed. Certain remedies are also available after the contract has been concluded, in particular against illegal direct awards. Legislation implementing the Remedies Directive 2007/66/EC was adopted by the Storting on 20 March 2012 and was subsequently supplemented by regulations adopted by the Ministry of Trade, Industry and Fisheries, and entered into force partially as from 1 July 2012, and in full from 1 November 2012.

With effect from 1 January 2017, the KOFA again has the power to impose administrative fines in cases of illegal direct awards of contracts. These decisions are binding and may be appealed to the courts. Other decisions by the KOFA are only advisory and not binding, and consequently not subject to appeal. A complainant may for different reasons decide to bring the case before the courts (eg, in order to force the contracting authority to comply with the decision of the KOFA, or in order to claim damages). The courts are free to reach other conclusions than those reached by the KOFA.

If the KOFA has decided to impose an administrative fine in the case of illegal direct award (see question 44), and the court later decides, regarding the same contract, to apply the ineffectiveness sanction or to shorten the duration of the contract or to impose a fine, the KOFA shall cancel its decision and repay the fine.

Timeframe and admissibility requirements

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

An application for interim measures before the ordinary courts will normally be handled quickly, between two and six weeks. Claims for damages before the District Court shall normally be heard within six months. Judgments may be appealed to the Appeal Courts and to the Supreme Court.

In cases before the KOFA, if the contracting authority is willing to suspend the signing of the contract until a decision has been taken, or if interim measures are in place, the case will be given priority and be handled by KOFA in an expedited procedure. Statistics show that on average, priority cases took two months (63 days) in 2018, and other cases took eleven months (330 days). In illegal direct award cases, a

priority case is normally handled quickly (in 2017 in 35 days, no such case in 2018), and 15 other cases in 253 days on average.

36 | What are the admissibility requirements?

In the case of a request for interim measures (which cannot be awarded after the contract has been signed), the applicant must show probability that an infringement has taken place, and the necessity to avoid irreparable damage. Ordinary court fees apply.

A complaint to the KOFA must be filed within six months after the contract in question was signed. A fee of 8,000 kroner has to be paid. In cases of an alleged illegal direct award, anyone may bring a complaint, the fee is 1,000 kroner, and there is a two-year time limit to bring the case before the KOFA.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The ordinary courts enforce the procurement rules. After the contract has been signed, interim measures cannot be awarded. In other words, an application for interim measures must normally be lodged with the court before the end of the standstill period.

The general rule is that an application for sanctions (ie, ineffectiveness, fines and the shortening of contract) must be filed with the court within two years of the conclusion of the contract.

It is possible to obtain a 30-day time limit if the contracting authority has informed the bidders and candidates concerned of the decision to award the contract or, in the case of a direct award, has published a contract award notice justifying the direct award.

A contracting authority may, in the restricted procedure or negotiations with prior notice, in respect of decisions to reject an application from an interested bidder, fix a deadline of at least 15 days to seek interim measures.

The statute of limitations (normally three years) applies to an application for damages.

A complaint to the KOFA must be filed within six months after the contract in question was signed. The time limit is two years for complaints alleging an illegal direct award.

The above-mentioned deadlines of 30 days and two years shall be suspended if a complaint is submitted to the KOFA, leaving a new 30-day time limit after the KOFA has taken its decision.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

In line with the Remedies Directive 2007/66/EC, it follows from the implementing provisions that the right of the contracting authority to conclude a contract is automatically suspended when an application for interim measures is filed during the standstill period. This is an innovation in Norwegian law, compared with applications for interim measures in general. The automatic suspension applies only to the extent required by the Remedies Directive (ie, contracts above EU thresholds).

With regard to procurements not covered by the Remedies Directive, the court may, following an application for interim measures, order suspension of the procedure and the conclusion of the contract.

The KOFA will always ask the contracting authority whether it is willing to suspend signing of the contract until it has reached a decision, in which case the review proceedings will be given priority.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Such statistics are not available.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority is required to inform the bidders of its decision to award the contract and to whom, and the reasons therefor, and to inform about the standstill period, after which it may sign the contract.

In line with the Remedies Directive 2007/66/EC, a standstill period of a minimum 10 or 15 days, depending on the means of communication, applies above EU/EEA thresholds. Below EU/EEA thresholds, the standstill period shall be 'reasonable'.

In line with the Remedies Directive derogations from the standstill requirement apply in the following three cases:

- where a prior publication of a contract notice is not required;
- where the only bidder concerned is the one who is awarded the contract and there are no candidates concerned; and
- where the contract is based on a framework agreement or a dynamic purchasing system.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

In cases before the court the rules on evidence and access to the file in the Act on Civil Proceedings apply. These rules shall, according to the Regulation on the KOFA, apply in a corresponding way.

Normally, the contracting authority is obliged to submit all relevant documents, with the exception of information subject to mandatory confidentiality by law (eg, professional confidentiality), as well as trade or business secrets, or if such information could harm competition. Such information may be blacked out. In the view of the KOFA, the total price of a bid may not be regarded as a trade or business secret. Hourly prices or product prices must be considered on a case-by-case basis taking into account negative effects on the competition in question or on future competition.

If prices are already widely known, for example through product catalogues, they will not be regarded as trade or business secrets.

The Act on Access to Documents in Public Entities of 19 May 2006, No. 16 and the Regulation on Public Access of 17 October 2008, No. 1119, both entered into force on 1 January 2009.

Where previously the contracting authority could decide not to grant access to the procurement file, in particular the protocol of the contracting authority and the competing bids, as well as internal documents (ie, the contracting authority's assessment of the bids), the point of departure is now that public access to protocol and bids may be refused only until the contracting authority has decided to whom it shall award the contract. However, certain information in such documents, such as business secrets, may still be exempt. Such information may be blacked out.

In its decision of 16 November 2009 (Case 2009/85), concerning legal services, the KOFA found that not giving the complaining law firm access to the protocol and the winning law firm's bid before the deadline for complaints or before the contract was signed constituted a breach of basic principles as well as a breach of the Act on Access to Documents in Public Entities.

In its decision of 29 April 2013 (Case 2011/326), the KOFA stated that the contracting authority was obliged to make its own assessment of confidentiality, and found that granting access to a bid where prices were not blacked out, before it had decided to cancel the procedure

(and start a new procedure where some bidders had obtained access to others' previous bids), constituted a breach of its obligation to keep secret information that could harm competition.

The KOFA sitting as a Grand Board (five members instead of three as normal), in its decision of 18 March 2014 (Case 2012/9), found a breach of confidentiality where information about the chosen bidder's average hourly rate was released after the contracting authority had received complaints that led to cancellation of the procurement procedure. Under such circumstances, access could harm competition.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

The number of lawsuits filed with the ordinary courts in procurement cases has always been low, but the number is increasing, in particular due to implementation of the Remedies Directive 2007/66/EC in 2012.

The ESA normally receives three to five complaints against Norway every year; there was a record high of 10 complaints in 2004, and only one in 2006, probably due to the establishment of the KOFA. In 2018 the ESA received one complaint against Norway.

The KOFA began operating in 2003. The number of complaints was high at the start, with 268–287 complaints per year in 2003–2005. It then dropped to 158 and 155 in 2006 and 2007, respectively, probably due to the raising of the national threshold from 200,000 to 500,000 kroner. It then increased from 224 in 2008 to a record high of 396 in 2010, before falling back to 331 in 2011. In 2012, due to a fee increase in July, the number dropped to 234, and down to 143 in 2013, slowly increasing again to 194 in 2016. Although the national threshold was raised to 1.1 million kroner as of 1 January 2017, the number of complaints kept steady at 192. In 2018, when the threshold was adjusted to 1.3 million kroner, the number of complaints dropped to 138, an all-time low.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The Public Procurement Act provides specifically that anyone who has suffered loss as a consequence of an infringement of the procurement rules is entitled to damages. The claim for damages must be filed before the District Court (court of first instance). In case of a material infringement, the bidder who should have been awarded the contract, had it not been for the infringement, is entitled to compensation for loss of contract (loss of profit, or 'positive contract interest'). Alternatively, a bidder may be entitled to compensation for costs incurred in preparing the bid and participating in the tender procedure ('negative contract interest'), if they are able to prove that it would not have participated had it known that the contracting authority would infringe the rules. In principle, all bidders who have submitted bids may be entitled to such compensation (except the bidder who should have been awarded the contract and is entitled to compensation for loss of profit). Even a supplier who has not submitted a bid owing to an infringement during the procedure (eg, incorrect notice) may claim damages for costs incurred in taking necessary measures to try to halt the procedure and have the infringement corrected.

The KOFA may in its decision express its opinion on whether conditions for claiming damages are met. If the complainant does not succeed in obtaining damages from the contracting authority on this basis, the complainant may file a lawsuit before the ordinary courts, and may refer to the decision as evidence, but the court may reach another conclusion.

In Case E-16/16 (*Fosen-Linjen AS vs AtB AS*), the EFTA Court answered questions from Frostating Court of Appeal on the conditions for the award of damages. In its advisory opinion of 31 October 2017, the EFTA Court found that the gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages. A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link. However, on 2 March 2018, Frostating Court of Appeal (LF-2015-18742) chose not to rely on the advisory opinion, arguing, among other things, that the EFTA Court ideally could have made a deeper analysis of the differences between the ECJ judgments in C-314/09 *Strabag* and C-568/08 *Combinatie Spijker*.

Finding that Norwegian case law aligns well with ECJ case law, Frostating upheld the view by the Supreme Court in Nucleus (HR-2000-1135) that a 'material' error must have been committed in order to obtain damages for positive contract interest. In this case, despite a material error, because the contracting authority for that reason was obliged to cancel the tender procedure, Fosen-Linjen was not entitled to be awarded the contract and consequently had no right to damages for the loss of profit (positive contract interest).

Frostating found no basis for compensation for 'loss of chance' (see question 45). However, the conditions for damages for the negative contract interest (competition costs) were met.

The judgment has been appealed to the Supreme Court which decided to request a new advisory opinion. The EFTA Court will hear the case (E-07/18) on 13 May.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The decision to award a contract can be annulled as unlawful by the courts, and the contracting authority itself may also reverse such a decision, but not after the contract has been concluded.

The new ineffectiveness sanction applies only for contracts covered by the Remedies Directive 2007/66/EC, namely contracts above EU/EEA thresholds. The court is empowered to decide on ineffectiveness (ie, retroactive cancellation of all contractual obligations (ex tunc)) or to limit the scope of the cancellation to those obligations that still are to be performed (ex nunc), in which case the court in addition must impose a fine amounting to a maximum of 15 per cent of the estimated value of the contract in question. However, retroactive cancellation is limited to those cases where the subject matter of the contract can be returned in substantially the same condition and quantity.

In a case concerning wintertime road maintenance (TSENJ-2015-85663), the court found that the contract was only advertised in Doffin and not in TED as it should have been, since the value of the services exceeded the EEA threshold, and consequently it constituted an illegal direct award. In addition, according to the notice the contract terminated after season 2017/2018, while the signed contract terminated after season 2018/2019. The court decided to cancel the services still to be performed (ex nunc), and imposed a fine of 200,000 kroner, approximately 5.4 per cent of the value of the contract already performed.

For contracts below EU/EEA thresholds, but above the national threshold, the court shall shorten the duration of the contract in the event of an illegal direct award, impose a fine or combine the two penalties, and may decide such sanctions in the case of infringements affecting the outcome in addition to non-respect of the standstill period.

Relevant statistics on these remedies are not available.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

In case of an illegal direct award, an economic operator interested in the contract may file an application for interim measures before the ordinary courts until the contract has been signed. Furthermore, the court is empowered to decide on ineffectiveness or to shorten the duration of the contract, and to impose fines (see question 44).

With effect from 1 January 2017, the KOFA again has the power to impose administrative fines in the case of an illegal direct award of up to 15 per cent of the contract value. Such decisions are binding and could be appealed to the ordinary courts. The KOFA had since 2007 the power to impose penalties in the case of illegal direct awards of contract in breach of the procurement rules. This penalty was replaced as from 1 July 2012 by measures implementing the Remedies Directive 2007/66/EC, and was no longer available after 1 July 2014. Complaints against an illegal direct award may also be filed with the ESA.

An economic operator interested in the contract and who has suffered loss due to infringement of the procurement rules is entitled to damages (see question 43), but since that party has not participated in the procedure it will not be able to prove it should have been awarded the contract, nor has it incurred costs in participating in the tender procedure. So far, case law does not recognise loss of opportunity. In *Fosen* (see question 43), the Frostating Appeal court upheld this view, stating that introducing such a basis for damages is a task for legislators. However, the economic operator may claim compensation for costs incurred trying to stop the infringement.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

Ordinary court fees apply in cases before the courts. Normally, lawyers represent parties. Legal costs may vary considerably. The main rule is that the losing party must cover the costs of the other party. The impression is that the costs for each party in an interim measures case typically vary between 50,000 and 200,000 kroner. In a recent case where the complainant's bid to the road authorities had been rejected because it was delivered to the wrong address, parties' costs before the District Court reportedly totalled 1.4 million kroner.

When filing a complaint to the KOFA, a fee of 8,000 kroner must be paid. It will be repaid if the KOFA finds that the contracting authority has committed a breach that could affect the outcome of the competition. In cases of an alleged illegal direct award, anyone may bring a complaint and the fee is 1,000 kroner. If the KOFA concludes that an illegal direct award has taken place, the fee shall be repaid. If lawyers represent the parties, the costs are normally much lower than in court cases (ie, owing to the written procedure). The parties cover their own costs.

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UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The white paper on public procurement, to be published by the Ministry of Trade, Industry and Fisheries before summer, is expected to address strategic procurement, corruption and, in particular, capacity building, professionalisation and efficiency.

Panama

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The main legislation is Law 22 of 2006, which regulates public procurement (the Public Procurement Law), as amended by Law 61 of 2017. Further regulation of Law 22 of 2006 was implemented by Executive Decree 366 of 2006.

Additional legislation of relevance includes:

- Executive Decree 188 of 2009, which regulates contractor selection procedures through PanamaCompra, Panama's electronic public procurement system;
- Law 38 of 2000, which establishes the framework for administrative proceedings;
- Law 48 of 2016, which establishes retaliatory measures for countries discriminating against the Republic of Panama;
- Law 16 of 1992, which establishes privatisation proceedings; and
- Law 1 of 2001, which regulates the acquisition of medicines, supplies and medical equipment, by the Social Security Administration.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Panama's Public Procurement Law governs all public contracts made by:

- the central government;
- autonomous and semi-autonomous entities;
- municipalities;
- the Social Security Fund;
- financial intermediaries; and
- public limited companies in which the state owns 51 per cent or more of shares or equity.

State-owned corporations may have their own rules for public tenders; however, the Public Procurement Law will be of supplemental application. Such is the case for state-owned Aeropuerto Internacional de Tocumen SA, a corporation managing several airports, including Panama City's main hub.

Public utilities are regulated by a special agency that is charge of telecommunications, electricity, water and sewage, radio and television. Law 26 of 1996, as amended, regulates all licences and concessions on public utilities.

Energy generation, distribution and commercialisation is further regulated by Law 6 of 1997, as amended, through state-owned company Empresa de Transmisión Eléctrica SA.

The Panama Canal Authority has a special procurement regulation established by Accord 24 of 1999, as amended.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The Republic of Panama has been an observer of the World Trade Organization's Committee on Government Procurement since 29 September 1997.

Proposed amendments

4 | Are there proposals to change the legislation?

Law 61 of 2017 recently amended the legal framework on the Public Procurement Law. These amendments came into force on 29 March 2018.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Privatised former utility companies in which the state owns less than 51 per cent of the shares are considered private entities and therefore do not constitute contracting authorities.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Contracts worth less than US$50,000 have a special expedited process, with fewer formalities, but within the scope of the Public Procurement Law.

Contracts worth less than US$10,000 will have a special process based on quotations for the goods or services required.

Contracts by municipalities and communal boards in rural areas that are worth less than US$30,000, will be subject to a special expedited procedure, established by Executive Decree 54 of 2011.

A special process applies to contracts worth less than US$10,000. This special process is based on a comparison of quotes on the goods or services requested.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The Public Procurement Law allows an exceptional procurement procedure under the following circumstances:

- contracts for the acquisition or lease of goods or services, in which the state acts as a lessor or lessee, as well as the sale of goods or services of the state, in which there is no more than one bidder or no adequate substitute;

- when there is extreme urgency, which does not allow the necessary time to hold the public tender;
- swap contracts for the acquisition of movable or immovable property, with a previous appraisal;
- contracts exceeding US$300,000, which constitute simple extensions of existing contracts, provided that the price does not exceed the agreed price, there is an existing budget and there is no substantial change in the contract (including leases);
- social benefit contracts, or ones of strategic importance for national development, including projects related to the development of energy resources, water resources and the environment;
- contracts for works of art or technical works, the execution of which can only be entrusted to reputed artists or recognised professionals; and
- contracts celebrated by the National Assembly that surpass US$50,000.

The said procedure would allow the state entity to select a contractor without any tender or competition between bidders. State entities employing this process must present a Substantiated Technical Report, explaining the circumstances for the application of the exceptional procurement procedure.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Amendments to concluded contracts are allowed and recognised by case law as a reaffirmation of the parties' willingness to contract. Amendments are deemed part of the main contract and part of the same contractual obligation and relationship.

To make modifications and additions to the contract based on the public interest; the following rules must be followed:

- the type of contract and its object may not be modified;
- any change in prices and costs will require the contracting parties' agreement;
- any modifications made to the main contract will be part of it, considering the original contract and its modifications as a single contract, for all legal purposes;
- the contractor must continue the work while the administrative act is being approved; and
- unitary prices may be reviewed and modified if the cost of the alterations is more than 25 per cent of the amounts on the total or initial value of the contract, respectively.

No modifications to the contract may exceed 40 per cent of its initial value.

Modifications and amendments will continue to be subject to the review and approval of the General Comptroller of the Republic of Panama.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Law 16 of 1992, as amended, establishes special procedures for privatisations, allowing the transformation of state entities into corporations, and the subsequent public sale of their shares. The public sale of shares must be done through processes established by the Public Procurement Law.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPPs are not expressly regulated under Panamanian law. However, in practice, PPPs may be established by individual laws, of which Law 41 of 2004 is an example. Law 41 of 2004 created a special regime for the establishment and operation of the Special Panama-Pacific Economic Area and a state autonomous entity called the Panama-Pacific Special Economic Area Agency. This area has been developed jointly by a private enterprise and the Panama-Pacific Special Economic Area Agency.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

As a rule, all publications pertaining to public procurement must be done through the electronic procurement system PanamaCompra, and on specially designated boards on the contracting entities. Should PanamaCompra not be available, publications must be made on a nationally circulating newspaper in consecutive editions on different dates.

Some state contracts and law contracts, especially those concerning concessions, once subscribed and countersigned by the Comptroller General, will be published in the Official Gazette, the state newspaper.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

There is no limitation on the ability of contracting authorities to set criteria or other conditions to assess bidders. However, said criteria and other conditions must be expressly stated in the tender specifications.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

The Council of Ministers may exceptionally order that certain projects, taking into account their cost and complexity, may require bidders to be subject to a pre-qualification process. This would limit the number of bidders participating in the final tender.

As a rule, under the Public Procurement Law, should there be a single bidder, and said bidder complies with all the requirements, the recommendation of the award may fall to them if the price offered is convenient for the state.

Some of the sector-specific procurement legislation may require a minimum of two bidders to validate the tender procedure.

There is no 'self-cleaning' process under Panamanian Law. A bidder excluded because of past irregularities will be able to participate once the exclusion or disqualification period expires.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

A bidder that has been fined, excluded or disqualified may file an appeal before the Administrative Court for Public Procurement. The exclusion or disqualification is imposed for a period of time and once this period expires the bidder may once again engage in public tenders.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Public Procurement Law specifically states that the following principles shall govern public tenders: equal treatment, transparency and competition, among others previously stated.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Public Procurement Law specifically states that authorities must select bidders objectively and fairly. It also states that the Administrative Court for Public Procurement must be independent and impartial.

Conflicts of interest

17 How are conflicts of interest dealt with?

All tender bids are reviewed by Verification Committees, which are comprised of professionals within the scope of the tender. Both the advisers of the committees and the members of these must be free of real or apparent conflicts of interest with respect to the bidders.

The Public Procurement Law states that public servants may not celebrate, by themselves or through interposed persons, contracts with the entity in which they work, or participate in as owners, partners or shareholders of the company or as administrators, managers, directors or legal representatives of the bidder in a public tender.

Any violation of this principle may give way to action before the General Contracting Direction, an agency in charge of overseeing all public procurement. The General Contracting Direction may order the correction of any step in the tender process that was not done in accordance with the law. The Administrative Court for Public Procurement may declare the nullity of the tender process should a conflict of interest be proven.

Bidder involvement in preparation

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Any person who is hired as a consultant to elaborate studies, feasibility projects, diagnostics, plans, designs and other actions that have a relationship with a project cannot participate in the future tender selection because of incompatibility and conflict of interest. This prohibition is absolute.

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

The most widely used procedure is the public tender – a process in which the price is the determining factor, given that all the legal, financial and technical aspects required are fulfilled. This procedure will be used when the amount of the contract exceeds US$50,000.

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

Yes, companies from the same economic group may submit separate bids. However, there must be at least one other bidder that does not belong to the same economic group. If all the proposals come from the same group, the tender process will be void.

An economic group exists in the cases:

- of subsidiaries and affiliates;
- when at least 50 per cent of one company's capital belongs to another company participating in the tender;
- when companies have integrated their boards of directors or their legal representatives are the same persons; or
- when, in any form, there is effective control of one of the companies on the others or part of them.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

Procedures involving negotiations with bidders are not provided within the Public Procurement Law. There is, however, a meeting with all bidders for standardisation of the tender process, a stage in which bidders may offer different solutions.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Procedures involving negotiations with bidders are not provided for within the Public Procurement Law.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

The General Contracting Direction will set the selection criteria for the framework agreement. The awarding of this tender may fall to one or more bidders and the contract is for a defined period. This period is usually no longer than two years, but may be extended for up to one additional year.

Once bids are presented, the General Contracting Direction will review and decide on the selected bids and new lines to a specific framework agreement, as well as receive bids from new interested parties to participate in the framework agreement. However, new lines and new bidders will enter only for the remaining period of time for which the agreement is in effect.

During the duration of the framework agreement, the favoured bidders may improve the price they have offered. Before engaging in new tenders for products or services, contracting authorities must review the Electronic Catalogue, and verify whether the products or services required by said authority are included in the Catalogue.

Framework agreements may be terminated, in respect to the supplier, if the contractor does not duly fulfil the purchase orders requested by the General Contracting Direction, or if the General Contracting Direction is able to verify that the provider contractor's prices for the state are higher in relation to market prices.

24 | May a framework agreement with several suppliers be concluded?

Framework agreements may include one or more suppliers. A contract for mass and daily use goods or services will be signed, and certain prices and conditions will be established. These prices and conditions will remain during a defined period.

The General Contracting Direction will include all goods and services within an Electronic Catalogue, and contracting entities will be able to freely select from the suppliers' offerings. Suppliers may review and decrease their prices to make them more competitive.

Once a contracting authority decides to purchase any goods or services from the Electronic Catalogue, purchase orders will be issued. These orders require the endorsement of the Office of the Comptroller General of the Republic for validity. There is no additional competitive procedure required. However, prices are subject to constant review.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The members of a bidding consortium may be freely modified up until the submission of the tender offer. Once the tender offer is submitted or the contract is adjudicated, the members of the consortium may not be modified without the consent of the contracting entity. During the execution of the contract, should one of the consortium's members be dissolved, the contract may continue as long as the other members are able to comply.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Yes, the Public Procurement Law establishes that the state will promote the competitive participation of micro, small and medium-sized enterprises (SMEs) in certain procurement procedures. In the event of a tie between tender offers, the award would go to the duly accredited SME.

Dividing a contract into lots is illegal; in such a case, the award will be nullified and the public servant will be sanctioned. Division of a contract is only allowed within framework agreements and in exceptional procurement procedures for state emergencies.

There are no rules or case law affecting lots awarded to single bidders, as long as the price is fair for the state.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

There is no specific rule regarding variant bids. The contracting authority is free to specify its requirements within the tender specifications.

28 | Must a contracting authority take variant bids into account?

There is no specific rule regarding variant bids. A contracting authority must take into consideration the compliance of the requirements set forth in the tender specifications, which will include the criteria and methodology for proposals qualification.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders may not change the tender specifications, nor submit their own standard terms of business. Any substantial change in the specifications within a bidder's offer may result in disqualification from the process.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The contracting authority must base its award criteria on the parameters included in the tender specifications. If the selection process requires criteria surpassing price assessment, the tender specifications may include all qualifications and evaluation parameters. The Public Procurement Principles will also be taken into consideration in the evaluation.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

An 'abnormally low' bid is a proposal that offers a price or technical conditions that are considered risky or materially difficult to fulfil for the purpose of the contract.

The tender specifications may also include a maximum percentage, to price, for risk margin effect.

32 | What is the required process for dealing with abnormally low bids?

An abnormally low bid will be disqualified. If all bids are abnormally low, the process will be void.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The General Contracting Direction may review applications before the tender adjudication or void declaration is in force. After the tender adjudication or void declaration is in force, the Administrative Court will review applications for public procurement.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The General Contracting Direction may order the completion of omitted procedures, or the correction or suspension of illegal procedures.

The Administrative Court for Public Procurement may order:

- cautionary measures;
- mediation or conciliation;
- a confirmation of the act by the contracting authority;

- a modification of the act by the contracting authority;
- the revoking of the act by the contracting authority;
- an annulment of the act by the contracting authority; and
- a review of the administrative resolution of a contract.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Admissions by the General Contracting Direction may take up to two business days and decisions must be rendered within five business days. If the General Contracting Direction does not render a decision within five business days, the process will be sent to the Administrative Court for Public Procurement.

Admissions by the Administrative Court for Public Procurement may take up to two business days, and decisions must be rendered within 10 business days if no evidence needs to be taken. Should evidence be taken it will be done within a term of 10 business days and an additional common term of two business days for closing arguments.

Once the Administrative Court for Public Procurement reaches a decision, action may be filed before the Third Chamber of the Supreme Court of Justice, which may take three years or more to issue a ruling.

36 | What are the admissibility requirements?

For actions before the General Contracting Direction, the claim must be filed before the tender adjudication or void declaration is in force. Actions must relate to any act or omission that may be deemed illegal or arbitrary during the procurement procedure.

For actions before Administrative Court for Public Procurement, the claim must include a bond for 10 to 15 per cent of the total proposal amount. Actions must relate to the resolution adjudication, rejecting or declaring void the procurement procedure.

For actions before Third Chamber of the Supreme Court of Justice, the recourse before the Administrative Court for Public Procurement must be duly exhausted. The Third Chamber of the Supreme Court of Justice may declare the nullity of the process or the contract.

37 | What are the time limits in which applications for review of a procurement decision must be made?

A claim to be heard before the General Contracting Direction must be filed before the tender adjudication or void declaration is in force.

A claim to be heard before the Administrative Court for Public Procurement must be filed within five business days after the tender adjudication or void declaration is in force.

A claim to be heard before the Third Chamber of the Supreme Court of Justice must be filed no later than two months after the Administrative Court for Public Procurement is published.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Before the General Contracting Direction and the Administrative Court for Public Procurement, the admission of the claim will have an automatic suspensive effect. No recourse is available for a contracting party to lift the suspension. The suspension is lifted once a ruling is issued.

Before the Third Chamber of the Supreme Court of Justice, the claim does not have an automatic suspension effect. There is, however, a special petition to seek a stay, although it is generally not granted.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

No recourse is available for a contracting party to lift the automatic suspension. A writ of amparo (a challenge seeking protection against orders breaching constitutional guarantees) may be filed before the Supreme Court of Justice, however the resolution of said challenge may take up to a year, and procurement automatic suspensions rarely last longer that the terms previously stated.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

No. Unsuccessful bidders will only be notified of the final adjudication through PanamaCompra electronic public procurement system.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Yes, the complete tender file may be found at PanamaCompra electronic public procurement system, including tender offers and recourses filed. This applies to tenders being supervised by the General Contracting Direction under the Public Procurement Law.

Contracting authorities with their own tender rules may not publish it on PanamaCompra; however, access to the file is usually granted.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Yes. In 2018, up to October, 154 review applications had been filed before the Administrative Court for Public Procurement. Final information for the year 2018 has not been made available yet. In 2018, 843 review applications were filed before the General Contracting Direction.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Public procurement law established that persons or companies that use falsehoods or fraud in the tender process are liable for damages caused. Such claims would be filed within civil or criminal jurisdictions. Winning bidders are legally responsible for having concealed, when contracting, any exclusions, disqualification, incompatibilities or prohibitions or for having supplied false information.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes, a concluded contract may be challenged by action before the Third Chamber of the Supreme Court. However, this remedy is rarely granted and review usually takes two years or more.

Contracts not concluded are subject to review application before the Administrative Court for Public Procurement. In 2018, out of 154 review applications filed, 107 had been resolved by October. Information has not been made available with regard to acts revoked, declared null, confirmed, rejected or declared non-viable.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

No, only parties that file a tender offer within the procurement process legally constituting themselves as bidders have legal protection and access to remedies.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

For review application before the General Contracting Direction, the average legal fees for the proceedings are US$3,000.

For review application before the Administrative Court for Public Procurement, average legal fees are US$5,000, and the plaintiff must file a bond for 10 to 15 per cent of the total proposal amount.

For review application before Third Chamber of the Supreme Court of Justice, average legal fees for the proceedings are US$30,000.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The amendments to Law 22 of 2006, which regulates public procurement, introduced by Law 61 of 2017, came into force on 29 March 2018. Local Communal Boards have been included in the scope of applicability of the Public Procurement Law. These local boards are in charge of local community projects and were previously subject only to the usage of PanamaCompra. Through Law 37 of 2009, which regulates government decentralisation, Local Communal Boards have an assigned budget stemming from property tax contributions in the local communities, which provides a more ample margin for investment in community projects.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

The Polish legislation framework regulating the award of public contracts consists of European Union (EU) law and relevant Polish legislation. Poland has transposed the following EU public procurement directives into Polish law:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC;
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC; and
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

In addition, the European Commission's regulation 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document applies directly in Poland.

The Polish legislation transposing the above-mentioned EU directives into national law consists of the Act of 29 January 2004 Public Procurement Law (PPL) and secondary legislation regulating various technical aspects of public procurement.

The most relevant secondary legislation consists of:

- Regulation of the President of the Council of Ministers of 28 December 2017 on the average exchange rate of the zloty to the euro constituting the basis for calculating the value of a contract;
- Regulation of the Minister of Economic Development of 22 December 2017 on the thresholds of contracts and design contests that require the dispatch of a notice to the Publications Office of the EU;
- Regulation of the Minister of Economic Development of 26 July 2016 on the types of documents that the contracting authority may require from the contractor in the contract award proceedings (amended by the regulation dated 16 October 2018);
- Regulation of the President of the Council of Ministers of 22 March 2010 on the rules of procedure concerning the examination of appeals (amended by the regulation dated 20 December 2016 and regulation dated 17 October 2018); and
- Regulation of the President of the Council of Ministers of 15 March 2010 on the amount and manner of collecting the appeal fee, types of costs in the appeal proceedings and the manner of their settlement (amended by the regulation dated 19 December 2016).

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

The PPL regulates all types of public procurement, including defence and utility procurement. The PPL is supplemented by two acts regulating private–public partnerships (PPPs), and work and services concessions: the Act of 21 October 2016 Concession contract on constructions works and services, and the Act of 19 December 2008 on PPPs.

There are also a few examples of specific legislation that regulates the procedures leading to the award of public contracts in very narrow areas, such as the award of concessions for construction and maintenance of highways. In some areas, there are also legal acts modifying (usually in a limited scope) the general rules of PPL, for example, in the case of the award of contracts related to the construction of Polish nuclear power plants or in the case of tenders for waste management.

International legislation

3 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The PPL regulates all public procurement procedures in Poland, including those within the EU thresholds. Public procurement below the EU thresholds is generally regulated in a similar way to procurements above the thresholds, though there are some differences (eg, notices are published in a special bulletin in Polish, a European single procurement document form is not required and the right for legal remedies is limited).

Poland, as a member of the EU, is a party to the World Trade Organization Agreement on Government Procurement (GPA). Polish awarding authorities must indicate in each procurement notice published in the Official Journal of the EU (OJEU) if the procurement is covered by the GPA.

In addition, in accordance with the PPL, the awarding authority, to the extent specified in the GPA and in other international agreements to which the EU is a party, shall ensure that contractors from states party to such agreements, and construction workers, suppliers and services originating in these states, receive treatment that is no less advantageous than that accorded to contractors, construction workers, suppliers and services originating in the European Union.

Proposed amendments

4 | Are there proposals to change the legislation?

The Polish authorities have started the process of preparation of a completely new and complex public procurement regulation. The main reason is the need to replace the current PPL, which has been amended many times. Another reason is the development of public procurement jurisprudence that strongly influences the practical application of the legislation. The draft of the new PPL Act was submitted for public consultation on 24 January 2019.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The PPL applies only to public contracts awarded by entities that are specified in article 3 of the PPL. These entities are:

- public finance sector entities within the meaning of the provisions on public finance (eg, central administration units, municipalities, universities and hospitals);
- state organisational units not having legal personality (other than those listed above);
- legal persons established for the specific purpose of meeting needs of a general nature, not having industrial or commercial character, if the entities referred to above separately or jointly, directly or indirectly through another subject:
  - finance them at over 50 per cent;
  - hold more than half of their shares;
  - supervise their managing body; or
  - have the right to appoint more than half of the members of their supervisory or managing body – insofar as the legal person does not operate under ordinary market conditions, its purpose is not generating profit and it does not incur losses arising out of the conducted activity;
- combinations of entities referred to above;
- other entities, where:
  - the contract is awarded for the purpose of performing a utility type of activity and such an activity is performed on the basis of special or exclusive rights;
  - where the entities referred to above, separately or jointly, directly or indirectly through another subject have a controlling influence on them through holding more than half of the shares or more than half of the votes resulting from shares; or
  - having the right to appoint more than half of the members of their supervisory or managing body;
- other entities, if the following circumstances occur:
  - more than 50 per cent of the value of a contract awarded by them is financed out of public funds or by public entities;
  - the value of a contract is equal to or exceeds the EU thresholds; or
  - the object of the contract shall be construction works in the area of land or water engineering specified in the Annex II to Directive 2014/24/EU, the construction of hospitals, sports and recreation or rest facilities, school buildings, buildings of schools of higher education or buildings used by public administration or services related to such construction works; and
  - entities with which a contract for a construction work concession has been concluded under the Act of 9 January 2009 on Concessions for construction works or services, to the extent to which they award a contract for the purpose of the execution of that concession.

Therefore, public procurement rules apply not only to public entities but also to some categories of private entities.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The PPL does not apply to contracts below €30,000. In addition, if the value of the contract exceeds the EU threshold, then specific legal regulations resulting from the EU directives apply. The differences between the regulations applying to the contracts above and below the EU threshold are not substantial. The main differences include the rules of tender notice publication, time limit for the submission of tenders and available legal remedies.

The EU thresholds are the following:

- €144,000 – for supply and service contracts awarded by public finance sector entities;
- €221,000 – for supply and service contracts awarded by other public entities;
- €443,000 – for supply and service contracts awarded by awarding entities in the utility sector and the defence and security sector; and
- €5.548 million – for construction works contracts awarded by any awarding entity.

The value of the contract is calculated as net value, without VAT.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

A public contract can be amended in situations described in the PPL. The Polish regulation complies with the regulation provided in article 72 of Directive 2014/2/ EU.

According to article 144 of the PPL, the general principle is that any changes in the provisions of a concluded contract or framework agreement, with regard to the contents of the bid based on which the contractor has been selected, shall be prohibited unless at least one of the following circumstances occurs:

- the changes have been envisaged in the contract notice or the specification of essential terms of the contract in the form of unambiguous contractual provisions that specify their scope, especially a possibility of changing the amount of the contractor's remuneration and the nature and conditions of introducing the changes;
- the changes pertain to the execution of additional supplies, services or construction works by the original contractor not covered by the main contract, insofar as they have become necessary and all of the following conditions have been fulfilled:
  - a change of contractor may not be made for economic or technical reasons, especially concerning interchangeability or interoperability of equipment, services or installations ordered under the main contract;
  - a change of contractor would cause significant inconvenience or substantial increase in costs for the contracting authority;
  - the value of each subsequent change does not exceed 50 per cent of the value of the contract originally set forth in the agreement or framework agreement; and
  - both of the following conditions have been fulfilled:
  - it is necessary to change the agreement or framework agreement because of circumstances that the contracting authority, acting with due diligence, could not have foreseen; and
  - the value of the change does not exceed 50 per cent of the value of the contract originally set forth in the agreement or framework agreement;

- the contractor to which the contracting authority awarded the contract is to be replaced by a new operator:
  - under the contractual provisions referred to above;
  - as a result of a merger, division, transformation, bankruptcy, restructuring or acquisition of the existing contractor or its enterprise, insofar as the new contractor fulfils the conditions for participation in the procedures, the grounds for exclusion do not apply thereto, and this does not entail any significant changes in the agreement; or
  - as a result of taking over by the contracting authority of liabilities of the contractor towards its subcontractors;
- the changes, irrespective of their value, are not significant; and
- the total value of changes is lower than the EU threshold value, and is lower than 10 per cent of the value of the contract originally set forth in the agreement with regard to contracts for services or supplies or, in the case of contracts for construction works, is lower than 15 per cent of the value of the contract originally laid down in the agreement.

A change in the provisions contained in the agreement or framework agreement shall be deemed significant where:

- it changes the overall nature of the agreement or framework agreement compared with the nature of the agreement or framework agreement set out in the original wording; or
- it does not change the overall nature of the agreement or framework agreement, but at least one of the following circumstances has occurred:
  - the change introduces conditions that, if they had been part of the initial contract award procedure, would have allowed for the admission of other contractors than those initially selected or for acceptance of a tenders other than that originally accepted;
  - the change distorts the economic balance of the agreement or framework agreement in favour of the contractor in a way not originally envisaged in the agreement or framework agreement;
  - the change materially extends or diminishes the scope of the performances and obligations under the agreement or framework agreement; or
  - the change consists in the replacement of the contractor to which the contracting authority awarded the contract by a new contractor in the cases other than those enumerated above.

Apart from minor differences in wording, Polish law follows the EU directive principles and does not introduce any other situations where the amendment of the contract is not be possible.

Any contractual provision amended in breach of the rules described above shall be invalidated and replaced by contractual provisions in their original wording.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The provisions described above, regarding the possibility of amending a concluded contract, have been in force since 28 July 2016, and they apply only to contracts that were concluded in public procurement procedures started after that date. As a result, the new case law on the scope of permitted amendments to the concluded contracts has started to be built.

The previous regulation was very restrictive and allowed only for insignificant amendments (as defined in the European Court of Justice decision in C-454/06 *Pressetext*), Significant amendments were possible only if the contracting authority provided for the possibility to make such amendments in the contract notice or the terms of reference, and laid down the terms and conditions of such amendment.

Contracting authorities quickly began to use the new rules, which are more flexible. The most popular basis for modification of a contract is a situation where the total value of changes is lower than the EU threshold value, and is lower than 10 or 15 per cent of the value of the contract originally set forth in the agreement, as this basis allows for modification in any situation. Another trend is that contracting authorities develop long lists of circumstances allowing for modification of a contract, which are included in the contract notice.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

The PPL does not contain any specific regulations regarding privatisations. Some transactions that bring an effect similar to privatisation may be partially regulated by the PPL (eg, some exclusion from the application of the PPL may apply or the provisions allowing for direct award of contracts); however, there is no general regulation of this matter.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPPs are regulated by the Act of 19 December 2008 on Public–Private Partnerships. This Act regulates the cooperation between a contracting authority and a private partner regarding joint implementation of a project based on the allocation of responsibilities and risks between the parties.

In some situations, the selection of the private partner is governed by the PPL. Generally, if the private partner's remuneration is the right to collect profits from the subject matter of the PPP or mainly such right together with payment of a sum of money, then the selection of the private partner and the PPP contract are governed by the Act on Concessions for Works or Services of 21 October 2016.

In other cases, the selection of the private partner and the PPP contract are governed by the PPL (to the extent not regulated in PPP legislation).

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

The notices about procurement procedures must be published:

- in case of procurement below the EU thresholds, in the Official Gazette and the Biuletyn Zamówień Publicznych (the Public Procurement Bulletin), available on the internet portal of the Public Procurement Office; and
- in case of procurement above the EU thresholds, in the OJEU.

The awarding entity may additionally publish the notice in another manner, for example, in the press.

Moreover, the awarding entity in all procurement proceedings that are published shall make the specification of the tender or other information about the procurement (depending on the type of procedure) available on its website from the date of publication of the contract notice in the OJEU or the Public Procurement Bulletin.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

The awarding entity must specify the conditions of participation in the proceedings and evidence required from contractors proportionally to the object of the contract and in a way permitting the assessment of the contractor's capacity to duly perform the contract.

The conditions of participation in the proceedings may concern:

- competence or authorisations to conduct a specific professional activity;
- economic or financial position; or
- technical or professional capacity.

The limitation for contracting authorities results mainly from the application of the proportionality rule – the conditions cannot be more severe than necessary to perform the contract.

The specific limitation concerns the condition related to the annual turnover. The awarding entity shall not require the minimum annual turnover to exceed twice the contract value, except in duly justified cases relating to the object of the contract or the method of its performance.

The PPL provides also for a specific right of the awarding entities, which may, at any stage of the proceedings, consider that a contractor lacks the required capacities where the engagement of contractor's technical or professional resources in other business ventures of the contractor may adversely affect the contract performance.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

The number of bidders can be limited only in restricted or negotiated procedures. In these procedures, bidders are shortlisted by the contracting authority. The number of shortlisted bidders must be specified in the contract notice and shall ensure competition; however, it shall no be fewer than five and no more than 20 in cases of restricted tender, and no fewer than three in cases of negotiations with publication and competitive dialogue.

If the number of bidders that meet the conditions for participation is greater than that specified in the notice, the awarding entity shall invite the bidders, selected based on the selection criteria, to submit tenders.

If the number of contractors that meet such conditions is less than that specified in the contract notice, the awarding entity shall invite all contractors to submit their tenders.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The PPL implements the concept of self-cleaning regulated in the EU Directives.

A contractor who is subject to exclusion may provide proof that the measures taken by it are sufficient to demonstrate its reliability. The PPL includes a list of such exemplary measures:

- redressing the damage;
- payment of a compensation;
- explanation of the facts and cooperation with prosecution authorities; and
- undertaking specific technical, organisational and personnel measures that are appropriate to prevent further misconduct of the contractor.

The self-cleaning remedy shall not apply in respect of a contractor that is an entity subject to a valid court judgment prohibiting it from competing for a contract.

The proof provided by a contractor is evaluated by the awarding entity, which must decide whether it finds them sufficient having regard to the importance and special circumstances of the contractor's act that is a basis for exclusion.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The PPL implements fully the general principles of public procurement set out in the Directives (ie, fair competition, equal treatment of economic operators, proportionality and transparency).

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

No, there is no such specific provision; however, this rule may be interpreted from the principle of equal treatment and fair competition.

In addition, there are rules regarding persons who perform activities in connection with the contract award proceedings. Such persons shall be subject to exclusion if they are in a situation of conflict of interests. These may include:

- being in competition for the award of the contract;
- being married or related to the contractor competing for the award of a contract;
- prior to three years before the initiation of the contract award proceedings they:
  - were employed by or in a mandate with a competing contractor; or
  - were a member of a managing or supervisory body of a competing contractor; and
- being in any legal or actual relationship with a competing contractor that may raise justified doubts as to their impartiality.

Persons who perform activities in the contract award proceedings must provide a written statement on the lack, or the existence, of potential conflicts of interest, such as those listed here.

Conflicts of interest

17 How are conflicts of interest dealt with?

The PPL provides detailed rules on conflicts of interest that are wider than those regulated in the Directives.

The awarding entity may decide (such possibility is indicated in the notice) to exclude a contractor if the contractor, an acting member of the contractor's managing or supervisory body, or its commercial proxy authorised to represent it, are in a relationship that may trigger a conflict of interest with the awarding entity, persons authorised to represent the awarding entity, members of the tendering commission, or experts of the tendering commission, unless it is possible to ensure impartiality on the part of the awarding entity other than by excluding the contractor.

A conflict of interest is understood to be if a contractor or any above-mentioned person:

- is married, related by blood or affinity in the direct line, related by blood or affinity in the collateral line up to the second degree, or related by adoption, guardianship or curatorship to the contractor, the contractor's legal agent or a member of managing or supervisory bodies of the contractors competing for the award of a contract;
- before the lapse of three years from the date of the initiation of the contract award proceedings, remained in a relationship of employment or mandate with the contractor or was a member of managing or supervisory bodies of contractors competing for the award of a contract; or
- remains in such legal or actual relationship with the contractor that may raise justified doubts as to his or her impartiality.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The awarding entity shall exclude contractors and their employees that participated in preparing contract award proceedings, and also any person performing work under a contract of mandate, a contract for specific work, a contract of agency or another contract for providing services who participated in preparing such proceedings, unless the resultant distortion of competition may be eliminated by some means other than the exclusion of the contractor from participating in the proceedings.

This is an obligatory exclusion that applies to each procurement.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

According to the recent statistical data published by the Public Procurement Office (data for 2017), the most popular type of contract award procedure is open tendering.

Open tendering was used in 86.10 per cent of cases. Other procedures were used much more rarely: restricted tendering was used in 0.40 per cent of cases and the negotiated procedure with publication in 0.05 per cent.

In cases of procurement proceedings of a value below the EU thresholds, open tendering was used in 85.21 per cent of cases. Other competitive procedures were used very rarely. There are a large number of procurement proceedings using the non-competitive procedure of direct-award contract – 10.14 per cent in 2017 – a decrease compared with the previous year.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

No, in such situations they shall be excluded from the procedure (this is an obligatory exclusion). The exclusion concerns contractors that, while being part of the same capital group, submitted separate tenders, tenders for one lot or requests for participation in the proceedings, unless they can demonstrate that the existing links between them do not prejudice fair competition in contract award proceedings.

Each contractor, within three days of the date of receiving the invitation to submit a bid or from publication on a website of the information about submitted bids, shall submit to the awarding entity a declaration on being or not being a part of the same capital group as another bidder. Along with the submitted declaration, a contractor may provide proof that links with another contractor do not lead to distortion of competition in the contract award proceedings.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Procedures involving negotiations can be used only in specific situations. Competitive dialogue and negotiations with prior publication can be used only if at least one of the circumstances below has occurred:

- during the prior proceedings under the open or restricted tendering procedure a request for participation in the proceedings was not submitted and no tenders were submitted, or all the tenders were rejected because of their non-compliance with the description of the object of the contract while the original terms of the contract have not been substantially altered;
- the contract value is less than the EU threshold;
- the solutions available at the market cannot satisfy, without being adjusted, the awarding entity's needs;
- the construction works, supplies or services include design or innovative solutions;
- the contract may not be awarded without previous negotiations as a result 0f special circumstances regarding its nature, degree of complexity or legal or financial conditions, or as a result of risk connected with the construction works, supplies or services; or
- if the awarding entity cannot describe the object of the contract in a sufficiently precise manner by reference to a specific standard, the European technical assessment, the common technical specification or the technical reference.

Only awarding entities in the utility sector can use negotiations with prior publication in every situation without having to meet any of these conditions.

There is also a special procedure of negotiations without publication, but this can be used only in exceptional situations.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The procedure of negotiations with publication is the most popular, mainly because awarding entities in the utility sector may use it for all procurement projects. However, in general, the negotiated procedures are rather rare – they are regarded as time consuming, long-lasting and prone to problems during control of the correctness of public procurement procedures.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

There are no specific requirements for the conclusion of the framework agreement. The only limitation concerns the choice of procedure used for the award of the framework agreement. Open tendering and restricted tendering are always possible, while other procedures are possible only if specific conditions are met.

24 | May a framework agreement with several suppliers be concluded?

A framework agreement can be concluded with several suppliers. In such a case, the framework agreement enables the awarding entity to

award contracts covered by a framework agreement to the contractor party in two ways:

- in the form of a direct call if the framework agreement provides for all the conditions regarding the execution of the contract and the conditions of selecting the contractors that will execute the contract; or
- in the form of a mini-competition, requesting the submission of tenders where not all the conditions of execution of the contract or not all the conditions of selecting the contractors have been set forth in the framework agreement.

It is also possible to combine the above-mentioned procedures.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Any pre-contract award changes to the membership of bidding consortium are not possible and they lead to exclusion from the contract award procedure.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The PPL transposed all the EU regulations in the directives aimed to increase access to public procurement markets for small and medium-sized enterprises.

The contracting authority may divide the contract into lots. It is not an obligation, but in case of resigning from such division the awarding entity shall justify its decision in writing in the procurement protocol.

In the case of dividing the contract into lots, the awarding entity shall indicate whether tenders may be submitted for one, several or all lots of the contract, as well as the maximum number of lots that may be awarded to one contractor. The awarding authority shall also specify the criteria it intends to apply for determining which lots will be awarded to the contractor, where the contract award procedures would result in one contractor being awarded more lots than the maximum number for which the contract may be awarded to it.

This is a new solution – therefore there is no relevant case law. The PPL itself does not specify any conditions for limitation of the number of lots single bidders can be awarded, and therefore the general rules of proportionality and equal treatment shall apply.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

The contracting authority may admit or require the submission of a variant bid. In such a case, the tender specification shall include the description of the manner of presenting variant tenders and minimum conditions that the variant tenders must satisfy, along with the selected evaluation criteria.

28 | Must a contracting authority take variant bids into account?

Yes, if a variant bid is allowed it must be considered. In the contract award procedure for supplies or services, the awarding entity cannot reject the variant bid on the sole ground that choosing it would lead to awarding a contract for services but not a contract for supplies, or to awarding a contract for supplies but not a contract for services.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Such a bid shall be rejected, as its content does not correspond with the content of the specification of the tender.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

Public contracts are awarded to the tenderer who has submitted the most advantageous bid determined on the basis of the contract award criteria. The criteria must be provided in the specification of tender.

The contract award criteria shall be either the price; the cost; or the price or cost and other criteria related to the object of the contract. Such other criteria may include quality, social aspects, environmental aspects, innovative aspects, organisation, occupational qualifications, experience of persons assigned to implement the contract and after-sales service, and technical assistance or terms of supply.

Awarding entities that are public finance sector entities or other state organisational units may apply the price criterion as the sole award criterion or as a criterion of the weight exceeding 60 per cent, if they describe in the specification the quality standards referring to all significant features of the object of the contract and demonstrate in the protocol to the procurement procedure how the life-cycle costs were taken into account in the description of the object of the contract.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no legal definition of an 'abnormally low' bid. An abnormally low bid is a bid where the offered price or cost, or its significant components, appear to be abnormally low in relation to the object of the contract, giving rise to the awarding entity's doubts as to the possibility of performing the object of the contract in compliance with the requirements.

32 | What is the required process for dealing with abnormally low bids?

If the awarding entity has doubts regarding the submitted bid and its abnormally low price or cost, it shall request the contractor to provide the explanation.

If the total price of the bid is by at least 30 per cent lower than the gross value of the contract, or 30 per cent lower than the arithmetic mean of prices of all submitted bids, the awarding entity is obliged to request the contractor to provide an explanation, unless the difference results from obvious circumstances.

The contractor shall explain the price or costs of its bid, including submitting evidence concerning calculation of the price or cost, in order to demonstrate either savings of the contract performance as a result of used solutions or exceptionally favourable conditions for the performance of the contract available only to the contractor or other factors that justify the offered price.

The awarding entity shall reject a tender submitted by a contractor who failed to provide explanations or where the evaluation of explanations confirms that the submitted tender contains an abnormally low price or cost.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Procurement complaints are filed with the National Appeals Chamber (NAC), which is a special quasi-arbitration body in Warsaw dedicated to resolving public procurement disputes.

The parties may subsequently file an appeal with the district court against the NAC's ruling.

The court's judgment is final. Only the president of the Public Procurement Office may file a cessation to the Supreme Court.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

No.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The complaint is usually considered by the NAC within 15 days after filing, during an oral hearing. The judicial procedure usually takes one to two months from filing the appeal.

36 | What are the admissibility requirements?

A complaint to the NAC may be filed against any act of the awarding authority contrary to the provisions of PPL or any omission by the contracting authority.

A contractor must demonstrate that it has or may have had an interest in obtaining a given contract and has suffered or may suffer damage as a result of the infringement by the awarding entity of the provisions of the PPL.

If the contract value is less than the EU threshold value, an appeal to the NAC may be filed only in a few specified situations, such as the exclusion of the contractor from contract award procedures or the rejection of its bid.

The complaint shall be lodged generally within 10 days from the date of sending the information concerning an act by the awarding entity constituting grounds for its lodging. The deadline is five days in case of tenders below the EU threshold.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The NAC shall examine the complaint within 15 days from its delivery to the president of the Public Procurement Office. According to the published statistics, the average duration of such proceedings does not exceed this term. The proceedings before the court shall last one month.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Filing a complaint appeal automatically blocks the possibility for the awarding authority to conclude a contract until the NAC issues its judgment. The awarding authority may submit a request to the NAC for the revocation of the prohibition on concluding the procurement contract.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

There are no statistics for this type of application.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The awarding entity shall immediately notify all contractors of information such as:

- the choice of the most advantageous tender, providing the name and address of the contractor whose tender has been selected;
- the names and addresses of the contractors who submitted tenders and the number of points received by the tenders under each tender evaluation criterion and the total number of points achieved;
- the contractors that have been excluded; and
- the contractors whose tenders were rejected and the reasons for tender rejection.

When rejecting the tenders, the information shall contain clarification of the reasons for which the evidence presented by the contractor has been deemed insufficient by the awarding entity.

Information about the choice of the most advantageous tender must also be made available on a website of the awarding entity.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

The procurement file is open to the public. Some documents are made available after the most advantageous tender is selected or after the cancellation of the proceedings; however, bids shall be made available upon their opening.

Access may be in person or by sending a request to provide copies of selected documents.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Filing a review application happens very often. Every year contractors submit around 3,000 complaints to the NAC. As a consequence of adding new grounds to the PPL for complaints in tenders below the EU threshold, it is expected that this number will increase.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, but the PPL does not regulate this matter. Therefore, it must be based on the general principles of civil law – the contractor must prove that it suffered a loss and that this loss is a direct consequence of the violation of the procurement law.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be subject to invalidation. The procedure of invalidation is initiated by the president of the Public Procurement Office in cases where an awarding entity performed an act or an omission in

violation of a provision of the PPL, which has or could have influenced the result of the proceedings.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

The direct award of a contract in violation of the provisions of the PPL is one of the situations in which a concluded contract may be invalidated. Moreover, any contractor may file a complaint if such illegal direct award was made. If the award was made without the publication of information about it, the deadline for filing the complaint is prolonged up to six months from conclusion of the contract in the case of procurement above the EU thresholds, or one month in other cases.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

The fee for filing a complaint to the NAC is from €3,500 to €4,700, depending on the value and type of subject of the procurement. The fee for a judicial complaint is from €17,800 to €23,800.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

On 24 January 2019, a draft of the new PPL was released for social consultation. In April the bill is to be submitted to the Standing Committee of the Council of Ministers, and according to legislative assumptions should be adopted by the government before the summer holidays and then submitted to the parliament. The new PPL would then be expected to enter into force at the beginning of 2020. The draft of the new PPL greatly limits the mandatory grounds for exclusion from tender proceedings by adjusting them to the latest version of the Classic Directive. The proposed draft provides for procedural simplifications by making procurements below the EU thresholds more flexible. The changes are intended to encourage SMEs to take a more active part in bidding for public contracts. The proposal introduces many changes in the procedure for filing appeals and complaints. The draft provides for a 14-day period for filing an appeal against an NAC ruling (twice as long as the current period), and cuts the fee on such appeal from five times the filing fee paid on the NAC complaint, to three times that fee. The draft also carries new conciliation proceedings.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The Public Contracts Code (PCC), approved by Decree-Law 18/2008 of 29 January, as amended, is the key legislation regulating the award of public contracts in the Portuguese legal system.

The most recently and significant amendment to the PCC was approved by Decree-Law 111-B/2017 of 31 August (of which the most recent wording derives from the amendments foreseen in Decree Law 33/2018 of 15 May), which transposed Directive 2014/23/EU (Concession Contracts Directive), Directive 2014/24/EU (the Public Procurement Directive) and Directive 2014/25/EU (Utilities Directive) into the Portuguese legal system. As a consequence, this provoked a profound revision to the previous legal regime, revoking 35 articles, adding 54 and changing 155, significantly modifying the legal regime applicable to the public procurement procedures and public contracts.

This amendment was complemented by both Decree ('Portaria') 371/2017 of 14 December, which established the model contract notices applicable to the pre-contractual procedures under the PCC and Decree 372/2017 of 14 December, which established the rules and terms concerning submission of the contractor's qualification documents.

Decree Law 123/2018 of 28 December, which regulates an organisational model for the implementation of electronic invoicing in public procurement, was also recently approved, and which foresees (i) a delay of the dates from which the electronic invoicing is mandatory in public procurement; and (ii) the delegation to the Public Administration Shared Services Entity (ESPAP) of the coordination of the implementation of electronic invoicing.

Also relevant is Law 96/2015 of 17 August, which establishes the legal framework for the access and use of electronic platforms for public procurement purposes, as well as Decree-Law 111/2012 of 23 May, which provides for a special legal framework for public-private partnerships (PPPs).

Portugal has two autonomous administrative regions – the islands of Madeira and Azores – each of which has adapted the national public procurement rules to the particularities of their territories.

In Madeira, the most relevant piece of legislation is the Regional Legislative Decree 34/2008/M of 14 August, as amended, which introduced minor adjustments to the national legal framework.

In the Azores, the Regional Government approved the Regional Legislative Decree 27/2015/A of 29 December, which consolidated the main provisions referring to the award of public contracts in this autonomous region and has transposed some provisions of the European Union (EU) Directives on public procurement.

Finally, there is also other relevant legislation, namely the Administrative Procedure Code (APC), approved by Decree-Law 4/2015 of 7 January, which establishes the general rules regarding the administrative procedures, the Administrative Courts Procedure Code (ACPC) and the Statute of Administrative and Tax Courts (SATC), both amended and republished by Decree-Law 214-G/2015 of 2 October, which are applicable to public procurement procedures in general.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

There is no special regime for public transport, utility procurement, or work or services concessions.

Nonetheless, regarding the defence and security sectors, Decree-Law 104/2011 of 6 October establishes a special legal framework for the award of contracts, which allow for more flexibility in procurement procedures. Moreover, in line with article 296 of the European Community (EC) Treaty, this Decree-Law also stipulates that some specific contracts are excluded from its scope of application.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Portugal is a member of the EU and is also a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), which provides for reciprocal market access commitments in procurement between the EC and other WTO members that are also signatories to the GPA.

The Portuguese legal framework on public procurement complements and details the EU directives on public procurement and extends the application of public procurement rules to a number of contracts that would otherwise not be subject to those directives owing to their nature and value.

Proposed amendments

4 | Are there proposals to change the legislation?

As mentioned in question 1, the PCC was significantly amended by Decree-Law 111-B/20017 of 31 August, which transposed the 2014 EU Directives to the national legal framework.

Additionally, as a consequence of the entering into force of the General Data Protection Regulation (GDPR) on 25 May 2018, there are various implications for administrative activity and public procurement which will continue to operate in 2019.

Regarding the possible legislative amendments currently being considered, the Portuguese Parliament recently submitted and approved two bills regarding administrative and tax reform to the Portuguese legal framework. In addition to other measures, these bills aim to develop tools to speed up administrative justice and to fight against procedure delays.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The PCC enshrines a wide concept of contracting authorities. However, until the revision of the PCC introduced by Decree-Law 149/2012 of 12 July, certain public entities (eg, public foundations for university education or corporate public hospitals) were excluded from its subjective scope of application.

The PCC currently identifies three main categories of contracting authorities.

The first group of entities is referred to in article 2/1 of the PCC. It is generally composed of the traditional public sector. This group includes:

- the Portuguese state;
- the autonomous regions;
- regional authorities;
- local authorities;
- municipalities;
- public institutes;
- independent administrative authorities;
- the Central Bank of Portugal;
- public foundations;
- public associations; and
- associations financed, for the most part, by the previous entities or:
  - subject to management supervision of those aforementioned authorities or bodies; or
  - where the major part of the members of its administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities.

The second group of entities is foreseen in article 2/2 of the PCC, and is composed of bodies governed by public law, namely, entities with legal personalities, independent of their public or private natures, provided they:

- were established for the specific purpose of meeting needs in the general interest;
- do not have an industrial or commercial character; and
- are financed, for the most part, by any entity of the traditional public sector, or by:
  - other bodies governed by public law;
  - other entities that are subject to management supervision of those authorities or bodies governed by public law; or
  - bodies having an administrative, managerial or supervisory board, where more than half of the members are appointed by any entity of the traditional public sector or by other bodies governed by public law.

Finally, in accordance with article 7 of the PCC, the third group of contracting authorities is constituted by the entities operating in the utilities sector – water, energy, transport and postal services sector – that fall within the following three subcategories:

(i) entities that possess legal personalities, independent of their public or private nature and:
  - are not considered a traditional public entity or a body governed by public law (even if established for the specific purpose of meeting needs in the general interest);
  - possess an industrial or commercial character;
  - operate in one of the utilities sectors; and
  - are directly or indirectly influenced by any entity considered a traditional public entity or a body governed by public law, through the public entity:
    - holding the major part of the share capital or the major part of the voting rights;
    - holding the right of management supervision; or
    - holding the right to appoint the major part of the members of the entity's administrative, managerial or supervisory board.

(ii) entities with a legal personality, independent of their public or private nature:
  - which are not considered a traditional public entity nor a body governed by public law; and
  - which hold special or exclusive rights that have not been granted within the scope of an internationally advertised competitive procedure, limiting the entity's exercise of activities in the utilities sector to prevent it from substantially affecting the ability of other entities to carry out such activity.

(iii) entities that were exclusively incorporated by the entities referred to in (i) and (ii) or:
  - are financed by the same, for the most part;
  - are subject to the management supervision of those authorities or bodies; or
  - that have an administrative, managerial or supervisory board where more than half of its members are appointed by the entities referred to in (i) and (ii); and
  - that jointly operate in the utilities sectors.

Further to the three main categories of contracting authorities referred to above, the PCC also extends its scope of application to entities that enter into public works contracts or public service contracts, provided those entities are directed and financed, for the most part, by other contracting authorities and the values of the contracts to be executed are greater than the relevant threshold.

Additionally, the PCC also extends the application of certain specific public procurement rules to contracts to be carried out by public works concessionaires or by entities holding special or exclusive rights, under certain circumstances expressly defined in articles 276 and 277 of the PCC.

Contract value

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Relevant thresholds (referring to the thresholds' value net of VAT), differ depending on the contracting authority at stake, and if the contracting authority pertains to the traditional public sector or to the utilities sector. Nevertheless, the award of certain contracts may be exempted from complying with procurement laws in some specific situations (eg, when imperative grounds of urgency so require).

All public contracts executed by entities pertaining to the traditional public sector or that are considered bodies governed by public law fall within the scope of procurement law. Nevertheless, contracts whose value is under the relevant threshold can be awarded through a non-competitive procedure (direct award) and their terms are also regulated by the PCC.

The scope of application of the direct award has been reduced with the latest amendment to the PCC with the inclusion of a new procurement procedure (prior consultation), which allows for the consultation of three entities for the award of a contract.

For entities pertaining to the traditional public sector or that are considered bodies governed by public law, the thresholds are:

- for public service, leasing contracts or public supply contracts: €20,000 for direct awards and €75,000 for prior consultations (€75,000 was the previous threshold for direct award in this scenario);

- for public works contracts: €30,000 for direct awards and €150,000 for prior consultations (€150,000 was the previous threshold for direct award in this case); and
- for other types of contracts: €50,000 for direct awards and €100,000 for prior consultations (€100,000 was also the threshold for direct award in this case).

For contracting authorities in the utilities sector, regardless of the general application of the public procurement principles to all contracts carried out by those entities, the thresholds are:

- for public service contracts, leasing contracts or public supply: €443,000;
- for public works contracts: €5,548,000; and
- for service contracts for social and other specific services: €1,000,000.

All public works concession contracts and all public service concession contracts, as well as all articles of associations, fall within the scope of the PCC, independently of their specific value.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

In accordance with the PCC, amendments to concluded contracts are permitted without a new procurement procedure only on public interest grounds or if the conditions under which the parties entered into the previous agreement have changed in an abnormal and unpredictable way and the contractor's new obligations would seriously increase the risks it assumes under the original contract.

Amendments can be introduced by a unilateral decision of the contracting authority based on public interest grounds, by an agreement entered into by both parties, or by a judicial or arbitral decision.

The amendments introduced cannot alter the overall nature of the contract and cannot affect competition within the procurement procedure launched for the performance of said contract (ie, the changes to be introduced cannot alter the order of the bids previously evaluated had the tender specification contemplated this amendment).

Moreover, the amendment cannot result in an increase of 25 per cent of the initial contractual price in the first case, or 10 per cent in the second. It cannot lead to the introduction of changes which, if included in the contract documents, would objectively change the evaluation of the bids and change the economic balance of the contract in favour of the co-contracting party.

Portuguese courts, in relation to amendments introduced to concluded contracts, still follow the *Pressetext* case law.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

See question 7.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Under the Portuguese legal framework, privatisation processes do not fall within the scope of the PCC and are regulated by specific legislation.

In relation to procedures for the disposal of shares held by public entities, there are several legal regimes potentially applicable, such as:

- the State-Owned Enterprises Law (approved by Decree-Law 133/2013 of 3 October, of which the more recent wording derives from the amendments foreseen in Law 42/2016 of 28 December);
- the law regarding the disposal of shares held by public shareholders, approved by Law 71/88 of 24 May (Law 71/88) and subsequently regulated by Decree-Law 328/88 of 27 September, which was amended by Decree-Law 290/89 of 2 September;
- the Framework Law on Privatisations, approved by Law 11/90 of 5 April, which was firstly amended by Law 102/2003 of 15 November and secondly amended by Law 50/2011 of 13 September.

Law 71/88 applies to regular privatisation procedures while Law 11/90 is a specific legal regime applicable to the reprivatisation procedures. The latter exclusively regulates the (re)privatisation processes of companies, nationalised after the end of the Portuguese dictatorial regime, which are intended to return to private ownership.

Under Law 71/88, with few exceptions specifically foreseen, privatisation can be held through a public tender or an initial public offering of shares, if the sale is of a majority shareholding and the value of the company is greater than a certain threshold (this is reviewed on an annual basis and is around €10.5 million), or through a direct negotiation in the other cases.

On the other hand, Law 11/90 stipulates that the reprivatisation process can be held through a public tender or an IPO. However, in certain circumstances – namely based on public interest grounds or on the specific strategy applicable to the economic sector of the company to be reprivatised – the reprivatisation process may be held through a limited tender with specific qualified bidders or through a direct negotiation.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

See question 1.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

In accordance with the PCC, regulated procurement contracts must be advertised in the National Gazette only, or also in the Official Journal of the EU (OJEU), depending on their value.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PCC, which are equivalent to those foreseen in the EU public procurement directives, contracting authorities are only allowed to assess whether private contracting entities are qualified to participate in a tender procedure if they launch a limited tender with prior qualification, a negotiation procedure or a competitive dialogue.

All other public procurement procedures foreseen under the PCC do not permit the evaluation of bidders' qualifications and are actually forbidden to do so.

In accordance with the PCC, the evaluation of the bidder's qualification is made during the first phase of the above-mentioned competitive procedures and the qualitative criteria set out by the contracting authority must refer to the economic and financial standing of the bidder and to its technical and professional ability.

Those qualitative criteria must be related and proportionate to the subject matter of the contract.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Concerning the procedures with a pre-qualification phase (ie, negotiation procedure, restricted procedure with pre-qualification, competitive dialogue), the PCC foresees the possibility to restrict participation to a limited number of bidders.

Following the assessment of the bidders and their compliance with the qualitative selection criteria referred to in the previous question, a limitation of the number of bidders may occur.

There are two different legal systems for the limitation of the number of bidders ('qualification of bidders').

Under the first system – the 'simple system' – all bidders that demonstrate that they comply with all the minimum qualitative selection criteria established will be invited to the second stage of the tender.

In accordance with the second system for the qualification of bidders – the 'complex or selection system' – the economic operators are evaluated based on their economic and financial qualification as well as on their technical capability to carry out the contract. Only the highest evaluated bidders are invited to the second stage of the procedure. Under this system, the minimum number of invitations is five bidders for the limited tender with prior qualification and for the competitive dialogue, and three bidders for the negotiation procedure.

It is important to stress that economic operators can invoke the technical qualification of third parties in order to demonstrate full compliance with the qualification criteria. To do so, they must submit with their expression of interest a declaration in which they state that the third party at stake will perform the relevant part of the scope of the contract for which such expertise is required.

Finally, besides the pre-qualification procedures, the selection of the bidders in a non-competitive procedure, such as the direct award, is at the discretion of the contracting authority.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning', as specifically foreseen in the new EU public procurement directives, is now established under the Portuguese legal framework.

It is now possible for bidders to demonstrate the adoption of corrective measures aiming at the removal of an abstract cause of exclusion under the PPC, which may be granted, for example, by the adoption of adequate technical and organisational measures to avoid the existence of criminal faults or infractions.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. In accordance with the Portuguese legal framework, the fundamental principles for tender procedures are the principles of transparency, equal treatment and competition, as well as the principles of mutual recognition, non-discrimination and proportionality.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PCC does not have a specific provision referring to the independence and impartiality of contracting authorities; however, the independence and impartiality of said authority results from the fundamental principles referred to in question 15.

The PCC establishes that before commencing their duties as members of a jury or of an evaluation team, individuals must declare the absence of any conflicts of interest using a specific form approved by the PCC.

Moreover, the APC, which subsidiarily applies to the PCC and to contracting authorities in general, foresees two different mechanisms to ensure impartiality: (i) situations under which members of contracting authorities are prohibited from interfering in the decisions taken in the public procurement procedure (eg, situations in which they have directly or indirectly a personal interest in the outcome of such procedure); and (ii) situations under which members of contracting authorities are able to ask, in specific situations, for their non-intervention in a certain procedure with the purpose of not raising any doubt about the impartiality of the decisions to be taken therein.

Conflicts of interest

17 | How are conflicts of interest dealt with?

See question 16.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

In the original version of the PCC, the involvement of a bidder in the preparation of a tender procedure would constitute an immediate ground for exclusion. However, since the revision of the PCC in 2012, and although that kind of involvement may still ground an exclusion decision, such decision will be issued exclusively in situations under which such specific intervention is considered to have conferred advantages to such bidder and prejudices competition.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

Although contracting authorities still tend to award contracts on a direct award basis, the strict supervision of public contracts by the Court of Auditors in this last decade has reduced its number significantly.

The current amendment to the PCC, which reduces the grounds for the application of such procedure, will probably contribute to the continuous reduction of the use of the direct award. It is expected that the prior consultation procedure is going to be more frequently used in the near future by contracting authorities.

For competitive procurement procedures, the prevailing type is the public tender.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The PCC has a specific provision under which a group of economic operators participating in a procurement procedure as a group are not entitled to participate in the same procedure solely or as members of other groups. Violation of such rule shall lead to the exclusion of both bids.

There is no specific provision for related bidders (eg, different companies within the same group) submitting separate bids in the same procedure. Nonetheless, in most cases this situation would probably lead to the exclusion of both bidders. In fact, if certain companies belong to the same economic group, it would be very hard for them to demonstrate that they are independent and that they are not distorting competition, which constitutes another ground for exclusion.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The use of procedures involving negotiation with bidders is limited to certain specific circumstances.

The PCC establishes two procedures that involve negotiation with bidders: the competitive dialogue and the negotiation procedure.

Currently, the PCC establishes that the adoption of a competitive dialogue or a negotiation procedure may occur if:

- the contracting authority's needs cannot be fulfilled, without adapting easily available solutions;
- the goods or services include the adoption of innovative solutions;
- it is not objectively possible for the contract award to occur without any previous negotiation due to the contract's specific nature, complexity or risk; and
- it is not objectively possible to precisely define, in a detailed manner, the technical solution to be implemented by referring to a certain rule or standard.

Besides the two situations mentioned above, provided that some requirements are fulfilled, the PCC recognises a negotiation phase in the procedures of direct award, prior consultation or public tenders.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The negotiation procedure is used more regularly, as its phases and organisation are simpler and similar to limited tenders with prior qualification. Before the recent amendment to the PCC, the negotiation procedure was often used by entities operating in the utilities sector, as the competitive dialogue procedure was not allowed. However, the rules have changed, and competitive dialogue is now permitted in the utilities sector too. Bearing this in mind, only time will tell if this procedure will be used more often.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Framework agreements may be concluded with one single entity only or with several entities, respectively, if the tender specifications have all been set forth in the tender documents, or with several entities if the tender specifications have not been all set forth in the tender documents.

A public tender or a limited tender with prior qualification usually precedes the conclusion of a framework agreement, since those procurement procedures do not have any threshold. On the contrary, if a framework agreement is concluded through a direct award, the global value of the contracts to be executed under such framework agreement cannot exceed the EU thresholds applicable to the PCC.

24 | May a framework agreement with several suppliers be concluded?

A framework agreement may be concluded with several suppliers. In that case, the award of contracts under such an agreement will be preceded by an invitation to the selected suppliers to submit a proposal to the specific aspects of the contract that will be relevant for that specific contract and that will be evaluated.

On the contrary, if a framework agreement is concluded with a single supplier, contracts based on that framework agreement should be awarded within the limits of the terms laid down in the framework agreement. Those terms must have been sufficiently specified in the procurement procedure that preceded the execution of the framework agreement under which they were evaluated.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The general rule is for changes in a consortium not to be admitted in the course of a procurement procedure, since the PCC expressly stipulates that all the members of the consortium and exclusively those members must carry out the contract.

Nonetheless, it would be difficult not to accept a change in the members in the case of a merger or a spin-off of one of the members of the consortium, as it would have to be accepted in the case of a sole bidder.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The Portuguese legislation allows for small and medium-sized enterprises to be positively discriminated in favour of, as it may be used as a tiebreaker award criterion in the presentation of a bidding offer by such enterprises.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids are only admitted when the terms of reference of the procurement procedure at stake specifically authorise its submission.

28 | Must a contracting authority take variant bids into account?

See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Any violation of the tender specifications that are not subject to competition and evaluation leads to the exclusion of such offer.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

As a result of the amendment of the PCC in 2017, the award criterion is the most economically advantageous tender, which may assume one of two categories: (i) best price-quality relationship, in which the award criteria consist of a group of factors and subfactors concerning several aspects of the performance of the contract to be executed; or (ii) evaluation on the price or the cost, where the tender documents shall establish all other components of the performance of the contract to be executed. Nevertheless, the Portuguese legislation also establishes the possibility to award the contract to lowest price tender where this is the most appropriate award criteria.

Regarding the former, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date, and delivery period or period of completion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

An 'abnormally low' bid is a bid whose proposed value appears to be abnormally low when referring to the object of the contract at stake.

The PCC stipulates that the contracting authorities may define the situations in which the price or cost of a proposal is abnormally low. Such determination must be well-founded and the criteria for such a decision must be clearly stated.

32 | What is the required process for dealing with abnormally low bids?

If contracting authorities have stipulated the estimated price for the contract in the tender specification, and the bidder intends to submit an offer with a price that will be considered as an abnormally low bid under the awarding authority previous determinations, the awarding authority must exclude the offer, but giving the opportunity for the bidder to explain the reasons behind its abnormally low bid.

The explanations may refer to several factors, such as:

- the economics of the manufacturing process;
- the technical solutions chosen or any exceptionally favourable conditions available to the bidder;
- the originality of the works;
- supplies or services proposed by the bidder;
- the specific conditions of work that the bidder benefits from; and
- the possibility of the bidder obtaining legal state aid.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through administrative review proceedings that are regulated by the contracting authorities or through judicial review proceedings under the jurisdiction of administrative courts.

Review proceedings are not mandatory and are not often used.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

See question 33.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The review proceeding concerning procurement decisions is characterised by its pressing urgency, aimed at avoiding excessive delays in the procurement procedure, and it must be brought within five business days. Furthermore, whenever the review concerns the award, the qualification decision or the rejection of a complaint regarding any of these decisions, the contracting authority must invite other bidders to submit their views and must issue a final following decision within five business days.

Judicial reviews can be initiated before the contract is formally concluded, and also after its termination.

Judicial proceedings regarding pre-contractual litigation must be filed within one month after the relevant decision has been issued and notified to the bidder. After the conclusion of the contract, any unsuccessful bidder can also seek remedies within six months of the conclusion of the contract or of its notice.

Because of the importance of obtaining a swift ruling, this kind of judicial proceedings usually takes no less than six months to obtain the first instance decision.

36 | What are the admissibility requirements?

All procurement decisions and tender documents, as well as the signed contract, are justiciable. Any unsuccessful bidder can submit an application for review of a certain decision, tender document or contract, provided that it demonstrates it has been directly affected by the infringement at stake and that it will obtain an advantage with the review decision sought.

37 | What are the time limits in which applications for review of a procurement decision must be made?

See question 35.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

According to the recent revision of the ACPC, the judicial proceedings on pre-contractual litigation filed to challenge the award decision of the contracting authority now have an automatic suspensive effect on the decision or on the contract's performance. Nevertheless, the court may decide to lift the suspensive effect of said decision during the judicial proceeding for public interest reasons and after a balanced consideration of all interests involved.

With regard to judicial proceedings that are not filed for challenging an award decision, Portuguese law also provides for administrative courts to grant interim measures if so requested by the plaintiff.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Although not 100 per cent, the rate of success of applications for the lifting of an automatic suspension is high, since administrative courts in Portugal tend not to challenge the arguments presented by public authorities.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders are notified at the same time of the award decision and the contract can only be signed after 10 business days of such notification have elapsed. In this respect, the PCC establishes a general standstill period of 10 days between the time of notification of the contract award decision and the execution of the contract, so that unsuccessful bidders can challenge the decision before the contract has been signed. Nevertheless, this standstill period shall not apply where:

- the contract is executed under a prior consultation procedure or a direct award or, in other procedures, where the notice has not been published in the OJEU;
- the contract pertains to a framework agreement executed with one entity only or to a framework agreement which terms cover all the aspects related to the contract's performance; or
- only one bid has been submitted.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

During the whole public procurement procedure, all bidders have access to the documents submitted by the parties and issued by the jury as well as by the contracting authority, except in relation to documents that bidders requested to be classified.

Third parties may also have access to the procurement file, since the file is considered to be public. Nevertheless, applicants must demonstrate a legitimate interest in having access to such documents and information.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Review applications are often filed, especially in cases in which the value or the strategic relevance of the contract is high.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, disadvantaged bidders can claim for damages.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, those situations are not very common.

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In the cases in which judicial decisions determine the cancellation of an executed contract, contracting authorities usually appeal such decisions, and when final and non-appealable decisions are finally issued the contracts are almost completed.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Legal protection is still available in these situations.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Administrative appeal of contracting authorities' decisions does not have any cost to the challenging entity.

For judicial challenges, there is a judicial fee of €204 in the first instance, irrespective of the value of the action. In the case of appeal of the court's decision, a variable judicial fee will be charged in accordance with the value of the claim.

São Tomé and Príncipe

Ana Marta Castro and Raul Mota Cerveira
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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The Regulation on Bids and Public Procurement (RBPP), approved by Law 8/2009 of 26 August 2009, is considered the key legislation regulating the award of public contracts in São Tomé and Príncipe. Also relevant is Dispatch 14/2009, which approves the structure and composition of an autonomous collegiate Appellate Body, which operates under the authority of the Prime Minister, and which is responsible for assessing and deciding, at the administrative level, on the appeals filed in relation to public works tenders and contracts and supply contracts to the State and Decree-Law 20/2015 of 11 December 2015, which establishes the Regulation on the activities of Public and Private Contractors (the Regulation).

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

The RBPP, the Dispatch 14/2009 and the Regulation are the main legal frameworks for public contracts. However, in some specific economic sectors, specific laws can be approved to safeguard the specific characteristics of those sectors.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

São Tomé and Príncipe is not a European Union member or a signatory to the World Trade Organization's Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets among its parties.

However, the Portuguese legal framework has had a major influence on the drafting and implementing processes of the RBPP, as well as on the other relevant legislation regarding the award of public contracts. For that reason, the RBPP and all relevant legislation end up closely following and determining a framework similar to those of the EU or the WTO.

Proposed amendments

4 | Are there proposals to change the legislation?

To our knowledge, no future amendments to the public procurement legislation are envisaged.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Under the RBPP, the contracting authorities correspond to the traditional public sector (central and local authorities). The group of entities considered in this regard is very wide and includes the bodies and agencies of the central administration, including public institutes, national agencies, public companies and publicly held companies, as well as the municipalities and the autonomous region of Príncipe.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

All public contracts concluded with contracting authorities fall within the scope of the RBPP and the type of procedures launched for the award of such contracts usually depend on the estimated value of the contract that is going to be awarded.

The RBPP provides for three distinct legal regimes:

- the general regime;
- the special regime; and
- the exceptional regime.

The general regime is applicable to the award of all public works contracts, supply of goods contracts, provision of services contracts, consulting services contracts and concession contracts that do not fall within the special regime or the exceptional regime. These contracts are generally awarded by means of a public or an international public tender, except for the concession contracts, which are awarded by means of a tender with prior qualification.

The special regime is applicable to the award of contracts in the following situations:

- contracts arising from any international treaty or any other type of international agreements and signed between São Tomé and Príncipe and any other state or international organisation, whenever its conclusion requires the adoption of a specific legal regime; or
- contracts concluded in the scope of public financed projects with resources originating from an official foreign cooperation agency or a multilateral financial body, whenever the adoption of a specific regime is a condition of the respective agreement or contract.

The specific rules to be applicable under the special regime are indicated in the relevant contract notices and tender documents.

Finally, there is the exceptional regime, applicable to the award of contracts that, on public interest grounds, cannot fall within the general

and the special regimes. In this exceptional regime, contracting authorities can select any of the following pre-contractual procedures:

- small-scale tender;
- tender with prior qualification;
- tender with two stages; and
- direct award.

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

It is possible to amend concluded contracts, provided the amendments have the appropriate grounds and are implemented by means of an amendment to the contract.

Public contracts may be amended whenever there is the need to alter:

- the ongoing project or its specifications to improve its adequacy to the contract's main object;
- the value of the contract, due to the increase or decrease of the quantities required for the contract's main object and aim;
- the implementation scheme of the public works, the provision of services or the supply of goods, due to the unenforceability of the original contracting terms; or
- the payment conditions, due to supervening circumstances.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

No, there has been no case law clarifying the application of the legislation in relation to amendments to concluded contracts.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Under the São Tomé and Príncipe legal framework, privatisation processes do not fall within the scope of the RBPP.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPPs are currently governed by Law 06/2018 of 10 April 2018.

The main issues surrounding PPPs are the financial impact and risk-sharing between the public and private parties.

Law 06/2018 of 10 April establishes the guidelines for the awarding process, implementation and monitoring of the three modalities of involvement of the private sector in the promotion of development of PPPs.

In accordance with the Law 06/2018 of 10 April, the setting up of a PPP usually follows the public tender regime and the RBPP is applicable on a subsidiary basis.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

As a rule, regulated procurement contracts must be advertised online, free of any charge. It is also possible for regulated procurement contracts to be advertised in the most circulated newspapers in the country.

The contract notice must be publicly displayed in the contracting authority's head office and must be reported to the Bidding System Coordination Cabinet.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the RBPP, contracting authorities are only allowed to assess whether private contracting entities are qualified to participate in a tender procedure if they launch a tender with prior qualification or if they want to award a consulting services contract.

In the first phase of the tender with prior qualification, bidders are invited to submit documents that demonstrate they comply with the technical and financial qualification requirements.

Subsequently, qualified bidders are shortlisted and invited to participate in the second phase of the procedure and to submit bids. In this phase, the procurement process follows the rules of the public tender.

Additionally, in specific tenders launched for the award of consulting services contract, contracting authorities may select a maximum of six consultants to participate in the competitive selection process.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

There are two ways to limit the number of bidders that can participate in a tender procedure:

On the one hand, as referred in question 12, it is possible for such limitation to occur in the tender with prior qualification and in the specific tender launched for consultancy services.

On the other hand, whenever a contracting authority launches a direct award for the award of a specific contract, the selection of bidders that will participate in the procedure depends on a discretionary decision of said authority.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not yet established in São Tomé and Príncipe. Economic operators that fall within any of the exclusion situations foreseen in the RBPP must wait for the lifting of the respective sanctions. They cannot participate in tender procedures until then.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. The RBPP states that the fundamental principles for tender procedures are, among others, the principles of legality, equal treatment, competition, transparency, financial regularity, economy, efficiency and effectiveness, as well as pursuing public interest, reasonability, proportionality, publicity, impartiality, good faith, stability, motivation, responsibility and expediency.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. The RBPP has a specific provision regarding the principles of independence and impartiality applicable to the contracting authorities and also contains an extensive set of rules applicable to contracting authorities, which establish that they must act impartially, allow every interested party to participate in tender procedures on equal terms, and guarantee full publicity and transparency of all procurement procedures launched for the award of public contracts.

Additionally, the RBPP foresees different mechanisms to ensure impartiality: situations under which members of contracting authorities are prohibited from interfering in the decisions taken in the public procurement procedure (eg, situations in which they have a direct or indirect personal interest in the outcome of such procedure); and situations under which members of contracting authorities may request a specific person not to participate in specific procurement procedures to prevent potential conflict of interests and breaches of confidentially rules.

Conflicts of interest

17 | How are conflicts of interest dealt with?

See question 16.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a bidder, directly or indirectly, in the preparation of a tender procedure constitutes an immediate ground for the bidder's exclusion.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing types of procurement procedure used by contracting authorities are the public tender and the international public tender. These are the procedures followed under the general regime.

The public tender and the international public tender are divided into the following phases:

- preparation;
- launching;
- submission of bids and qualification documents;
- evaluation of bids and qualification documents;
- post-qualification of the tenderer with the lowest price offered;
- classification and recommendations of the jury;
- homologation;
- challenge of decisions taken in the procurement procedure, if applicable;
- award; and
- announcement of the final ranking of tenderers and bids.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

No. Bidders may participate in procurement procedures constituted as a consortium or association. But members of a consortium or an association cannot bid separately and/or as part of another consortium or an association, in the same tender.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

The only procedure involving negotiations between contracting authorities and bidders is the one used for the award of consulting services contracts. The establishment of a negotiation phase is not mandatory and takes place before the award of the contract to the selected bidder. Nonetheless, only the first ranked bidder is invited to participate in the negotiation phase. Negotiations cover discussions on the terms of reference, methodology, personnel, expenses and contractual conditions. All negotiations must be noted in minutes and signed by both parties.

If negotiations are not satisfactory, the contracting authority may terminate the negotiations and invite the following ranked bidder to negotiate.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

There are no specific rules regarding the conclusion of framework agreements.

24 | May a framework agreement with several suppliers be concluded?

See question 23.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The general rule is for changes in a consortium not to be admitted during the course of a procurement procedure. Nonetheless, it would be difficult not to accept a change in the membership if one of the members of the consortium is involved in a merger or a spin-off, as it would have to be accepted in the case of a sole bidder.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

RBPP has no specific rule or mechanism that would further the participation of small and medium-sized enterprises specifically.

In relation to the division of a contract into lots, there is a provision that establishes the rules for such contracts. In tenders in which the division of a contract into lots is admitted, the tender documents and the evaluation criteria must be adapted for that purpose.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids are only admitted when the specific provisions of the public procurement at stake expressly authorise its submission. In tenders in which variant bids are admitted, the tender documents and the evaluation criteria must be adapted for that purpose.

28 | Must a contracting authority take variant bids into account?

See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders cannot change the tender specifications. The RBPP establishes that bids which do not comply with the tender specifications or that contain unenforceable or abusive conditions shall be disqualified.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

According to the RBPP, the award of public works contracts, supply of goods contracts and provision of services contracts shall be decided based on the lowest-price criterion.

However, the RBPP also allows contracting authority to use a combined criterion, under which the evaluation is based on the technical evaluation of the proposal submitted, as well as on the price offered, provided that the decision to choose this combined criteria results from a well-founded assessment.

Decisions based on the lowest-price criterion must always ensure that the selected bid has the necessary level of quality to pursue the public interest goals, in accordance with the tender documents.

In the event of a tie arising from the adoption of the lowest-price criterion, the final selection is determined by a sweepstake during a public session.

With regard to the award of public works concessions or services concessions, the RBPP stipulates that the contracting authorities may evaluate proposals based, individually or jointly, on the following criteria:

- the highest price offered for the concession;
- the lowest tariff or price to be charged to users; and
- the best quality of services or goods available to the public.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The RBPP does not contain specific provisions regarding abnormally low bids.

32 | What is the required process for dealing with abnormally low bids?

See question 31.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

According to São Tomé and Príncipe's legal framework, it is possible to challenge all decisions taken under a specific procurement procedure, such as the qualification and disqualification decisions, as well as award decisions through administrative review proceedings.

Complaints must be filed within three business days of the notification of the challenged decision. This administrative review proceeding is assessed by the contracting authority, which must decide whether to accept or reject such complaint within five business days of receipt. The filing of a complaint does not require the payment of any fees.

Until the end of the deadline established, all tenderers have free access to the tender's administrative documents.

After the contracting authority's decision on the complaint filed, tenderers have three business days to react to such decision, after which a final decision is taken, through a hierarchical appeal.

The hierarchical appeal is assessed by ultimate authority of the contracting entity and a decision whether to accept or reject such hierarchical appeal must be taken within five business days of the filing date.

After the ultimate authority of the contracting entity's decision on the hierarchical appeal is filed, tenderers have three business days to react to such decision through another appeal to the appeal body, which must take a final decision within 10 business days of the filing date.

All administrative review proceedings described above have suspensive effects.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

See question 33.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

See question 33.

36 | What are the admissibility requirements?

See question 33.

37 | What are the time limits in which applications for review of a procurement decision must be made?

See question 33.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

All administrative review proceedings described in question 33 have suspensive effects.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

The RBPP does not provide for the possibility to lift an automatic suspension.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders are notified at the same time of the award decision.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

All documents issued during the procurement procedure are available to public consultation, free of charge, from the date of publication of the tender announcement until 60 days after the procurement procedure's conclusion.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Although there are cases of disadvantaged bidders filing review applications, especially in the cases in which the value of the contract or its strategic relevance is high, most disadvantaged bidders abstain from such practice.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, disadvantaged bidders can claim for damages.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes. A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, those situations are not very common.

In the cases in which judicial decisions determine the cancellation of an executed contract, contracting authorities usually appeal such decisions and when final and non-appealable decisions are finally issued contracts are almost completed.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Legal protection is still available in these situations.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Any of the administrative review proceedings described in question 33 require the payment of fees.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The main pieces of national legislation are the following:

- Act 9/2017, dated 8 November, on public procurement and transposition to the Spanish legislation of EU directives on public procurement 2014/23/EU and 2014/24/EU (Act 9/2017);
- Act 31/2007, dated 30 October, on public procurement of special sectors (Act 31/2007);
- Royal Decree 814/2015, dated 11 September, on approval of the Regulation of the special proceedings for review of administrative decisions on public procurement (RD 814/2015);
- Royal Decree 817/2009, dated 8 May, on partial regulatory implementation of the General Act on Public Procurement (RD 817/2009); and
- Royal Decree 1098/2001, dated 12 October, on approval of the general regulation of the Act on contracts of the Public Bodies (RD 1098/2001).

Also, some Spanish regions have enacted their own legislation:

- Navarra: Act 2/2018, dated 13 April, on public contracts in Navarra;
- Region of Madrid: Decree 49/2003, dated 3 April, on approval of the general regulation of public procurement in Madrid; and
- Basque Country: Decree 116/2016, dated 27 July, on legal regime of the public procurement in the Basque Country.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Yes, there is special legislation, set out in Act 24/2011, dated 1 August, on public procurement in the fields of defence and national security.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The legislation in force incorporated the European Union (EU) procurement directives 2014/23/EU and 2014/24/EU and the former 2004/18/CE. Some of the regulations in such legislation are also based on the rules in the World Trade Organization's Agreement on Government Procurement (GPA), of which the EU is a member state.

Proposed amendments

4 | Are there proposals to change the legislation?

There is currently a bill in the Spanish parliament, the purpose of which is to incorporate the new EU directive on public procurement of special sectors, 2014/25/EU.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Any private undertaking that an entity of the public sector has less than 50 per cent participation in or control of is not subject to the legislation on public procurement.

Likewise, public bodies that are engaged in any profit-making activity of goods manufacture or services provision, or that are mostly financed by income received as consideration for the provision of goods of services, shall not be subject to the legislation on public procurement.

In any event, in practice, there are very few of these institutions.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

No. There are exclusions according to the purpose of the contract, but not according to its value.

Despite this, minor contracts (work contracts with a value of less than €40,000, or any other contracts of less than €15,000) have very light requirements: public expense approval, registry of the relevant invoice and, if possible, the submission of at least three offers.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Yes, but only provided that such possibility is expressly set out in the tender documents, or in case of unexpected circumstances. In the latter scenario, the contracting authority shall not alter the essential conditions of the tender and award, and the scope of the amendments shall not exceed what is strictly necessary to include new provisions owing to unexpected circumstances.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Most of the judgments in this matter have been issued by the European Court of Justice (CJEU). See, for example, the judgment dated 29 April 2004, *CAS Succhi di Frutta SpA*, C-496/99 P, EU:C:2000:595.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

Privatisation is ruled by the public properties legislation, not public procurement regulations.

Despite this, if a public authority decides to change the management of a public service or utility from a purely public management scheme to a public-private partnership (PPP) scheme, it shall be obliged to choose the private undertaking by means of a public tender, which is controlled by the public procurement legislation.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

In cases of the management of public services or utilities by means of the granting of concessions in favour of private undertakings and the incorporation of companies allocated to the management of such services and owned by public and private shareholders, the private undertaking (ie, concessionaire or private shareholder) shall be chosen according to a public tender.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

In official gazettes and in the contracting profile of the contracting authority.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Such requirements shall be bound to the purpose of the contract and be proportional to such purpose.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Yes. The restricted proceeding allows the contracting authority to limit the number of bidders according to impartial criteria related to financial solvency or technical ability. In any event, the number of bidders shall not be less than five.

In the cases set out in the Act 9/2017 that allow the contracting authorities the use of the competitive procedure with negotiation, the authorities shall request offers from at least three undertakings when possible.

Moreover, the contracting authority is entitled to award a contract to a single bidder (therefore without any prior selection based on competitive concurrence) by means of the competitive procedure with negotiation without publicity, on the basis of exclusivity, in cases where only the single bidder is capable of executing the contract for technical or artistic reasons, or any reasons related to the protection of industrial property rights.

In the cases set out in Act 9/2017 that allow the contracting authorities the use of the competitive dialogue, such authorities shall request offers from at least three undertakings.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The prohibition to contract is not indefinite, but subject to the term ordered by the relevant public authority or judicial court.

Self-cleaning is currently recognised as a way of avoidance of the statement of prohibition to contract (see article 72, paragraph 5 of Act 9/2017).

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. They are all set out in article 1 of Act 9/2017.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. Any officer of the contracting authority shall refrain from participating in any tender and could be subject to recusal if he or she shares any interests with any of the bidders.

Conflicts of interest

17 | How are conflicts of interest dealt with?

The officer of the contracting authority shall refrain from participating in any tender. If the officer does not refrain, any bidder may request the officer to be recused by the contracting authority, the officer could be recused if it is deemed that there is a conflict of interests that must be avoided.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Bidders are not entitled to participate in the tender if such participation could restrict free competition or result in an advantage in favour of the bidder in front of the remaining participants.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing types of procurement procedure are the open and restricted proceedings.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

No, they cannot.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

It is compulsory to request at least three offers whenever possible and the negotiation points must be expressly indicated in the tender documents.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The competitive procedure with negotiation is used most frequently, since it is easier to justify its use. There are new forms enacted upon the Act 9/2017, but these have not been used much yet, as the Act entered into force recently.

Competitive dialogue can only be used when the contracting authority is not sure of the scope of the purpose of the public contract to be awarded and requires the feedback of the market itself. These circumstances do not usually occur, as the contracting authorities are perfectly aware of the needs to be fulfilled and the scope of the purpose of the public contract to be awarded.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

In general terms, the framework agreements cannot be used in a fraudulent manner or result in distortion of free competition. The framework's term shall not be more than four years, save for exceptional cases, which shall be duly justified.

24 | May a framework agreement with several suppliers be concluded?

Yes. The award of contracts resulting from such framework agreement requires an additional competitive procedure, but such a procedure is only based in the award criteria of the contract and not the framework agreement itself.

Act 9/2017 sets out the award of contracts under framework agreements without the need to issue an additional competitive procedure, provided that certain requirements are met.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Only before the term granted for the filing of documents related to the financial solvency and technical ability of each member of a bidding consortium.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Yes, by means of the division of the purpose of the public contract into different lots.

There are no limitations, but such division shall not be carried out to avoid the application of stricter rules for the award of the public contract due to its value.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

This possibility shall be indicated in the tender documents, including in which elements and under which conditions a variant bid may be admitted.

28 | Must a contracting authority take variant bids into account?

Only if the tender documents entitle bidders to propose variant bids or improvements.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The participant shall be excluded from the tender.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The award criteria shall be directly related to the purpose of the public contract, such as:

- quality;
- price;
- term for execution;
- delivery of the goods;
- provision of the service;
- costs bound to the use of the goods supplied;
- technical value;
- aesthetic or functional characteristics;
- maintenance;
- technical assistance;
- after-sales or customer services;
- environmental or social advantages;
- quality-price ratio or value for money; or
- any other similar features.

The award criteria are set out by the contracting authority and are expressly indicated in the tender documents. Such criteria cannot refer to the bidders' technical ability or financial solvency, which are tender admission criteria, not tender award criteria.

In cases where the contracting authority decides to set out only a single criterion for an award, the criterion will be the price offered.

Award criteria can be appraised automatically, by means of formulae, or by a value judgment. In order to ensure impartiality, the appraisal of award criteria based on value judgments is carried out before the appraisal of the award criteria based on formulae.

In general terms, award criteria based on formulae count for more than award criteria based on value judgments. When award criteria based on value judgments receive a higher score than those based on formulae, the contracting authority forms an expert committee of at least three members that appraise the award criteria based on value judgements, or commission such an appraisal from a specialised technical body.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The contracting authority is entitled to indicate objective parameters by which a bid can be deemed as abnormally low in the tender documents.

An abnormally low bid is, therefore, any bid that is considered such compared to the objective parameters set out in the tender documents.

32 | What is the required process for dealing with abnormally low bids?

If the contracting authority finds any bid abnormally low, according to the objective parameters set out in the tender documents, it shall ask the bidder to justify the terms of its proposal and explain the reasons why it is able to offer an abnormally low bid.

Such terms can be related to the:

- reduction of the costs in the execution of the public contract;
- technical solutions proposed;
- any exceptionally favourable conditions in favour of the bidder for the execution of the public contract that enables the offering of lower prices;
- innovation of the proposed provisions; and
- compliance with the provisions related to employment protection and labour, social, environmental or outsourcing conditions in force in the place where the public contract is to be executed; or
- the potential granting of state aid.

The contracting authority shall request the relevant public body's technical advice to analyse the bidder's justification.

Upon such hearing and analysis, the contracting authority shall either accept the justification and admit the bid or exclude the bidder from the award procedure if it deems that the public contract cannot be executed due to the abnormal or disproportionate values.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Procurement complaints can be filed before an administrative tribunal of contractual complaints, which is a special administrative body created specifically to solve some public procurement disputes, and the decisions of which may be subsequently appealed before judicial courts. Procurement complaints can also be submitted directly to the judicial courts.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes, as any decision of these administrative contractual complaints can be subsequently challenged before the relevant courts.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Administrative proceedings are normally concluded within one or two months.

Judicial proceedings may take two years initially, and another one or two years if a ruling is appealed before the High Court.

36 | What are the admissibility requirements?

Besides formal requirements, there are two substantive issues that should be considered:

- if a participant challenges an award based on any potential nullity of any term set out in the tender document, but did not challenge the tender document itself, the award challenge shall be dismissed, as it is considered that the lack of challenge of the tender documents is deemed as a full acceptance of their contents; and
- if a participant challenges an award, the claim shall only be admitted if such participant would be the awardee of the public contract, if the administrative tribunal agrees with the participant's legal grounds.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The deadline for appealing before the administrative tribunals of contractual complaints is 15 working days, and two months before the judicial courts. These periods start from the day following the date of publication or notification of the challenged administrative action or resolution. Both deadlines are strictly observed; thus, appeals filed later will be rejected.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

If a challenge is filed against an award, the administrative tribunal of contractual complaints automatically suspends the conclusion of the contract.

Upon 30 working days as from the filing, the administrative tribunal of contractual complaints reviews the decision and can resume the conclusion of the contract if new circumstances require such continuation.

Furthermore, in the case of any other decision being challenged, such as the approval of the tender documents, the administrative tribunal of contractual complaints can adopt injunctive measures (including suspension of the procurement procedure) by its own decision or upon a request from the challenging bidder. Likewise, the administrative tribunal of contractual complaints is entitled to revoke such injunctive measures should it be advisable due to justifiable circumstances.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Ninety per cent of the automatic suspensions are in force until the conclusion of the claim before the administrative tribunal of contractual complaints.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Yes. The notice shall be sent to all unsuccessful bidders and uploaded to the contracting profile within 10 days as from the date of award of the bid.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Yes.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Approximately 2,000 appeals on public procurement matters are submitted every year (the central tribunal of contractual complaints issued more than 1,200 resolutions in 2018).

Considering that the special appeal on contracting in Act 9/2017 can be filed against a greater type of administrative decisions beyond the approval of tender documents, exclusions from public tenders or awards (for instance admission to public tenders, in-house providing or contractual amendments), this number is expected to increase.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, but only upon request of the bidder, and such damages shall be duly justified.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes, but cancellation or termination is usually delayed until urgent measures are adopted to avoid damages to the public interests.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes. In such cas`e, parties interested in the public contract are entitled to challenge the award before the administrative tribunals of contractual complaints, and courts on the legal grounds that such a contract is null and void, due to the absolute breach of administrative proceeding rules which are applicable to public procurement.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

Such costs depend on the estimated value of the contract. However, the minimum cost of the legal services related to the filing a challenge to a decision with the administrative tribunals of contractual complaints is €3,000 to €6,000.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

There are three main acts on public procurement. They are:

- the Public Procurement Act (SFS 2016:1145) (PPA);
- the Utilities Procurement Act (SFS 2016:1146) (UPA); and
- the Concessions Procurement Act (SFS 2016:1147) (CPA).

These acts implement the EU directives on public procurement (2014/24/EU) (PPD), utilities procurement (2014/25/EU) (UPD) and the award of concession contracts (2014/23/EU) (CPD).

The PPA regulates procurement of public works contracts, public supply contracts and public service contracts. The UPA regulates procurement for entities operating in the water, energy, transport and postal services sectors. The CPA regulates the procurement of service concession contracts and public works concession contracts. Contracting authorities and entities must comply with the PPA, UPA or CPA, as applicable, when entering into a contract that is covered by one of these acts.

The PPA, UPA and CPA are enforced by the administrative courts, the civil courts and the Swedish Competition Authority. The duties of the Swedish Competition Authority include supervising compliance with the PPA, UPA and CPA.

This chapter is based on the PPA, UPA and CPA as of March 2019.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

The Act on Freedom of Choice System (SFS 2008:962) (FCSA) prescribes that freedom of choice systems are an alternative to procurement in accordance with the PPA in the areas of healthcare, medical treatment and social welfare services.

According to the FCSA, private individuals are given the opportunity to choose the supplier that they consider to be best suited to provide the best quality. The purpose of the FCSA is to give private individuals more influence on which supplier shall perform the services they require. An advantage for private individuals is the opportunity to change supplier if they so wish. It is voluntary for the contracting authorities to introduce a system as prescribed in the FCSA. However, it is mandatory for county councils to use the FCSA when procuring primary healthcare, and for the Swedish Public Employment Service in certain activities concerning immigrants who recently arrived in the country.

There is also a specific act on procurement in the fields of defence and security (SFS 2011:1029), which implements Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Different rules apply for public procurement above and below the European Union (EU) threshold values respectively. For procurement above the threshold values, the PPA, UPA and CPA are mainly based on EU directives and the World Trade Organization's Agreement on Government Procurement.

For procurement below the threshold values, the provisions are national and the EU directives do not apply. These national provisions are also applicable for procurement of social and other specific services, regardless of value (however, see below regarding welfare services contracts). As a general rule, such procurement must be advertised in an electronic database open to the public.

In relation to procurement below the threshold values according to the PPA and UPA, four main types of procurement procedures may be applied. In all four procedures the contracting authority or entity may negotiate with one or several tenderers:

- simplified procedure – all suppliers are entitled to submit tenders by means of notification;
- selective procedure – all suppliers have the right to apply to submit tenders and the contracting authority or entity invites certain suppliers to submit tenders;
- direct award – if the value of the procurement is 28 per cent of the threshold values for procurement according to the PPA (approximately 586,000 Swedish kronor) and 26 per cent of the threshold values for procurement according to the UPA (approximately 1,092,000 Swedish kronor) or less, or if there are exceptional reasons, this procurement procedure without formal requirements for tenders may be applied; and
- competitive dialogue – this procedure is applicable if a simplified procedure or a selective procedure will not result in the award of a contract (for further details regarding competitive dialogue, see question 22).

In addition to these four main procurement procedures, a restricted procedure must be applied when procuring under a dynamic purchasing system below the threshold values according to the PPA and UPA.

In relation to procurement below the threshold values according to the CPA, the contracting authority or entity must always comply with the fundamental EU principles. Direct award may be applied if the value of the procurement is 5 per cent of the threshold values for procurement of concessions (approximately 2,631,000 Swedish kronor) or less, or if there are exceptional reasons.

With respect to direct award procedures, the Supreme Administrative Court rendered a decision in 2018 in which it stated that the fundamental EU principles apply in procurement with a value below the EU threshold values, including direct award procedures under the national procurement legislation. However, the Supreme Administrative Court held that in a direct award, the principles may be applied in a less strict way depending on the nature of the procedure, the subject matter and the value of the procurement. Also, if the contracting authority chooses, for example, to advertise the direct award procedure and invites suppliers to submit tenders, the principles will be of greater practical importance than if a contract is directly awarded after negotiations with only one supplier.

In January 2019, more flexible rules under the PPA, concerning the procurement of welfare services (mainly healthcare and social services) with a value below the EU threshold values, entered into force. The main requirements for the contracting authorities in procurement of welfare services contracts are to publish a procurement notice, to inform the bidders of the award decision and to document the conducting of the procurement. Furthermore, the new rules stipulate that in procurement of welfare contracts with a value below the EU threshold values, the fundamental EU principles only apply if there is a certain cross-border interest (ie, when it is assumed that suppliers from other EU member states have an interest in the contract).

Proposed amendments

4 | Are there proposals to change the legislation?

In June 2018, a report was submitted to the government (SOU 2018:44), containing proposals as to how the procurement of contracts not covered by the EU directives should be simplified. The report also contains proposals on the implementation of an application fee for court review of a procurement procedure, and that the losing party should pay the counterparty's legal costs. Stakeholders and other interested parties have submitted their opinions about the report, and the report's proposals are currently being reviewed. In the report, it is suggested that, if any of the legislative proposals are enacted, the new rules shall be implemented in July 2019.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

In the PPA, UPA and CPA, definitions are set out in order to determine which authorities and entities constitute contracting authorities and entities.

The question of whether an authority or entity is a contracting authority or entity is not frequently examined by courts. The Supreme Administrative Court has held that Akademiska Hus (a state-owned company in the real-estate sector) is a contracting authority. Furthermore, the Administrative Court of Appeal has ruled that AB Svenska Spel (a state-owned company mandated by the government to arrange gaming and lotteries under a government licence) constitutes a contracting authority.

The Administrative Court of Appeal has ruled that SJ AB (a state-owned passenger train operator) does not constitute a contracting authority. After the verdict was appealed, the Supreme Administrative Court requested a preliminary ruling from the European Court of Justice (ECJ) (this is the first time that a Swedish court has requested a preliminary ruling in a procurement case). In February 2019, the ECJ rendered its preliminary ruling (case no C-388/17), in which the ECJ provided guidance as to the interpretation of 'network of rail transport services' and 'operation of networks' in the meaning of the previously applicable EU Directive on utilities procurement (2004/17/EC). The Supreme Administrative Court has not yet rendered is final decision.

The Stockholm Administrative Court of Appeal has ruled that Systembolaget (a state-owned chain of stores that sells alcoholic beverages) does not constitute a contracting authority. This verdict was appealed to the Supreme Administrative Court, but a review permit was not granted.

According to the UPA, contracting entities may file an application directly to the European Commission, in order to be granted an exemption under article 34 UPD. Regarding Swedish entities, the European Commission has granted two exemptions under article 30 of the Directive 2004/17. The first concerns an exemption for the production and sale of electricity (2007/706/EC) and the second decision concerns an exemption for certain services in the postal sector (2009/46/EC).

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

See question 3.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Under the PPA, UPA and CPA, a concluded contract can be amended or modified without a new procurement procedure in the following situations, provided that the overall nature of the contract is not altered, in one of the following ways:

- if the value of the modification is below both the applicable threshold value, less than 10 per cent of the initial contract value for service and supply contracts (and all concession contracts), and less than 15 per cent of the initial contract value for works contracts;
- in accordance with a clear, precise and unequivocal review clause or option provided in the original procurement documents. The clause or option must state the extent and the nature of the modifications that may be made; or
- owing to unforeseeable circumstances. For contracts covered by the PPA, and for certain concession contracts covered by the CPA, the value of the contract may not be increased by more than 50 per cent of the value of the original contract.

In addition, the following amendments and modifications are permitted without a new procurement procedure:

- an amendment consisting of a supplementary order from the supplier, provided that:
  - (i) it has become necessary;
  - (ii) a change of supplier cannot be made for economic or technical reasons; and
  - (iii) a change of supplier would cause significant inconvenience or substantial duplication of costs for the contracting authority or entity; or
- a modification consisting of a replacement of supplier, if the change is made due to corporate restructuring, including takeover, merger, acquisition or insolvency. The new supplier must fulfil the criteria for qualitative selection originally established. Such a change of supplier must not entail other substantial modifications to the contract. A subcontractor to the original supplier may also succeed into the position of the original supplier, following an agreement between the supplier, the contracting authority and the subcontractor.

With regard to (i), (ii) and (iii), for contracts covered by the PPA, and for certain concession contracts covered by the CPA, the value of the contract may not be increased by more than 50 per cent of the value of the original contract.

Furthermore, amendments and modifications that are not substantial are always permitted.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Following the PPA, UPA and CPA coming into force in 2017, no precedents clarifying the application of the new provisions regarding the amendments of concluded contracts have been established.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Privatisation, in which former employees of a contracting authority start a business and perform work they formerly carried out as employees, is not directly regulated in the PPA, UPA or CPA. According to case law, the act of privatisation as such does not require a procurement procedure. The contracting authority's purchase of services or products from the privatised company, however, requires a procurement procedure.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

There is neither a common definition of PPP nor any specific legislation with regard to these types of partnerships in Sweden. However, the PPA, UPA and CPA generally apply to PPP projects.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

For procurement above the threshold values, the contracting authority or entity must advertise the procurement electronically to the Publications Office of the EU. SIMAP, the EU information system for public procurement, provides an official standard form to be filed. The Publications Office will then publish the advert in the Official Journal of the EU (OJEU) and Tenders Electronic Daily.

As a general rule, procurement below the threshold values must be advertised in an electronic database open to the public.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

As a general rule, a supplier shall be excluded from participation in a procurement procedure if it has been convicted – by final judgement – of committing one or more of the criminal acts listed below and such convictions have:

- participation in a criminal organisation;
- corruption;
- fraud relating to the protection of the financial interests of the EU;
- money laundering;
- terrorism; or
- human trafficking.

Furthermore, a supplier shall be excluded if the supplier is in breach of its obligations relating to the payment of taxes or social security contributions, provided that this breach has been established by a judicial or administrative decision having final and binding effect. However, if such breach is proved by other means, the supplier may still be excluded. If the supplier has fulfilled its obligations in this regard, or entered into a binding arrangement with a view to payment, the supplier shall not be excluded.

A supplier may be excluded from participation in an award procedure if:

- it can be demonstrated that the supplier is in breach of applicable environmental, social and labour law obligations;
- the supplier is insolvent, the business is being wound up, is the subject of insolvency or liquidation proceedings, has its assets being administered by a liquidator or by the court, is in an arrangement with creditors or is in any similar proceedings;
- the supplier is guilty of grave professional misconduct, which renders its integrity questionable;
- the supplier has entered into agreements with other suppliers aimed at distorting competition;
- the supplier has shown significant or persistent deficiencies in the performance of a substantive requirement within a prior contract under the procurement acts, that led to the early termination of a contract, damages or other comparable sanctions;
- the contracting authority or entity cannot avoid distortion of competition or guarantee equal treatment due to conflict of interest or the supplier's participation in the preparation of the procurement procedure;
- the supplier has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or has withheld such information; or
- the supplier has undertaken to unduly influence the decision-making process of the contracting authority.

Before a supplier may be excluded, the supplier must be granted an opportunity to address the reasons for the potential exclusion.

A contracting authority or entity may decide not to exclude a supplier, for overriding reasons relating to the public interest.

A contracting authority or entity can set criteria for a minimum level of a supplier's economical and financial capacity and the supplier's technical and professional abilities. According to the PPA and UPA, a contracting authority or entity may also require that the supplier retains the right to perform certain professional services. Other qualifications requirements are not allowed. All criteria must be stipulated in the procurement documents and applied in accordance with the fundamental EU principles.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

In restricted procedures, negotiated procedures with prior publication, competitive dialogues and innovation partnerships in accordance with the PPA and UPA, as well as in procurement covered by the CPA, contracting authorities and entities may limit the number of suppliers that may submit a tender. The selection criteria and the lowest amount of suppliers that will be invited must be stated in the advertisement or the invitation to confirm interest.

The number of suppliers invited to submit a tender must be sufficient to ensure that effective competition is achieved. In procurement covered by the PPA, the minimum number of suppliers that must be

invited is specified. In a restricted procedure there must be at least five suppliers. In the other above-mentioned procedures, at least three suppliers must be invited. In procurement covered by the UPA and CPA respectively, no minimum number of suppliers is specified.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Rules regarding 'self-cleaning' are stipulated in the PPA, UPA and CPA.

A supplier shall not be excluded if it proves that it is reliable by showing that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken actual technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the supplier shall be evaluated, taking into account the gravity and particular circumstances of the criminal offence or misconduct.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The PPA, UPA and CPA state that the contracting authorities and entities shall treat the suppliers equally and without discrimination, and that procurement shall be conducted in a transparent manner. Furthermore, the PPA, UPA and CPA state that procurement shall be conducted in accordance with the principles of mutual recognition and proportionality, and that procurement must not be arranged with an intention of limiting competition, so that certain suppliers are unduly favoured or disadvantaged.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

In accordance with the fundamental principles (see question 15), and case law, all contracting authorities are obligated to be independent and impartial.

Conflicts of interest

17 | How are conflicts of interest dealt with?

The principle of the equal treatment of suppliers is applicable in any situation where there is a conflict of interest. In addition, the provisions regarding conflicts of interest in the Administrative Act and, for some contracting authorities, the Local Government Act is applicable. A person who has a conflict of interest is not allowed to handle the relevant matter.

Furthermore, a supplier may be excluded if there is a conflict of interest, provided that there are no other, less adverse, measures that the contracting authority can take in order to ensure the equal treatment of suppliers.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

If one of the suppliers has been involved in the preparation of the tender procedure, under the PPA and the UPA the contracting authority or entity shall inform all other suppliers of any relevant information that the supplier has received during its involvement in the preparations. The supplier that was involved in the preparation of the procurement may, however, only be excluded if there is no other way to ensure equal treatment. Before a supplier is excluded, the supplier must be given the opportunity to prove that their prior involvement does not distort competition.

In accordance with the PPD and UPD, the contracting authority shall ensure that competition is not distorted where a bidder, or an undertaking related to a bidder, has advised the contracting authority or has otherwise been involved in the preparation of the procurement. The government bill regarding the PPA and UPA states that these rules are not necessary to implement, as they follow from the principle of equal treatment.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

Procurement below the threshold values is the most frequent. The prevailing procedure, concerning procurement that must be advertised, is the simplified procedure. Regarding procurement above the threshold values, the prevailing procurement procedure is the open procedure.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

There are no specific regulations regarding related bidders in the PPA, UPA or CPA. There is no case law stating that related bidders are prohibited from submitting separate bids in one procurement procedure.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

For procurement above the threshold values, there are four procedures that permit negotiations in accordance with the PPA:

- negotiated procedure with prior publication, which may be used if:
  - the needs of the contracting authority cannot be met without adaptation of available solutions;
  - the procurement includes design or innovative solutions;
  - the contract cannot be awarded without negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks in conjunction to these circumstances;
  - the technical specifications cannot be established with sufficient precision by the contracting authority; or
  - if only irregular or unacceptable tenders have been submitted in an open or restricted procedure;
- competitive dialogue, which may be used on the same conditions as the negotiated procedure with prior publication;
- negotiated procedure without prior publication, which may be used:
  - where no tenders or requests or no suitable tenders or requests have been submitted in an open or restricted procedure;
  - if the procurement concerns something which only one particular supplier can provide, due to technical reasons,

exclusive rights or the fact that the procurement regards a unique work of art;
- for reasons of extreme urgency;
- if only irregular or unacceptable tenders have been submitted in an open or restricted procedure, provided that the tenders comply with the qualification criteria and the formal requirements;
- in certain procurement of supplies (among other things, when the supplies are manufactured for the purpose of research);
- if the procurement concerns works or services consisting in the repetition of similar works or services entrusted to the same bidder (under certain conditions); or
- if the procurement concerns services, where the contract follows a design contest; and

- innovation partnership, which may be used to procure supplies, services or works to meet needs which, according to the contacting authority, cannot be met by solutions already available on the market.

The above-mentioned four procedures are applicable also under the UPA. However, the use of negotiated procedure with prior publication and competitive dialogue are not subject to any special conditions in the UPA. The use of negotiated procedure without prior publication is subject to the same conditions as in the PPA (with the exception of the situation where irregular or unacceptable tenders have been submitted). The use of innovation partnership is subject to the same conditions as in the PPA.

In procurement under the CPA, negotiations are always permitted.

Regarding procedures below the threshold values permitting negotiations, see question 3.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

In procurement above the threshold values, the procedure used most regularly is the negotiated procedure with prior publication. One reason for this is that the requirements for using the negotiated procedure without prior publication are very restrictive.

In procurement below the threshold values, the procedure used most regularly is the simplified procedure. Similarly to the situation above the threshold values, one reason for this is that the requirements for using direct award are very restrictive.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

The PPA contains relatively detailed rules regarding framework agreements. A framework agreement is defined in the PPA as an agreement entered into by one or several contracting authorities and one or several suppliers with the aim of establishing the terms of contracts to be awarded during a certain later time period. A framework agreement may only be used by those contracting authorities clearly identified for this purpose in the documents for the procurement leading up to the framework agreement. The term of a framework agreement can, as a general rule, not be longer than four years. In December 2018, the ECJ rendered a decision in case no C-216/17, which has had a major impact on Swedish procurement of framework agreements. In this case, the ECJ stated, inter alia, that the contracting authority must indicate – at the outset – the quantity and maximum amount of services that will be covered by the framework agreement, and once that limit has been reached the agreement will no longer have any effect.

If a framework agreement is entered into with one supplier, the general rule is that the conditions cannot be amended when contracts are awarded. However, minor amendments can be accepted if they are specifications in relation to the conditions.

If a framework agreement is entered into with several suppliers, two different methods for contract awards are available. If all terms for contract awards are established in advance, a distribution key must be set up with objective conditions for determining which supplier shall be awarded the contract (for example, a ranking order). If all terms for contract awards are not established in advance, the suppliers are invited to file a new 'mini-tender' based on the first tender (renewed competition). A combination of these two methods for contract awards is also possible.

The rules of the PPA regarding framework agreements are also applicable on procurement below the threshold values and procurement of social and other special services (with the exception of welfare services contracts; see question 3).

The rules of the UPA regarding framework agreements are not as detailed as those of the PPA. The term of a framework agreement can, as a general rule, not be longer than eight years. Contract awards must be based on objective conditions, set out in the procurement documents. The use of a renewed competition is also available.

24 | May a framework agreement with several suppliers be concluded?

See question 23 regarding framework agreements with several suppliers.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The conditions under which consortium members may be changed have not been regulated in the PPA, UPA or CPA. However, an Administrative Court of Appeal has ruled that – under the PPA – it is not allowed to pre-qualify a group of consortium members and thereafter allow one of the members in the consortium to file a tender, if such member did not fulfil the requirements at the time for the pre-qualification.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Approximately 99 per cent of all enterprises in Sweden are small or medium-sized enterprises (SMEs). The principle of equal treatment implies that a contracting authority or entity is neither allowed to favour nor to disfavour a company because of its size. Consequently, the contracting authority or entity is not allowed to treat SMEs differently in relation to other market performers.

In order to facilitate the participation of SMEs, procuring authorities and entities are allowed to divide a contract in several lots. If a contract is not divided, the contracting authority or entity must provide the reasons for that decision. There is no established case law on how many lots a supplier can be awarded. However, the contracting authority or entity will have the authority to limit the number of lots a supplier can be awarded and how many lots for which a supplier may submit a tender.

Another rule intended to facilitate the participation of SMEs concerns minimum yearly turnover. If the contracting authority or entity

stipulates in the procurement documents that suppliers are required to have a certain minimum yearly turnover, such turnover must not exceed two times the estimated contract value, except in duly justified cases.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

According to the PPA and UPA, a contracting authority or entity may authorise or require tenderers to submit variant bids, if such bids fulfil the minimum requirements laid down by the authority. The contracting authority or entity shall state in the procurement documents the minimum requirements to be met by the variant bids, any specific requirements for their presentation, and whether variants may only be submitted if the bidder has also submitted a tender which is not a variant.

28 | Must a contracting authority take variant bids into account?

The contracting authority or entity must take variant bids into account, if this is indicated in the procurement documents.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

In the procurement documents, the contracting authority or entity is required to specify which requirements the bidder must fulfil. If such requirements are not met the bid must be declined. In general, the terms of the contract shall be part of the contract documents. The terms are thereby a requirement that bidders cannot change by submitting their own standard terms of business. There are cases in which the administrative courts have ruled that a bid cannot be accepted owing to the fact that the supplier has attached its own terms of business that contradict the tender specifications.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

According to the PPA and UPA, a contracting authority or entity shall accept the tender that is economically most advantageous. The assessment of the most economically advantageous tender shall be based on the best price-quality ratio, cost or price. The assessment of the best price-quality ratio shall be based on criteria connected to the subject matter of the public contract (such as quality, organisation and experience). The assessment of cost shall be based on an assessment of the effects of the tender in terms of cost efficiency, such as an analysis of life-cycle costs.

The contracting authority or entity shall, when evaluating the best price-quality ratio or cost, specify in the procurement documents the relative weighting that it gives to each of the criteria chosen to determine the most economically advantageous tender. The criteria may be weighted within intervals, with a suitable largest allowed range. The government bill regarding the PPA and UPA contains the following example of a suitable largest allowed range: 60 to 70 per cent for criterion one, and 30 to 40 per cent for criterion two. If weighting of the criteria is not possible, the contracting authority or entity shall indicate, in the procurement documents, the criteria in order of priority.

According to the CPA, the award criteria shall be linked to the subject matter of the concession. Furthermore, the criteria must ensure that tenders are assessed in conditions of effective competition, and shall not confer an unrestricted freedom of choice on the contracting authority or entity. The award criteria shall be listed in descending order of importance.

When determining the award criteria the contracting authority or entity must always comply with the fundamental EU principles.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

There is no general definition of an 'abnormally low' bid in the legislation. The contracting authority or entity must determine if a bid is abnormally low based on the circumstances of the procurement.

32 | What is the required process for dealing with abnormally low bids?

Under the PPA and UPA, a contracting authority or entity must request an explanation from a supplier if the bid appears to be abnormally low. A request for an explanation may relate to details, such as the use of especially cost-effective methods to execute the contract, and technical solutions or any exceptionally favourable conditions available to the tenderer for the execution of the contract.

The contracting authority or entity shall reject an abnormally low bid if the supplier in question has not submitted satisfactory explanations for the low tender. The bid must also be rejected if it is abnormally low because it does not comply with provisions relating to environmental, social and labour law. If the contracting authority or entity finds that the bid is abnormally low due to the supplier obtaining state aid, the supplier must be given a reasonable amount of time to show that the state aid is compatible with the TFEU. If the supplier fails to show such compatibility, the bid must be rejected.

In 2016, the Supreme Administrative Court rendered two decisions regarding the application of the regulations concerning abnormally low tenders. In one decision, the Supreme Administrative Court stated, among other things, that the offering of negative prices regarding a few out of many price positions (ie, prices that stipulate a payment to the contracting authority) was considered an abnormally low bid, but since the explanations provided by the bidder were satisfactory, the bid was not to be refused.

In the other decision, the Supreme Administrative Court held that two bids submitted by related bidders (from the same group of companies) in a procurement of a framework agreement were to be refused as abnormally low. The main reason was that the bidders had constructed their bids in such a way that one bidder could refuse to accept a call-off contract, in order for the other related bidder – which had offered higher prices for the services covered by the call-off contract at hand – to be offered the call-off contract instead.

In 2018, the Supreme Administrative Court rendered a decision in which it stated that a mandatory requirement based on a minimum price, which implies that a tender is automatically rejected if the tender price is below the minimum price, eliminates tenderers' possibility to compete with low prices. It also results in a circumvention of the mandatory contradictory procedure described above (ie, that a tenderer must be given the right to explain its low tender price before it is rejected). Therefore, such a requirement, based on a minimum price, infringes the principle of equal treatment.

There are no rules concerning abnormally low bids in the CPA.

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

During an ongoing procurement procedure, a supplier that is of the opinion that it has been harmed, or risks being harmed, may apply for review of the procurement to an administrative court (regarding time limits, see question 37). The administrative court may order that the procurement procedure must be recommenced, or that the procedure may not be concluded until corrections have been made.

If a contract has been concluded, a supplier can apply for review of the effectiveness of the contract (also to an administrative court). The administrative court may then declare the contract ineffective in certain situations, such as in cases where the conclusion of the contract was preceded by an unlawful direct award (see question 44).

An appeal against the decision of the administrative court can be lodged with the Administrative Court of Appeal. Rulings of the Administrative Court of Appeal can be appealed to the Supreme Administrative Court. A review permit is required for judicial review in the Administrative Court of Appeal and in the Supreme Administrative Court (SAC).

If a supplier considers it has been treated incorrectly, it can appeal to the European Commission or turn to the Swedish Competition Authority. The Swedish Competition Authority only reviews cases that are of general or principle interest. The Swedish Competition Authority may apply to an administrative court for a contracting authority to pay a procurement fine, between 10,000 and 10 million Swedish kronor. However, the fine may not exceed 10 per cent of the contract value.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Only the administrative courts may rule on a review application.

Timeframe and admissibility requirements

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

It depends, among other things, on the complexity of the case and the workload of the relevant administrative court. In general, the review proceeding in an administrative court takes less than five months per instance.

36 What are the admissibility requirements?

An administrative court can review an application from a supplier that is of the opinion that it has been, or risks being, harmed as a consequence of the contracting authority's or entity's infringement of the PPA, UPA or CPA. The Supreme Administrative Court has stated that a supplier only has the right to a court review of a procurement procedure if the supplier has an interest in being awarded the contract in the procurement.

A review application shall be made to the administrative court in whose judicial district the contracting authority or entity is based.

37 What are the time limits in which applications for review of a procurement decision must be made?

The contracting authority or entity is prohibited from entering into a contract within either 10 days (if the notification of the award decision was made electronically) or 15 days (if the notification was not made electronically) from the contract award decision (the standstill period). The period for a supplier to submit a review application to an administrative court corresponds with the standstill period. If a supplier applies for review to an administrative court, the standstill period is automatically prolonged.

An application for review of the effectiveness of a contract must, as a general rule, be brought before the administrative court no later than six months after the contract has been concluded (see question 44, concerning ex ante transparency).

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

A review application to an administrative court has an automatic suspensive effect, blocking the conclusion of the contract. The administrative court may decide, normally following a request from the contracting authority or entity, that the automatic suspension shall be lifted. However, lifting of the automatic suspension only occurs in exceptional cases.

An appeal to the Administrative Court of Appeal or to the Supreme Administrative Court does not have an automatic suspensive effect. However, the courts can instead render an interim decision pending the final decision, prohibiting the contracting authority from concluding the contract until further notice.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

It is very unusual that the automatic suspension is lifted (see question 38). However, there are no official statistics available in this regard.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

When the decision concerning the winning tender has been rendered, the contracting authority or entity shall inform every candidate or tenderer of the decision and the grounds for the decision. The contracting authority or entity must also state the duration of the standstill period. Such information shall be given in writing and immediately or as soon as possible to each bidder. The information given should be of enough substance for the bidder to have a fair chance of invoking its right in a review proceeding.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

If the contracting authority or entity is subject to the principle of public access to official records (ie, if the authority constitutes a government, local or other authority, decision-making body, county council or company owned by a county or local authority) all documents regarding the procurement are, as a general rule, public official documents after the notification of the award decision or after all the tenders have been made public.

If the documents are requested, the contracting authority must, without delay, determine whether some of the information in the documents is confidential according to the Public Access to Information and Secrecy Act. Confidential information may not be disclosed.

Government-owned or private companies that constitute contracting authorities or entities do not normally fall under the

principle of public access to official records. These companies are, however, governed by the provisions of the PPA, UPA and CPA relating to information (see question 40). Furthermore, in accordance with the PPA and UPA, a contracting authority or entity must – at the request of a supplier – grant access to contracts which have a value of at least €1 million (in the case of public supply or services contracts) or €10 million (in the case of public works contracts).

In these cases, similar conditions regarding secrecy apply, as is the case for contracting authorities and entities that fall under the principle of public access to official records.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

Approximately 18,000 to 20,000 public procurement procedures with advertisements are conducted annually. In 2016, almost 4,200 cases were registered by the administrative courts regarding review applications filed by disadvantaged bidders. In 2017, approximately 3,300 cases were registered. These statistics include procurements that have not been advertised.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

A supplier who is of the opinion that it has suffered damage due to a violation of procurement law can claim damages from the contracting authority in a district court. Rulings in these cases can be appealed to the court of appeal and eventually to the Supreme Court. A review permit is required for judicial review in the Supreme Court.

The right to claim damages exists regardless of whether a violation of procurement law has been established in an administrative or judicial review proceeding. However, the supplier should generally first apply for review of the procurement at an administrative court in order to try to limit its harm, as a review application might increase the supplier's chances of winning the contract.

Actions for damages are to be brought before the district court within 12 months of the conclusion of a contract. If this period is exceeded, the right to damages will be forfeited.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Even if a contract has been concluded, a supplier can apply to an administrative court to review the effectiveness of the contract. A contract may be declared ineffective if the conclusion of the contract was preceded by an unlawful direct award. A contract may also be declared ineffective in certain other situations, such as if it has been concluded in contravention of a standstill period, a prolonged standstill period or an interim decision by court. If there are imperative reasons regarding a public interest, a court may decide that the agreement shall remain in effect, even if the criteria for declaring the contract ineffective are met.

Contracting authorities or entities may in certain situations (eg, in the event of a direct award), announce in advance that they intend to use a direct award procedure by using a notice for 'ex-ante transparency'. If the contracting authority or entity then observes the applicable standstill period, and has stated valid reasons for a direct award procedure in the notice, the contract cannot be declared ineffective.

It is not unusual for the courts to declare a contract ineffective, but there are no official statistics available in this regard.

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Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

In the case of a de facto award of a contract – that is, an award without any procurement procedure – the court may declare the contract ineffective if a direct award procedure is not permitted according to the PPA, UPA or CPA. (See question 44.)

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

There is no application fee for submitting a review application to the administrative court. The costs of a review application case depends to a large extent on whether or not the supplier uses external legal counsel. However, it is not possible to make a general estimation of such costs, as they depend on many different factors specific to each case. There is a legislative proposal concerning the implementation of an application fee and the obligation for the losing party to pay the counterparty's court costs (see question 4).

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The Swedish procurement legislation for contracts not covered by the EU directives goes beyond what is required by the EU. This has given rise to a long ongoing debate in Sweden regarding the perception of Swedish procurement legislation as inflexible and over-complicated. In 2018, a government report was published proposing comprehensive changes in order to simplify the rules for procurement outside the scope

of the EU directives. Such procurement would still have to be published, but the procurement procedures can be constructed by the contracting authorities themselves (subject to the fundamental EU principles). The proposals are suggested to enter into force on 1 July 2019. However, the proposed amendments are extensive and some of the proposals have been criticised during the referral process. Therefore, it is likely that any implementation of the proposals will be postponed.

Switzerland

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Owing to Switzerland's federal structure, public procurement legislation is very fragmented and can be found on both a federal and a cantonal level, and to a certain extent on a municipal level. Switzerland's international obligations are incorporated in the World Trade Organization's Agreement on Government Procurement (GPA), the bilateral agreement between Switzerland and the European Union (EU) and the European Free Trade Association agreement.

The relevant federal laws governing federal procurement projects are the Federal Act on Public Procurement of 16 December 1994 (SR 172.056.1) (FAPP) and the corresponding Ordinance on Public Procurement (SR 172.056.11) (OPP).

Within their sphere of sovereignty, the cantons enacted public procurement legislation to regulate procurement of the cantonal administration. For harmonisation purposes among the cantons, all cantons entered into the Inter-cantonal Agreement on Public Procurement (IAPP).

The Federal Administrative Court enforces federal public procurement legislation and the cantonal administrative courts enforce cantonal public procurement legislation. Appeals from a cantonal administrative court and the Federal Administrative Court to the Federal Supreme Court are possible, provided that the procurement project exceeds the relevant threshold values set forth in the FAPP and the bilateral agreement between Switzerland and the EU on public procurement, and raises a fundamental question of law.

Both the Law on Cartels and the Law on Internal Markets complement the Legislative framework

Relevant legislation on public procurement. The competent enforcement authority is the Swiss Competition Commission; its decisions can be appealed to the Federal Administrative Court. The Law on Cartels and the Law on Internal Markets apply cumulatively with the procurement laws. Whereas the FAPP, OPP and IAPP (and cantonal procurement laws) govern the procurement process as such, the Competition Commission can intervene (see question 2) to examine whether a procurement process violates the Law on Cartels (eg, possible abuse of dominance by the contracting authority or unlawful agreements) or violations of the Law on Internal Markets (eg, discrimination or failure to organise a public tender procedure).

The entire Legislative framework

Relevant legislation is currently under revision to implement the GPA 2012, which Switzerland signed but has not yet ratified. Both chambers of parliament have debated the proposal and are currently in the process of resolving differences that arose during their debates. Only when parliament adopts the revised FAPP and OPP may the Federal Council ratify the GPA 2012. Until then, the GPA 1994 remains effective with respect to Switzerland. Accordingly, the following observations will focus on the existing Legislative framework

Relevant legislation (primarily federal procurement law) and not the reform proposal.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

In principle, exceptions emanate from the relevant procurement statutes directly. For example, article 3 of the FAPP specifies contracts to which the FAPP does not apply, in particular those relating to national defence.

In relation to defence, a helicopter manufacturer applied to the Competition Commission in 2005 to investigate whether armasuisse, the Federal Office of Defence Procurement, infringed competition law in a procurement of light transport and training helicopters. The Competition Commission handed down an opinion (which is not an appealable decision) saying that armasuisse, although exempt from procurement law, is not exempt from competition law. Hence to the extent the procurement conditions would infringe competition law, the Competition Commission can intervene.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Both the FAPP and the IAPP were enacted with a view to implementing Switzerland's obligations arising out of the GPA. With effect from 1 June 2002, a bilateral agreement between Switzerland and the EU on public procurement entered into force to extend the regulations in the GPA to regions and municipalities, and public and private companies in the rail transport, gas and heating supply sectors, as well as procurement by private companies based on special and exclusive rights transferred by a public authority, in the sectors of drinking water, electricity and urban transport and airports, as well as river and sea transport.

Proposed amendments

4 | Are there proposals to change the legislation?

See 'Update and trends'.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Owing to the fact that public procurement law in Switzerland is highly fragmented, the following answers relate solely to federal procurement

law, unless an express reference to cantonal public procurement law is made.

Unlike in the EU, Switzerland has not opted for a functional definition of a 'contracting authority' for the purpose of the FAPP, but for a positive-list approach (article 2(1) of the FAPP). With respect to certain sectors, contracting authorities are described in abstract terms and relative to certain activities (article 2(2) of the FAPP and article 2(a) of the OPP). On the other hand, the IAPP seems to have incorporated a functional definition of a 'contracting authority' (article 8 of the IAPP).

With the coming into force of the bilateral Switzerland–EU agreement, procurement by public and private entities providing public services active in certain sectors (see Switzerland–EU bilateral agreement, article 3(2)(f)) was liberalised and the application of the FAPP broadened (article 2a of the OPP).

Entities active in the relevant sectors may be granted individual exemptions from public procurement law by the Federal Department of the Environment, Transport, Energy and Communications (DETEC) provided that competition exists among them (see Ordinance of the DETEC Concerning the Exemption from public procurement legislation (SR 172.056.111)).

Contract value

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The contracting authority must apply procurement law, irrespective of the contract's value. The threshold values determine which legal framework applies and what remedies bidders may have.

In terms of federal threshold values, as a result of the fragmentation of federal public procurement legislation and different international obligations, there are five sets of threshold values for those areas and sectors covered by Switzerland's international obligations:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Government entities (GPA)	230,000	230,000	8.7 million
Postal coach service (GPA)	700,000	700,000	8.7 million
Entities active in the electricity sector (CH–EU)	766,000	766,000	9.575 million
Entities active in the telecoms sector (CH–EU)	960,000	960,000	8 million
Entities active in the rail transport sector (CH–EU)	640,000	640,000	8 million

The current threshold values are valid until 31 December 2019. The applicable threshold values are available at on Simap.ch, a joint electronic platform of the federal government, the cantons and the municipalities.

In the case of construction works exceeding the applicable threshold value, if the contracting authority awards more than one contract then it is not bound to follow the procedures set forth in the FAPP as long as the value of each single contract is below 2 million francs and the value of all such contracts does not exceed 20 per cent of the total construction value (article 14 of the OPP).

Express provisions in the calculation of the contract value can be found in article 7 of the FAPP (eg, if the contracting authority awards a number of similar contracts for supplies and services, dividing of projects into different lots, and option contracts) and article 14(a) of the OPP.

For those areas and sectors not covered by Switzerland's international obligations, the contracting authorities will award contracts by virtue of a limited tendering procedure or a tender by invitation, subject to the following threshold values:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Limited tendering procedure	Less than 50,000	Less than 150,000	Less than 150,000
Tender by invitation	Between 50,000 and the applicable threshold value	Between 150,000 and the applicable threshold value	Between 150,000 and 2 million

Cantonal threshold values for those areas and sectors captured by Switzerland's international obligations are as follows:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Cantons (GPA)	350,000	350,000	8.7 million
Public authorities and undertakings in the water, energy, transport and telecoms sectors (GPA)	700,000	700,000	8.7 million
Municipalities and regions (CH–EU)	350,000	350,000	8.7 million
Private undertakings with exclusive or special rights in the water, energy and transportation sector (CH–EU)	700,000	700,000	8.7 million
Private undertakings operating under special or exclusive rights and public undertakings active in the rail transportation, gas and heating supplies sector (CH–EU)	640,000	640,000	8 million
Private undertakings operating under special or exclusive rights and public undertakings active in the telecoms sector (CH–EU)	960,000	960,000	8 million

Cantonal threshold values for those areas not captured by Switzerland's international obligations are:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction-related (Swiss francs)	Construction (Swiss francs)
No-bid or direct award	Less than 100,000	Less than 150,000	Less than 100,000	Less than 300,000
Tender by invitation	Less than 250,000	Less than 250,000	Less than 250,000	Less than 500,000
Open bid or selective bid proceeding	Less than 250,000	Less than 250,000	Less than 250,000	Less than 500,000

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

As a general principle, unless the amendment does not materially change the scope of the contract, no new procurement procedure is necessary. When amendments to an ongoing project are necessary and these amendments exceed the applicable threshold value, a new tender may be necessary; unless, for example, for organisational or technical reasons the amendment can be only be implemented by the original contractor.

If, after the award, the contracting authority and the successful bidder have not yet entered into the procurement contract, the award may be revoked. The relevant threshold is whether the amendment of the project is likely to have resulted in a different award.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There is limited case law that can be applied to such cases by analogy; therefore, each case must be assessed individually. To what extent a Swiss court could be inspired by the thresholds included (eg, in the EU-Directive 2014/24 or the German Act against Restraints of Competition), remains to be seen.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

The transfer of a public function to a private entity (contracting out) is subject to the general principles of administrative law. To the extent that the state procures services from a private entity against payment, the transaction may be subject to public procurement regulation.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Procurement procedures are required whenever the project at issue, according to its characteristics, is a public procurement; that is whenever a private entity will assume a public function against remuneration or when the public entity procures services or goods. Generally, one may distinguish procurement PPPs (eg, the public entity contracts with a private entity to procure certain goods or services) or joint-venture PPPs. In procurement PPPs, roughly three types of PPP models may be distinguished:

- build–operate–transfer (BOT);
- design–build–operate–transfer (DBOT); and
- design–build–finance–operate-transfer (DBFOT).

There is no clear definition of 'PPP' in Swiss procurement legislation. With respect to the infrastructure sector, 'PPP' is commonly defined to encompass a long-term cooperation between a public and a private entity to build and operate certain infrastructure (eg, public administration buildings).

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

At federal level, calls for a tender as well as the award of the contract are published on Simap.ch.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Any such conditions must be non-discriminatory. However, as a general rule, bids by foreign tenderers in those areas and sectors not covered by Switzerland's international obligations must only be considered under the condition of reciprocity by the foreign tenderer's home state. Upon request, the State Secretariat for Economic Affairs informs prospective foreign bidders whether they home state grants reciprocity.

As a matter of transparency, the contracting authority must set out the eligibility criteria in the invitation to tender.

Federal and cantonal contracting authorities may establish a verification system to examine the eligibility of tenderers. The decision on the application of a potential tenderer to be included in the list of eligible tenderers or the revocation of a tenderer from such list can be appealed.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

Contracting authorities may limit the number of bidders in a selective bidding procedure if the procurement procedure cannot be handled efficiently otherwise. Effective competition among bidders must be ensured at all times.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is unknown in Switzerland. Bidders that violate, for example, employment regulations (namely laws regarding illegal employment) may be disqualified from the tender (articles 11 and 8 of the FAPP) or be excluded from any public tender for a period not exceeding five years (see, eg, article 13 of the Law on Illegal Employment; SR 822.41). The State Secretariat for Economic Affairs publishes a list of temporarily disqualified tenderers.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Article 1 of the FAPP states that the purpose of the act is to regulate and transparently organise the award of public contracts and to strengthen competition between bidders. Article 8(1)(a) of the FAPP requires the contracting authority to ensure equal treatment of domestic and foreign bidders in all phases of the procurement proceeding (but see question 12).

The contracting authority is entitled by law to verify that tenderers follow the principles of procurement procedures (eg, health and safety regulations and the terms and conditions of employment, including equal treatment of men and women). Finally, in article 21(1), the FAPP sets out another fundamental principle of Swiss public procurement law: 'best value for money'. The same principles are also restated in the IAPP and the cantonal laws.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Neither federal nor cantonal procurement laws specifically prescribe that the contracting authority must be independent and impartial. However, they are bound by the fundamental principles of the Federal Constitution, whereas a public authority must act in good faith and in a non-arbitrary manner.

Moreover, administrative principles require that any person who is responsible for preparing or issuing a ruling shall recuse themselves from the case if, among other reasons, they have some form of personal interest in the matter or could be regarded as lacking impartiality in the matter. This principle essentially mirrors the constitutional guarantee that everyone has a right to equal and fair treatment in proceedings before administrative bodies.

Conflicts of interest

17 | How are conflicts of interest dealt with?

As mentioned in question 16, members of the administration must recuse themselves from a matter if they have a personal interest in the matter or could be regarded as lacking impartiality. In principle, statutory grounds for recusal must be followed ex officio and no specific motion shall be necessary. However, if a bidder becomes aware of a conflict of interest, he or she should immediately raise the issue and file a motion with the supervisory authority that the particular person be removed from the case. It would be regarded as an abuse of law by the courts if a bidder, knowing of a potential conflict of interest, let the procedure move ahead and only upon receiving a negative award claim that a member of the contracting authority had a potential conflict of interest.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a potential bidder in the preparation of the tender will not necessarily result in his or her exclusion from the bidding process. The threshold is whether the bidder concerned obtained, by virtue of his or her involvement in the preparation of the tender, a competitive advantage that cannot be remedied (eg, through a prolongation of the relevant time limits or disclosure of all relevant information on the preparatory tasks that were assigned to him or her) and whether the exclusion of the bidder concerned will not negatively affect competition among the remaining bidders.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

As a rule, procurement projects within the scope of the applicable rules and regulations should be undertaken in either the open or selective procurement procedure.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Federal procurement law does not contain an express provision on related bidders. Related bids can occur in various forms, such as within the same group of companies, in the participation in more than one bidding consortium or in subcontractors participating in more than one bid. As a matter of transparency, the contracting authority must clearly and unambiguously state in the tender documents whether and to what extent it will accept related bids.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

In 2010, the Federal Council amended the OPP to include a 'dialogue' (article 26(a) of the OPP). This form of dialogue, however, must be clearly distinguished from the competitive dialogue in the pertinent EU Directives. Unlike in the EU, it is not a procurement proceeding of its own kind. Rather, the contracting authority may, for the purposes of complex projects or the procurement of 'intellectual services', enter into dialogue with the tenderers to further develop the proposed solutions, provided that it has included this option in the invitation to tender. It is an instrument that may be used in open and selective procedures, as well as in tenders by invitation.

Further, contracting authorities may initiate a planning and global solution competition for complex and novel projects to evaluate different solutions therefrom. A planning and global solution competition must be tendered in the open or selective tendering procedure if it exceeds the applicable thresholds in article 6(1) of the FAPP (goods and services) or 2 million francs for construction projects. Whether the contracting authority will initiate such competition is within its discretion; however, if it initiates a competition, it may require that in a selective tender young entrepreneurs and developers must be invited to tender.

Unlike Directives 2014/24/EU and 2014/25/EU, the consultation proposal of the revised FAPP/OPP/IAPP did not include a separate, competitive dialogue proceeding but a 'dialogue' as introduced in article 26(a) of the OPP.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Not applicable.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Unlike in the EU, there are no specific rules on framework agreements in Switzerland, and Swiss courts, so far, have not ruled on the admissibility of framework agreements. However, the federal contracting authorities regularly enter into framework agreements. The tendering of framework agreements must generally follow the same principles as if a single contract was the tender's subject. Contracting authorities should further be careful not to foreclose the market for competing suppliers; hence, for recurring services or deliveries, the duration of the framework contract should not exceed five years.

24 | May a framework agreement with several suppliers be concluded?

See question 23. If a framework agreement was concluded with several suppliers, the contracting authority must initiate a 'mini-tender' among these suppliers for each contract under the framework agreement, unless otherwise stipulated.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Bidding consortia are generally permitted. However, the contracting authority may limit or exclude the possibility of consortia bidding. The

contracting authorities will examine each member of a bidding consortium as regards its required eligibility criteria.

Since a change of a member of a bidding consortium may have an impact on the overall offering, it must be transparent and requires reasonable grounds. Moreover, the new member of the bidding consortium must satisfy the required eligibility criteria (articles 8 and 11 of the FAPP).

Note that members of a bidding consortium are subject to the rules of the simple partnership. For this reason, they are also subject to a compulsory joinder for an appeals proceeding. If not all members of the bidding consortium join the appeals proceeding, the Federal Administrative Court will not review the matter.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

There are no express provisions aimed at furthering the participation of small and medium-sized enterprises. Procurement projects may be divided into different lots. Such subdivision must be disclosed in the bidding documents (article 22 of the OPP) and the contracting authority must add up all lots of the project to determine whether the applicable threshold value (see question 7) is exceeded or not. A contracting authority may reserve the right to limit the number of lots it will award to a single bidder. However, this reservation should not be understood as a strict rule, as otherwise the contracting authority would unduly interfere in competition. The contracting authority may use such limits so as to award a bidder only as many lots as the concerned bidder may reasonably supply.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Bidders are free to offer, in addition to their complete offer, alternative bids. In exceptional circumstances, the contracting authority may prohibit or limit this possibility in the tender.

28 | Must a contracting authority take variant bids into account?

See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders cannot change the tender specifications. Amendments are possible to the extent that formal negotiations take place. Also, bidders may submit alternative bids to the extent that such bids were not excluded in the tender documents.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The contracting authority will enter into a contract with the bidder that made the most economically advantageous bid (article 21(1) of the FAPP).

In determining the most economically advantageous bid, a number of criteria will be taken into account by the contracting authority, such as:

- quality;
- price;
- deadlines;
- profitability;
- operating costs;
- customer service;
- expediency of the service;
- aesthetics;
- environmental sustainability; and
- technical value.

The criteria mentioned in the law are not exclusive and the contracting authority may take into account other criteria it deems appropriate and that are reasonable and justified, but criteria related to fiscal or structural policies are generally not permitted. As a matter of transparency, all award criteria must be listed in the tender documentation according to their relevance and weight.

In 2010, the federal government published guidelines on sustainable procurement. These guidelines describe how contracting authorities may include social and ecological criteria in a tender. With respect to social criteria, particular attention is given to the principles set forth in the eight core International Labor Organization (ILO) agreements. The FAPP only makes reference to the bidder's obligation to adhere to the relevant employment regulation (article 8(1)(b) of the FAPP for domestic bidders) and treat men and women equally in terms of wage payments (article 8(1)(c) of the FAPP for international bidders). Article 7(2) of the OPP makes a direct reference to the eight core ILO agreements.

With respect to selective proceedings, jurisprudence provides that criteria that have already been examined for the purposes of a bidder's admissibility to the tender procedure may not be considered for the purposes of the award again.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

Federal procurement legislation does not contain an express definition; however, given the purpose of the FAPP, the definition set forth in article XIII(4)(a) of the GPA is (eg, in the cantons of Berne (article 28 of the cantonal procurement ordinance) and Zurich (section 32 of the cantonal procurement ordinance)), the definition set forth in the GPA was incorporated.

Tenderers are generally free to calculate their bids; however, a bid that does not correspond to the principles set forth in article 8 of the FAPP may be subject to disqualification.

32 | What is the required process for dealing with abnormally low bids?

As federal procurement law does not contain an express provision on abnormally low bids, it is likely that the contracting authorities will apply the remedy set forth in article XII(4)(a) of the GPA and make appropriate enquiries with the concerned bidder. On a cantonal level, the proceeding set forth in the GPA has been incorporated in the relevant ordinances.

See also question 32. Pursuant to article 11(d) of the FAPP, the contracting authority may withdraw the award or disqualify tenderers if they fail to adhere to the principles set forth in article 8 of the FAPP.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The competent authorities for review proceedings are the administrative courts. On a federal level, review applications are only possible for tenders subject to the FAPP (article 39 of the OPP).

Decisions rendered by the Federal Administrative Court based on the FAPP may be appealed to the Federal Supreme Court if the threshold levels of the FAPP are reached and the issue raises a question of fundamental nature.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Not applicable.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The length of a review proceeding depends on the complexity of the case and may take between four and 15 months before the Federal Administrative Court, mainly depending on whether interim measures have been ordered.

36 | What are the admissibility requirements?

The applicable threshold is whether an applicant has an immediate and legitimate interest that the decision of the contracting authority be revoked. According to general principles of administrative law, this normally requires that the applicant participated in or was denied the opportunity to participate in the bidding procedure, was specifically affected by the contested decision, and has an interest that is worthy of protection in the revocation or amendment of the decision. The latter is normally considered to exist when the outcome of the proceeding is capable of affecting the legal position of the applicant. Two clarifications must be made to the aforementioned general principles.

Limited tendering procedure

In these cases, the applicant neither participated in nor was denied the opportunity to participate in the bidding procedure for lack of knowledge thereof. Accordingly, the focus is confined to the other elements of admissibility and the applicant must establish that he or she has an immediate interest in supplying the goods and services requested by the contracting authority and that the goods and services he or she would have proposed to deliver were capable of substituting for those that the contracting authority purchased directly.

For the latter element, the Federal Administrative Court looks into the methodology according to which the competition authorities determine the relevant market. In the above-mentioned case, regarding the procurement of information technology services, the suppliers of open-source solutions could not establish that their solution was capable of substituting for the solution chosen by the contracting authority, for which reason their application was not admissible.

Where the contract was already entered into

If, after the award, the procurement contract has already been entered into and the applicant's application for review was not granted suspensive effect, the Federal Administrative Court will only determine whether and to what extent the award was in breach of federal law and thus lay grounds for a potential damages claim.

It is important to note that appeals concerning the invitation for tender (in particular the tender criteria) may not be brought upon the award of the contract, but must be filed within the applicable appeals period upon notification of the invitation. According to jurisprudence of the Federal Supreme Court, this includes appeals against the tender documentation. A complaint against tender criteria and tender documentation upon awarding the contract is generally considered tardy and not protected by law.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Appeals must be lodged within 20 days of the notification of the award on a federal level (article 30 of the FAPP) and within 10 days on a cantonal level (article 15(2) of the IAPP). An appeal to the Federal Supreme Court must be lodged within 30 days from the notification of the judgment of the lower court, subject to the above limitations (see question 33).

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The application for review does not entail suspensive effect (on either a federal or a cantonal level) and, accordingly, the appellant must file a motion to the Federal Administrative Court or the cantonal administrative courts and request that the application will have suspensive effect.

With regard to question 36, whether the suspensive effect will be granted depends on the outcome of a two-stage exercise: the court will first assess whether the applicant's matter brought before it is not obviously unfounded; if so, the court will then assess whether the applicant's individual interests outweigh those of the state to have the procurement project immediately implemented.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority is required to publish any decision, including a reasoned summary, against which an appeal can be lodged before the Federal Administrative Court on Simap.ch.

If requested by an unsuccessful bidder, the contracting authority must promptly disclose:

- the award procedure applied;
- the identity of the successful bidder;
- the price of the successful bid from the highest and lowest prices of the bids included in the award procedure;
- the essential reasons why the bid was not considered; and
- the determining characteristics and advantages of the successful bid, unless statutory exceptions apply.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Access to files for the purposes of a review proceeding is governed by the general rules set forth in the Law on Federal Administrative Procedure (article 26 of the FAPP) and the pertinent cantonal legislation.

Accordingly, the authorities must grant access to those files that are relevant to the reasoning of the award; however, the authorities are under a duty to preserve confidential information (eg, competing bids) and, therefore, may restrict or deny access to the files.

If a party is refused the right to inspect a document, this document may be relied upon for the prejudice of that party only if the party has been notified by the authority, either orally or in writing, of the content of the document that is relevant to the case and the party has been given the opportunity to state its position on the document and to provide counter-evidence.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

It is not customary. From January 2018 until March 2019, there were only around 35 decisions published on the website of the Federal Administrative Court concerning federal procurement projects.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The contracting authority is liable for damages it caused by an award that was later declared unlawful in a judicial review proceeding. Damages are limited, however, to the amount of costs incurred by the appellant in connection with the tender procedure and the appeal.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

If a contract has been concluded between the contracting authority and the successful bidder, the Federal Administrative Court may only determine the extent to which the award was in breach of federal law (article 32(2) of the FAPP).

Although the Federal Administrative Court may only determine the extent to which the award was in breach of federal law, court practice suggests that the award may be revoked or the contracting authority instructed to suspend or terminate a contract that was concluded.

The contract that follows the award – note that the contract may not be entered into until the deadline to file an appeal has lapsed or a decision on a motion to a grant suspensive effect has been issued – is subject to the Code of Obligations (CO). The award concludes the administrative proceeding, unless the award is subject to an appeal. The cancellation or termination of the contract is basically subject to the general or specific rules set forth in the CO and other applicable norms of civil law.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Any award of the contracting authority subject to procurement legislation can be appealed to the Federal Administrative Court.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

It depends on the amount in dispute. The amount in dispute is understood as the vested interest in the matter (ie, not the contract value). The Federal Administrative Court and some cantonal courts appear to define the vested interest as an amount corresponding to 10 per cent of the contract value (rule of thumb). In proceedings before the Federal Administrative Court, court fees are capped at 50,000 Swiss francs.

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UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

In February 2017, the Federal Government submitted its proposal for a complete revision of the FAPP to Parliament. The structure of the proposal is based on the GPA 2012.

The proposal was debated in both chambers of parliament. Currently, the chambers are attempting to resolve any remaining differences. The lengthy preparatory debate as well as some returns to previous decisions show that certain aspects of the revision are quite controversial.

Apart from the currently pending revision of the Legislative framework

Relevant legislation governing public procurement, the Federal Supreme Court has handed down some noteworthy judgments:

- in October 2018, the Federal Supreme Court handed down a decision regarding the scope of applicability of the FAPP holding that a contract by which a municipality commissions a private Spitex organisation to provide care services outside of a hospital is a public contract falling under public procurements laws; and
- in February 2019, the Federal Supreme Court handed down a decision on list hospitals. These are hospitals (private or public) that may charge treatment costs to the patient's canton of residence and his or her basic insurance. These hospitals and clinics receive a performance mandate from the canton that defines the scope of services. The decision concerned a public list hospital, but it has implications also for privately held list hospitals. According to the decision, privately held list hospitals are subject at least to internal procurement laws.

Taiwan

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The primary central legislation regarding government procurement in Taiwan is the Government Procurement Act, which was promulgated on 27 May 1988 and came into effect one year later. The Act has been amended several times since then: on 10 January 2001, 6 February 2002, 4 July 2007, 26 January 2011 and 6 January 2016.

The Government Procurement Act (the Act) covers areas such as:

- invitation to tender;
- award of contracts;
- administration of contract performance;
- inspection and acceptance;
- dispute settlement; and
- penal provisions.

Supplementary provisions are also enacted to establish a government procurement system that has fair and open procurement procedures; promote the efficiency and effectiveness of government procurement operation; and ensure the quality of procurement.

Articles 45 to 62 of the Act detail the requirements of the awarding of public contracts. (For further information, see question 30.)

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

There used to be a regulation for military procurement, which was promulgated on 17 November 2003 in Taiwan. However, this was abolished on 1 January 2015.

There is another act that covers the promotion of private participation in infrastructure projects, which came into effect on 9 February 2000. It has been amended several times – on 31 October 2011, 25 June 2012 and 30 December 2015 – and is still effective. It was enacted to improve the level of public service; to expedite social economic development; and to encourage private participation in infrastructure projects.

With regard to the promotion of the private participation in infrastructure projects, this act will prevail. If infrastructure projects are built or operated by private institutions as approved under this act, the provisions under the Act shall not apply.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The World Trade Organization (WTO) Government Procurement Committee adopted Taiwan's accession to the Agreement on Government Procurement (GPA) on 9 December 2008. Subsequently, Taiwan's Executive Yuan approved the Accession Bill to the GPA on 25 December 2008 and referred it to the Legislative Yuan for review on 26 December 2008. After the Accession Bill was adopted by the Legislative Yuan and ratified by the President, the GPA entered into force in Taiwan on the 30th day (15 July 2009) following the date when the instrument of accession was received by the director-general of the WTO (15 June 2009).

According to the GPA, a supplier may file a protest in writing with an entity if the supplier deems that the entity is in breach of laws or regulations or of a treaty or an agreement to which Taiwan is a party so as to impair the supplier's rights or interest in a procurement (see article 75).

Proposed amendments

4 | Are there proposals to change the legislation?

There was a proposal to change the legislation, updated on 10 May 2018. There are three additional articles, 19 amendments and total amendment of 22 articles. The essentials regarding the amendments are as follows:

- to establish procurement review unit(s) assisting the review of documents and consultation in procurement affairs, so as to promote the efficiency and effectiveness of government procurement operation;
- to lift the limitation of most advantageous tender, so as to extend the discretion of the procuring entity when conducting the award of contract;
- to aggravate the penalties of suppliers offering the procuring entities commission, percentage, brokerage, kickback or any other unjust benefits;
- to amend the requirements that suppliers be published in the Government Procurement Gazette, offering them chances to make explanation;
- to exclude certain cultural and artistic procurement from the scope of the Act;
- to expand the circumstances that an entity may apply limited tendering procedures (eg, procurement of social welfare services);
- to allow an entity to lay down technical specification or measures regarding energy and resource saving or reducing greenhouse gas emission to promote natural resources conservation and environment protection; and
- to demand that an entity proceed with a lawful alternative in 20 days where a review decision specifies the entity is in breach of the law and to allow a supplier to file complaint if the entity does not do so within the forgoing period.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

In principle, procurement conducted by any government agency, public school or government-owned enterprise shall be governed by the Act. The following are not covered by the Act:

- activities falling under the regulation of the Fundamental Science and Technology Act, the Act for Promotion of Private Participation in Infrastructure Projects and the Cultural Heritage Preservation Act; and
- activities of government, such as:
  - sale of property and venue rental;
  - financial securities service providers' buying behaviour in the
  - financial securities market;
  - earnings;
  - debit and credit;
  - financial management;
  - auction;
  - payment;
  - expropriation;
  - hiring;
  - personnel in the name of individuals themselves to purchase business tickets and accommodation; and
  - providing social housing via rent and management of private building etc.

Contract value

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

According to article 5 of the Tendering Regulations of Central Government Entities for Procurement of a Value Not Reaching the Threshold for Publication, which was promulgated on 26 April 1999 and was last amended on 9 April 2003, an entity engaged in a procurement of a value not more than one-tenth of the threshold for publication (NT$1 million) may directly negotiate with the supplier where public notice and submission of offers or proposals from suppliers are waived.

Regarding article 47 of the Act, for small procurement (according to the Thresholds for Government Procurement, which was promulgated on 2 April 1999, small-amount procurement by central government entities is classed as any procurement with a value of less than NT$100,000) an entity may conduct procurement without setting a government estimate. However, the reasons for not setting a government estimate and the terms and principles of awarding the contract shall be provided in the tender documentation. Also, the amount of small procurement shall be set, at the central government level, by the responsible entity; and at the local government level, by the municipal or county (city) governments provided that the said amount shall not exceed one-tenth of the threshold for publication. (Where a local government does not set the amount, the amount set by the central government shall govern.)

Amendment of concluded contracts

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Besides other procedures prescribed at the local government level and limited tendering procedures, there is the Essential Requirements for Procurement Contracts, which is the main central regulation permitting the special conditions under which contracts can be amended, as follows:

- the entity notifies the supplier of a contract amendment:
  - within the scope of the contract, the entity may notify the supplier to revise the contract. Except where otherwise stipulated in the contract, the supplier shall present documents relating to the subject of procurement, price, time limit of the contract, performance, payment schedule or other contract matters that require revision after receiving the notification; and
  - prohibition: before the entity accepts the related revision documents, the supplier may not change the contract by itself. Unless requested by the entity, the supplier shall not, because of the notification of the preceding paragraph, delay its responsibility of contract performance;
- the supplier requests a contract amendment: in the following situations the subject of procurement agreed in the contract can be replaced by another entity with the same or better specification, function and effectiveness if the supplier gives a reason and attaches a comparison table including specification, function, effectiveness and price after approval of the entity. However, this must not be used as an excuse for increasing the contract price. When this reduces the supplier's cost of contract performance, it shall be deducted from the contract price:
  - the original brand or model in the contract is no longer manufactured or supplied;
  - the original subcontractor in the contract is no longer in business or refuses to supply;
  - change is required due to force majeure; or
  - the subject of the amended contract is better than that of the original contract or more advantageous for the entity;
- an adjustment in contract price due to government actions: where the supplier, when performing the contract, encounters any of the following government actions that result in an increase or reduction in the cost of contract performance, the contract price may be adjusted:
  - introduction of new laws or amendments to the existing laws;
  - new taxes or regulatory fees or changes to existing ones; or
  - changes to the fees and expenses under government control.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

As for the application in courts, when suppliers request for amendments to concluded contracts, the court will look into the details whether the requirements are met or not, but the crucial criterion remains whether the entity has approved or agreed to such amendments and whether there is sufficient evidence showing such approval or agreement. (See Judgment No. 100-Tai-Shang-Zi-1836 of the Taiwan Supreme Court.)

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

Procurement conducted by any government agency, public school or government-owned enterprise shall be governed by the provisions under the Act.

Privatised state-owned enterprises, where the government has less than 50 per cent of the shareholding, are not subject to the Act. Hence the tender does not need to be published in the government procurement bulletin or be posted on the information network.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

According to the Act for Promotion of Private Participation in Infrastructure Projects, for any dispute in connection with or arising out of the application and the evaluation procedures between an applicant for participating in an infrastructure project and the authority in charge, the complaint shall be handled in accordance with the provisions under the Act with regard to the dispute resolutions for the invitation to tender, the evaluation of tender and the award of contract. (The competent authority shall prescribe the regulations governing dispute resolutions.)

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

In accordance with article 27 of the Act, for open tendering procedures or selective tendering procedures, an entity shall publish a notice of invitation to tender or of qualification evaluation on the Government Procurement Gazette, and also disclose this on the responsible entity's government procurement information website.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

According to article 36 of the Act, when conducting procurement, an entity may prescribe the basic qualifications of tenderers based upon actual needs. For a special or large procurement that must be performed by suppliers of substantial experience, performance record, human resources, financial capability, equipment and so on, specific qualifications may be prescribed for tenderers.

There is also a regulation, Standards for Qualifications of Tenderers and Determination of Special or Large Procurement, which was enacted to state more explicit qualifications in detail.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Referring to the Act, there is a 'limited tendering procedure', under which, where no public notice is given, two or more suppliers are invited to compete or only one supplier is invited for tendering.

An entity may apply the limited tendering procedure to a procurement of a value reaching the threshold for publication under any of the following circumstances:

(i) where there is no tender in response to an open tender, selective tender, or the open procedures referred to the following conditions ((ix) to (xi)), or where the tenders submitted have been not in conformity with the requirements in the tender, provided, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;

(ii) where the subject of a procurement is an exclusive right, a sole source product or supply, a work of art, or a secret, which can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(iii) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the subject of the procurement could not be obtained in time by means of open or selective tendering procedures;

(iv) for additional deliveries by the original supplier which are intended either as follow-up maintenance, or parts and components replacement for existing supplies or installations, or as an extension of existing supplies, services or installations where a change of supplier would not meet the requirements of compatibility or interchangeability;

(v) where the subject of a procurement is a prototype or a subject first produced or supplied in the course of research, experiment or original development;

(vi) when additional construction work, which was not included in the initial contract but which was within the objectives of the original tender documentation has, through unforeseeable circumstances, become necessary, and the entity needs to award contracts to the contractor carrying out the construction work concerned to achieve the objectives of the initial contract since the separation of the additional construction work from the initial contract would be too difficult and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction work may not exceed 50 per cent of the amount of the main contract;

(vii) for any further procurement whose period, value or quantity to be expanded is indicated in the tender notice and tender documentation;

(viii) for property purchased on a commodity market;

(ix) in the case of contracts for professional services, technical services or information services awarded to the winner selected publicly and objectively;

(x) in the case of contracts awarded to the winner of a design contest and the selection has been conducted publicly and objectively;

(xi) in the case of designating an area for real property procurement in response to a need for business operation provided that the real property procured has been solicited publicly in accordance with its requirements and criteria;

(xii) where the subjects of a procurement are supplies or services not for-profit provided by the physically or mentally disabled, the aborigines, prisoners, philanthropic organisations of the physically or mentally disabled, registered organisations of the aborigines, prisoners' works or philanthropic organisations;

(xiii) in the case of research and development of science, new technology, administration or academic concern entrusted to a person in a professional area or a leading academic or non-profit organisation screened as a winner by open notice;

(xiv) in the case of inviting or entrusting a professional person, institution or organisation of culture or art concern to perform or join in culture or art activities, provided that they have the characteristics or specialties required or have been screened as a winner by open notice;

(xv) where a procurement is for the purposes of commercial resale or production of goods or provision of services for resale, and is not appropriate for conducting open or selective tender considering the characteristics or actual needs of the party for resale, manufacturing process or source of supply; or

(xvi) other circumstances as prescribed by the responsible entity.

See article 22 of the Act.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Where a procuring entity finds that a supplier has any of the following circumstances, the entity shall notify the supplier of the facts and reasons related thereto and indicate in the notification that it will be published in the Government Procurement Gazette if the supplier does not file a protest.

The supplier whose name has been published in the Government Procurement Gazette is prohibited from participating in tendering, or being awarded or subcontracted for one or three years, depending on what kind of violation the supplier has committed, except where the original penalty has been revoked or where a 'not guilty' verdict has been entered where:

- the supplier allows any others to borrow its name or certificate to participate in a tender;
- the supplier borrows or assumes another's name or certificate or uses forged documents or documents with unauthorised alteration for tendering, contracting or performing a contract;
- the supplier has substantially reduced the work or materials without obtaining prior approval;
- the supplier forges or alters without authorisation documents related to tendering, contracting or contract performance;
- the supplier participates in tendering during the period when its business operation has been suspended by a disciplinary action;
- the supplier has committed any of the offences prescribed in articles 87 to 92 of the Act, and has been sentenced by a court of first instance;
- the supplier refuses to execute a contract without due cause after award;
- an inspection indicates any serious non-conformity with the contractual requirements;
- the supplier does not fulfil its obligation of guarantee after inspection and acceptance;
- the time limit for contract performance is seriously delayed due to causes attributable to the supplier;
- the supplier is in breach of the requirement to assign a contract to others;
- a contract is rescinded or terminated for causes attributable to the supplier;
- the supplier is undergoing bankruptcy proceedings; or
- the supplier seriously discriminates against women, aborigines or any person of a disadvantaged group.

See articles 87 to 92 and 101 of the Act.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The general principles of the Act are set out in article 1 and are to establish a government procurement system that has fair and open procurement procedures, promote the efficiency and effectiveness of government procurement operation, and ensure the quality of procurement.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The related regulations are stated under the Act:

- in conducting any procurement, an entity shall observe the principle of protecting public interests, fairness and reasonableness, and shall not accord differential treatment to suppliers without due cause;
- in conducting selective tendering procedures, the entity shall give qualified suppliers an equal opportunity to be invited;
- in conducting a procurement, an entity shall not disclose, before opening of tenders, the government estimate, the names and number of the suppliers that have obtained the tender documentation, or submitted a tender and any other relevant information that may result in competition restraint or unfair competition; and
- in conducting negotiations (for further information, see question 30), no tenderers meeting the requirements shall be discriminated.

See articles 6, 21, 34 and 57 of the Act.

Conflicts of interest

17 How are conflicts of interest dealt with?

Where a conflict of interest exists:

(i) former procurement personnel and procurement supervision personnel shall be prohibited from contacting the entity that they previously worked either for their own sake or on a supplier's behalf for three years following their resignation for matters related to their former duties within five years prior to their resignation; and

(ii) the procurement personnel and procurement supervision personnel shall withdraw themselves from a procurement and all related matters if they or their spouses, relatives by blood or by marriage within three degrees, or other relatives with whom they live have interests involved therein.

Upon finding that the procurement personnel or procurement supervision personnel failed to withdraw themselves when any of the conflicts of interest stated above exist, the head of the entity shall order such personnel to withdraw and shall appoint a replacement.

On the other hand, a supplier shall not participate in the procurement of a procuring entity in the event that the relationship between the head of the procuring entity and the supplier itself or the responsible personnel of the supplier is as mentioned in condition (ii). However, this requirement may be waived where enforcement of it would be against fair competition or public interests and an approval has been obtained from the responsible entity.

See article 15 of the Government Procurement Act.

Bidder involvement in preparation

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

A procuring entity shall prescribe in the tender documentation that a supplier is prohibited from participating in tendering, being awarded or subcontracting, or assisting tenderers where any of the following circumstances occurs:

(i) the supplier has provided planning or design services to the entity, and the procurement has resulted from such planning or design;

(ii) the tender documentation has been prepared by the supplier for the entity;

(iii) the supplier provides a tender evaluation service to the entity for the procurement;

(iv) the supplier knows, by fulfilling a contract with the entity, certain information that is unknown to other suppliers or should be kept secret, and the supplier can benefit from the information and win the bid; and
(v) the supplier is a project management service provider entrusted by the entity and the procurement is related thereto.

However, where there is no conflict of interest or concern over unfair competition, the circumstances referred to in (i) and (ii) above, and the other circumstances, may not be applicable to the subsequent procurements after approval of the entity:

- where the planning or design service provider is a sole source manufacturer or supplier for the subject of a subsequent procurement, and no reasonable alternative or substitute exists;
- where the supplier has developed a new product for an entity and prepares the tender documentation accordingly for the entity;
- where the tender documentation is prepared separately for different major parts by two or more suppliers for the entity; or
- under other circumstances as prescribed by the responsible entity.

See articles 38 and 39 of the Enforcement Rules of the Act.

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

Different types of contracts have different procurement procedures. According to the statistics of the Implementation of Government Procurement in 2017, published by the Public Construction Commission, Executive Yuan of Taiwan in March 2018, out of the main three procurement procedures – open tendering, selective tendering and limited tendering – open tendering had the highest accumulative contract value in 2017.

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

In Taiwan, it is not prohibited that related bidders submit separate bids in one procurement procedure. However, in general such bidders shall not engage in the following activities, or shall be punished with imprisonment up to five years or fined not more than NT$1,000,000:

- use any other illegal means to cause the opening of tenders to have an incorrect result;
- not to proceed with price competition by means of contract, agreement or other forms of meeting of minds, with the intent to adversely affect the price of award or to gain illegal benefits; or
- borrow or assume any other's name or certificate to tender, with the intent to adversely affect the result of procurement or to gain illegal benefits.

See article 87 of the Act.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

Where an entity plans to award a contract to the lowest tender but cannot do so, the entity may alternatively award the contract through negotiation, provided that such negotiation has been approved by the superior entity and announced in advance in the notice of invitation and the tender documentation.

See articles 53 to 55 of the Act.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

In Taiwan, articles 55 to 57 of the Act provide the negotiation procedure for bidders if the entity cannot grant the award.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

The closest concept to a framework agreement of government procurement in Taiwan may be the inter-entity supply contract.

An entity may execute an inter-entity supply contract with a supplier for the supply of property or services that are commonly needed by entities. According to the Regulations for the Implementation of Inter-entity Supply Contracts, this term means property or services that are commonly required by two or more entities.

The different forms of inter-entity supply contract are available in the Procurement section of the Bank of Taiwan's website.

24 May a framework agreement with several suppliers be concluded?

The procedure of an inter-entity supply contract is the same as that prescribed under the Act. An entity may prescribe in the tender documentation that contracts may be awarded to different tenderers by different items or different quantities, but the spirit of competition as to the lowest price or the most advantageous tender shall be respected.

Changing members of a bidding consortium

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

A bidding consortium can be changed in the course of a procurement procedure if there are fewer than five members of the consortium or if the proportion of experts and scholars is less than one-third.

Participation of small and medium-sized enterprises

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

According to the Act, the responsible entity may take into account the requirements of the relevant laws and regulations to adopt measures assisting small and medium-sized enterprises (SMEs) in contracting or subcontracting to the extent not less than a certain percentage of government procurement in value.

The responsible entity shall, acting with the Ministry of Economic Affairs, discuss with the National Assembly, the Presidential Office, the National Security Council, the five Yuans and all the first-level entities under each Yuan, and all municipal, and county (city) governments, to set the percentage of the targeted value of annual procurement of respective entities and their subordinate entities that will be contracted or subcontracted to the SMEs, and publish them in the Government Procurement Gazette within two months from the beginning of each fiscal year.

There are also the Regulations Governing Assistance for Small and Medium Enterprises Participating in Government Procurement, which was promulgated in 1999 and was last amended in 2002. The Regulations set out the following:

- in conducting a procurement, an entity may, depending on the characteristic and the scale of the procurement, prescribe that the tenderer must be an SME or encourage the tenderer to invite SMEs for subcontracting, to the extent not contrary to provisions of laws and regulations and the treaties or agreements to which Taiwan is a party; and
- in conducting a procurement of a value not reaching the threshold for publication, SMEs shall be awarded in principle except where such SMEs are incapable of carrying out the procurement in question, their competitiveness is inadequate or their tendering prices are unreasonable, or where circumstances are prescribed about limited tendering, military procurement and emergent procurement.

See paragraph 1 of article 22, subparagraphs 1 and 3 of paragraph 1 of article 104, and paragraph 1 of article 105 of the Act.

There is no specific regulation that limits the number of lots single bidders can be awarded at present.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

According to the Enforcement Rules of the Government Procurement Act, each tenderer may submit only one tender during a procurement process. Branch companies of the same company, or a parent company and its branch company both submitting tenders is deemed as a breach of this requirement.

However, where the procurement is to be awarded to the lowest tender and the tender documentation specifies that tenderers may submit two or more proposals with the same bid price to provide a choice, this requirement does not apply.

28 | Must a contracting authority take variant bids into account?

Apart from the exceptions mentioned in question 27, where a tenderer is found to be in breach of the foregoing conditions, the following requirements shall apply: the tender submitted by such tenderer shall not be opened when such circumstance is found before tender opening; and the tender submitted by such tenderer shall not be accepted when such circumstance is found after tender opening.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

If the tendering does not comply with the requirements of the tender documentation or the content of the tender is inconsistent with the requirements of the tender documentation, an entity shall not open the tender if such circumstance is found before tender opening, nor shall it award the contract to such tenderer if such circumstance is found after tender opening.

See article 50 of the Act.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The award of contract conducted by an entity shall adhere to one of the following principles and the principle adopted shall be specified in the tender documentation:

(i) where a government estimate is set for the procurement, a tender that meets the requirements set forth in the tender documentation and is the lowest tender within the government estimate shall be awarded;
(ii) where no government estimate is set for the procurement, a tender that not only meets the requirements set out in the tender documentation with a reasonable price, but also is the lowest tender within the budget amount shall win the bid;
(iii) the tenderer whose tender meets the requirements set forth in the tender documentation and is the most advantageous one shall win the bid; or
(iv) the tenderer may adopt multiple awards by prescribing in the tender documentation that contracts may be awarded to different tenderers by different items or different quantities, but the spirit of competition as to the lowest price or the most advantageous tender shall be respected.

Point (iii) shall only be applied to cases where tenderers are allowed to submit tenders for construction work, property and services with different qualities, and, therefore, (i) and (ii) are not suitable for application.

Where the value of a procurement reaching the threshold for publication, and the subject of procurement is professional service, technical service or information service, the award procedures of the most advantageous tender without setting a government estimate may be applied.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

If, for example, the total or a part of the offered price is so low that it evidently appears to be unreasonable, and the quality of performance is likely to be impaired or the contract is not likely to be performed in good faith, or there are any other extraordinary situations, it may constitute an 'abnormally low' bid. The following situations may be included:

- where a government estimate is set, the total price is 20 per cent less than the government estimate;
- where there is a part of the government estimate corresponding to the part of the offered price in question, the latter is 30 per cent less than the former;
- where no government estimate is set, the total price or a part of the price is determined by a committee or evaluation committee to be unreasonably low;
- where neither a government estimate is set nor a committee or an evaluation committee is established, the total price is 30 per cent less than the budget or the estimated procurement value. Where an appropriation bill is pending for legalisation, the estimated procurement value shall govern;
- where a part of the price is 30 per cent less than the award price of the same kind of procurement conducted by other entities recently; or
- where a part of the offered price is 30 per cent less than the regular price available for reference.

See articles 79 and 80 of the Enforcement Rules of the Act.

32 | What is the required process for dealing with abnormally low bids?

According to the Act, where a contract is to be awarded to the lowest tender, an entity may set a time limit for the tenderer offering the lowest tender to provide an explanation or a security. If such tenderer fails to comply before the deadline set forth by the entity, the contract may not be awarded to the tenderer, and the tenderer offering the second lowest tender shall then be deemed as the tenderer offering the lowest tender.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Where the value of procurement reaches the threshold for publication, a supplier may file a written complaint with the Complaint Review Board for Government Procurement (CRBGP) as established by the responsible entity, or the municipal or the county (city) governments, depending upon whether the procurement is conducted at the level of central government or local government.

The complaining supplier shall prepare a written complaint including the following particulars and affix its signature or seal thereon:

- the name, address and telephone number of the complaining supplier and the name, gender, birth date, and domicile or residence of the responsible person;
- the entity that handled the protest;
- the facts of and reasons for the complaint;
- evidence; and
- the year, month and day of the written complaint.

When filing a complaint, the supplier shall also provide a copy of the complaint to the entity. The entity shall present its response in writing to the competent CRBGP within 10 days of the day following receipt of such copy.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

CRBGPs have the power to rule on the reviews of applications. If the supplier is not satisfied with such ruling, an administrative litigation can be filed to seek remedies.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The CRBGP shall complete its review within 40 days of the day after the date of receipt of the complaint, and shall notify the supplier and the entity of its decision in writing. If necessary, the foregoing period may be extended for another 40 days.

36 | What are the admissibility requirements?

Primarily, applicants must follow the time limit of submitting the review application. If the application can illustrate the decision or award rendered by an entity has violated the Government Procurement Act (such as article 50 and article 101), the CRBGP may make a decision favourable to the applicants.

37 | What are the time limits in which applications for review of a procurement decision must be made?

First, a supplier may, in the period specified below, file a protest in writing with the entity if the supplier deems that the entity is in breach of laws or regulations or of a treaty or an agreement to which Taiwan is a party so as to impair the supplier's rights or interest in a procurement where:

- the protest is filed for the content of the tender documentation, one-quarter of the period for tendering starting from the date following the date of publication or invitation to tender and a segment of less than one day shall be counted as one day – provided that the whole period is not less than 10 days;
- the protest is filed for the interpretations, subsequent explanations, amendments or supplements of the tender documentation, 10 days from the date following the date of receipt of the notification from an entity or the date of public notice given by the entity; or
- the protest is filed for the procedures or the outcome of the procurement, 10 days from the date following the date of receipt of the notification from an entity or the day after the date of public notice given by the entity; or 10 days from the day after the date when said procedures or outcome are known or can be known if such procedures or outcome are not notified or published; provided that the period shall not exceed 15 days from the day following the date of the award of contract.

Subsequently, a supplier may file a written complaint with the CRBGP within 15 days from the date of receipt of the disposition rendered by the entity if the supplier objects to the disposition or from the expiry of the period specified in the preceding requirements if the entity fails to settle the case within the period.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The CRBGP may, before completion of review, notify the procuring entity to suspend the procuring procedures, if necessary. Furthermore, where a procuring entity deems that a protest or complaint filed by a supplier is justifiable after reviewing the causes related thereto, the procuring entity shall nullify or change the initial result or suspend the procurement procedures, except for emergencies or public interest, or where the causes of complaint or protest are not likely to affect the procurement.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

There are few or no precedents of applications for lifting a suspension of a procurement procedure in the Taiwanese courts at present. On the contrary, there are some cases regarding filing suspension orders with the court.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

An entity shall notify each tenderer of the outcome of the review that tenders submitted in accordance with the requirements set forth in the tender documentation and provide reasons for disqualified tenderers. In addition, tenderers need not be notified to be present upon the award of contract, but they must be notified of the outcome.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

According to the Act and the Regulations for Publication of Government Procurement Notices and Government Procurement Gazette, except for extraordinary circumstances, an entity shall publish the outcome of an award on the Government Procurement Gazette and notify all tenderers in writing within a specific period of time after award of contact provided that the procurement is of a value reaching the threshold for publication.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

From the official website of the Public Construction Commission, there were approximately 587 cases dealt with by central and local CRBGP in 2018.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

A supplier may file a protest in writing with an entity if the supplier deems that the entity is in breach of laws or regulations or of a treaty or an agreement to which Taiwan is a party so as to impair the supplier's rights or interest in a procurement exercise.

According to article 85 of the Act, where a violation of procurement law is established in review proceedings, the supplier may request that the procuring entity reimburse the necessary expenses incurred by the supplier for preparing the tender and the filing of protest and review. However, the damages that disadvantaged bidders could claim seem only confined to bid bond or review fees. Other than those two, there are few or no precedents of a disadvantaged bidder successfully claiming damages in a Taiwanese court at present.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

When any of the following circumstances are found after award or signing of the contract, the entity shall revoke the award, and terminate or rescind the contract, and may claim for damages against such tenderer except where the revocation of the award or the termination or rescission of the contract is against public interests, and is approved by the superior entity:

- the tendering does not comply with the requirements of the tender documentation;
- the content of the tender is inconsistent with the requirements of the tender documentation;
- the tenderer borrows or assumes another's name or certificate to tender, or tenders with forged documents or documents with unauthorised alteration;
- the tenderer forges documents or alters documents without authorisation in tendering;
- the contents of the tender documents submitted by different tenderers show a substantial and unusual connection;
- the tenderer is prohibited from participating in tendering or being awarded any contract pursuant to paragraph 1 of article 103 of the Act (regarding the restriction on 'bad suppliers'); or
- the tenderer is engaged in any other activities in breach of laws or regulations that impair the fairness of the procurement process.

Generally speaking, a contract should be void under Taiwan Civil Code if the contracting authority and a tenderer deliberately breaks the law or act against public policy or morals.

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Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Under Taiwanese public procurement regulations, entities must refrain from continuing an illegal direct award, and not award the contract without a proper procurement procedure. If a party's interests have been damaged because of an authority's breach of the Act, the relevant authority may bear liability. However, there are few precedents of a bidder successfully claiming such damages in Taiwanese courts.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

For disputes regarding invitations, evaluations of tenders, or the awards of contracts, the review fee is NT$30,000 per complaint; however, no review fee shall be paid if the procuring entity nullifies or changes its disposition prior to the date of first pre-review meeting so that handling of the complaint is no longer necessary.

For the administrative litigation against the decision of the review, the typical cost will be NT$4,000 per case. (See Regulation Governing Fees for the Complaint Review for Government Procurement and article 98 of the Taiwan Code of Administrative Litigation Procedure.)

For disputes regarding the performance of the contract, the typical costs of the dispute resolution proceedings (including mediation, arbitration or civil litigation) will be decided by the value of the claim. (See also article 5 of the Regulation Governing Fees for the Mediation for Government Procurement, article 25 of the Rules on Arbitration Institution, Mediation Procedures and Fees and articles 77–1 and 77–13 of the Taiwan Code of Civil Procedure.)

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

There was a proposal to change the legislation, updated on 10 May 2018. The essentials regarding the amendments are as follows:

- to establish procurement review units assisting the review of documents and consultation in procurement affairs, so as to promote the efficiency and effectiveness of government procurement operation;
- to lift the limitation of most advantageous tender, so as to extend the discretion of the procuring entity when conducting the award of contract;
- to aggravate the penalties of suppliers offering the procuring entities commission, percentage, brokerage, kickback or any other unjust benefits;
- to amend the requirements that suppliers be published in the Government Procurement Gazette, offering them chances to make explanation;
- to exclude certain cultural and artistic procurement from the scope of the Act;
- to expand the circumstances that an entity may apply limited tendering procedures (eg, procurement of social welfare services);
- to allow an entity to lay down technical specification or measures regarding energy and resource saving or reducing greenhouse gas emission to promote natural resources conservation and environment protection; and
- to demand that an entity proceed with a lawful alternative in 20 days where a review decision specifies the entity is in breach of the law and to allow a supplier to file complaint if the entity does not do so within the forgoing period.

Tanzania

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

In Tanzania, procurement is regulated by the Public Procurement Regulatory Authority (PPRA). The principal legislation is:

- the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E 2002 (LRA);
- the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014 (JR Rules);
- the Public Procurement Act, 2011 (PPA);
- the Public Procurement (Amendment) Act 2016 (PPAA);
- the Public Procurement Regulations 2013 (PR);
- the Public Procurement (Amendments) Regulations 2016 (PRA);
- the Public Private Partnership Act 2010 (PPP);
- the Public Private Partnership Regulations 2011 (PPR); and
- the Public Procurement Appeals Rules 2014 (PPAA Rules).

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Under section 2 of the PPA, defence and national security organs man- age their procurement on a dual-list basis. The dual list covers items subject to open and restricted procurement or disposal methods respectively. The defence or national security organs can use single sourcing whenever they deem it is the most appropriate.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Tanzania is not bound by the European Union (EU) procurement directives or the World Trade Organization Agreement on government Procurement (GPA), as it is not a member of the EU nor a signatory to the GPA and therefore the EU directives and the GPA have not been imported into the Tanzanian public procurement laws.

Proposed amendments

4 | Are there proposals to change the legislation?

There are no proposals to change the legislation as it has only recently undergone extensive overhauls.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

All non-public bodies, or authorities and bodies that were not established and mandated by the government to carry out public functions, are not considered 'contracting authorities'. Public bodies or public authorities include:

- any ministry, department or agency of the government;
- any body corporate or statutory body or authority established by the government;
- any company registered under the Companies Act, being a company in which the government or an agency of the government, is in the position to influence the policy of the company; or
- any local government authority.

'Public funds' are any monetary resources appropriated to contracting authorities through budgetary processes, including the consolidated funds, grants, loans and credits put at the disposal of the contracting authorities by local or foreign donors, and revenue generated by procuring entities.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

For the procurement of goods, works and non-consultancy services, guidance has been provided for different types of tendering processes.

The thresholds are as follows:

	Goods	Works	Non-consultancy services	Disposal of public assets
International competitive tendering	No limit	No limit	No limit	No limit
National competitive tendering	Up to 5 billion Tanzanian shillings	Up to 15 billion shillings	Up to 5 billion shillings	Up to 5 billion shillings
Restricted tendering	No limit, but must be justified	No limit, but must be justified	No limit, but must be justified	No limit, but must be justified
Competitive quotations ('shopping method', see question 13)	Up to 120 million shillings	Up to 200 million shillings	Up to 100 million shillings	n/a

	Goods	Works	Non-consultancy services	Disposal of public assets
Single-source procurement	No limit, but must be justified	No limit, but must be justified	No limit, but must be justified	n/a
Minor value procurement	Up to 10 million shillings	Up to 20 million shillings	Up to 10 million shillings	n/a
Micro value procurement	5 million shillings	n/a	n/a	n/a
Force account	n/a	No limit, but must be justified	n/a	n/a
Direct from manufacturer, dealer or service provider procurement	No limit, but must be justified	No limit, but must be justified	No limit, but must be justified	n/a

In respect of consultancy services, the thresholds are:

- International competitive selection: no limit.
- National competitive selection: up to 1.5 billion shillings.
- Restricted competitive selection: no limit, but must be justified.
- Consultant qualifications: 200 million shillings.
- Single-source selection: no limit, but must be justified.
- Individual selection: up to 150 million.
- Minor value procurement: up to 10 million shillings.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Amendments to concluded contracts are permitted, provided that they are necessary for the benefit of the contracting authority or if the alteration does not prejudice the contracting authority. In the event that the variation to the contract, such as additions or deductions, result in the alteration of the contract's scope, extent or intention, they must be referred to the appropriate tender board for approval before instructions are issued to the tenderer.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There has been no case law clarifying the application of the current procurement laws in relation to concluded contracts.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

The disposal of public assets, including privatisation, require the adoption of a procurement procedure under the procurement laws, provided that they meet the thresholds set out in question 6.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Section 11(1) of the PPP provides that in all circumstances where there is an agreement between a public and a private entity, in which the private entity enters into an agreement with a public entity in order to perform one or more functions of the public entity, the procurement procedure must be followed.

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

The first schedule of the PR, as amended by the PRA, provides for the types of publications that must be done in regulated procurement. These are as follows:

Prequalification or expression of interest

- International competitive tendering or selection:
  - the Journal and Tender Portal;
  - the contracting authority's website or noticeboard;
  - at least one local newspaper; and
  - one international newspaper.
- National competitive tendering or selection:
  - the Journal and Tender Portal;
  - the contracting authority's website or noticeboard; and
  - one local newspaper.

Tendering

- International competitive tendering:
  - the Journal and Tender Portal;
  - the contracting authority's website or noticeboard;
  - at least one local newspaper; and
  - one international newspaper.
- National competitive tendering:
  - the Journal and Tender Portal;
  - the contracting authority's website or noticeboard; and
  - one local newspaper.

Tender award disclosure information

- All tenders, irrespective of the method used:
  - the Journal and Tender Portal; and
  - the contracting authority's website or noticeboard.

With regards to PPPs, r.370 of the PR provides that advertisements must be placed in the *Tanzania Procurement Journal* issued by the PPRA and at least one newspaper of wide circulation in Tanzania. The contracting authority also has the option to place adverts in inter-national newspapers, technical magazines or trade publications, as directed by its tender board.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Yes. Regulation 116(1) of the PR sets the criteria and qualifications that a contracting authority can impose. Regulation 116(4) of the PR states that a contracting authority must not impose any further criteria, requirements or procedure with respect to the qualifications of a party intending to participate in a tender procedure.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

The number of potential bidders can be limited under r.164(1) of the PR, where a contracting authority is procuring through the 'shopping method'. In the shopping method, a contacting authority invites competition through requests for quotations at an international or national

level. The contracting authority is required to obtain quotations from at least three bidders. This method can only be used if the goods to be procured are so diversified that it would be of no commercial interest for any single supplier to tender for them, the goods are readily available off-the shelf, or the goods are standard-specification commodities.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Any bidder aggrieved by a decision to exclude it from a tender procedure because of past irregularities may appeal to the PPRA against the exclusion within 21 days of being notified of the exclusion. However, if that bidder is already debarred and blacklisted by the PPRA it would not have an appeals avenue. The concept of self-cleaning is not recognised under the Tanzania procurement legal framework. The blacklisted or debarred party would have to wait for the lapse of such debarment or blacklist period.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. Section 8 of the PPA provides that there should be equality, fair biding and every tenderer should be treated in an unbiased fashion.

Independence and impartiality

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Section 41 of the PPA requires for the contracting authority to act independently.

Conflicts of interest

17 How are conflicts of interest dealt with?

Section 40(6) of the PPA states that members of the evaluation committee tasked with evaluating bids must declare if they have conflicts of interest. Where a member of the committee has a conflict of interest, section 40(5) of the PPA and regulation 226(4) of the PPR requires the contracting authority to, where necessary, engage an external evaluation committee to make a decision.

Bidder involvement in preparation

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

In case of an unsolicited PPP, a potential bidder is typically involved in the preliminary steps leading to the tender procedure (ie, by conducting the feasibility study and submitting details of the intended project that the contracting authority will eventually advertise for the purpose of receiving bids). In such a case, the bidder is not prohibited from taking part in the tender process, and under section 80(2) the contracting authority may, upon consultation with the relevant authorities (ie, registrars), acknowledge the intellectual rights over the project idea of the original proponent and recognise the bid by such a bidder in the tendering process.

In all other methods of procurement, bidders would not be involved in the preparation of the bid documentation.

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of procurement procedure used by contract- ing authorities is the Solicited Procurement for Goods and Services process. This is made up of the following steps:

- requirement identification;
- determining procurement method;
- procurement planning and strategy development;
- procurement requisition processing;
- solicitation documents preparation and publication;
- pre-bid or proposal meeting and site visit;
- bid or proposal submission and opening;
- bid or proposal evaluation;
- contract award recommendation;
- contract negotiations; and
- contract award (signing).

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

The law is silent on this issue. However, the law allows for a contracting authority to disqualify a bid in the event of a conflict of interest. Contracting authorities typically include in the tender documents descriptions of bidders' relationships that are deemed to be conflicts. In such cases, bids from the parties which are judged to have conflicts of interest would be disqualified.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

The terms of negotiations with bidders are provided under r.225 of the PR, as amended by the PRA. Negotiations are permitted, provided that they do not:

- substantially change the specification or details of the requirement, including tasks or responsibilities of the tenderer;
- materially alter the terms and conditions of contract stated in the solicitation document; and
- substantially alter anything that formed a crucial or deciding factor in the evaluation of tender.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The only procedure for negotiations proceedings with bidders in tendering proceedings is that provided under r.225 of the PR.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

Subject to the procurement procedures provided set out above, a contracting authority is permitted to enter into a framework agreement, provided that the agreement is arranged by the Government Procurement Services Agency for procurement of common use items and services by contracting authorities, and will only run for between one and three years.

24 | May a framework agreement with several suppliers be concluded?

Yes. Framework agreements with several suppliers may be concluded. In respect of open framework agreements (without an agreed price), the contracting authority, following receiving the approval of the tender board, may conduct a mini competition among the suppliers or service provided awarded.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

A tender, including a consortium's members, may be modified at any time prior to the deadline for the submission of tenders. If a modification is made after the deadline for the submission of tenders, the tenderer would forfeit its tender security. The specific tender specification documents would set out the extent of the permitted changes post-submission (ie, clerical errors, etc).

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

There are no mechanisms in the procurement laws to further the participation of small and middle-sized enterprises. However, the r.40 of the PR contain provisions to increase the participation of local firms who are based and operate in the local authorities or regions of the contracting authority.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Variant bids under the procurement laws are only permitted if the document soliciting for bids permits them. Where a bidder intends to submit a variant bid, they must provide a bid based on the tender advertised and a quote with the proposed alterations, as required under r.293 of the PR.

28 | Must a contracting authority take variant bids into account?

If the solicitation documents allow for variant bids, then they must be taken into account.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Where variant bids are permitted, the alternate bid will be taken into consideration. If variant bids are not permitted, then the tender would be disqualified for having failed to submit a tender in line with the specifications set out in the solicitation documents.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The award criteria used by the contracting authority must be outlined in the solicitation document, as required by section 72 of the PPA. The tender document is required to specify factors, in addition to price, which may be taken into account in evaluating a bid, as well as information as to how such factors may be quantified or otherwise evaluated.

The solicitation documents must also set out the criteria for evaluating variant bids where variant bids are acceptable.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

An 'abnormally low' bid is defined under r.17(6) of the PR as a tender that, in light of the contracting authority's estimate and all the other tenders submitted, appears to not provide a margin for normal profit levels.

32 | What is the required process for dealing with abnormally low bids?

The contracting authority may reject an abnormally low bid. Prior to rejecting an abnormally low bid, the contracting authority has an obligation to:

- request an explanation of the tender or of those parts which it considers contribute to the tender being abnormally low;
- take account of the evidence provided in response to a request in writing; and
- subsequently verify the tender or parts of the tender as being abnormal.

The accounting officer of the contracting authority must seek approval of the PPRA, prior to rejecting an abnormally low bid.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The first authority that may rule on review applications is the accounting officer within the contracting authority. The accounting officer may constitute an independent review panel from within or outside the contracting authority to advise him or her on the appropriate actions to be taken. The decision of the accounting officer may be appealed to the Appeals Authority. The decision of the Appeals Authority may be subjected to a judicial review at the High Court. A decision of the High Court may be appealed to the Court of Appeal.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes. The remedies that can be provided vary as set out below.

Complaints or disputes to the accounting officer

No remedies that can be provided by the accounting officer have been provided under the law.

Complaints or disputes to the Public Procurement Appeals authority (appeals authority)

The Appeals Authority has the power to dismiss, strike out or uphold a complaint or dispute. The Appeals Authority may also issue one or more of the following orders:

- declare the legal rules or principles that govern the subject matter;
- prohibit the contracting authority from acting or deciding unlawfully or from following an unlawful procedure;

- require the contracting authority that has acted or proceeded in an unlawful manner, or reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;
- annul, in whole or in part, an unlawful act or decision of the contracting authority;
- revise an unlawful decision by the contracting authority or substitute its own decision for such a decision; or
- require the payment of reasonable compensation to the tenderer submitting the complaint or dispute as a result of an unlawful act, decision or procedure followed by the contracting authority.

Judicial reviews by the High Court

In the application for judicial review, the High Court may grant the following orders:

- prohibition – prohibit an act from being carried out;
- mandamus – ordering a mandatory step be taken or consider a specific fact that may result a change in its final decision; or
- certiorari – quashing a decision.

Court of Appeal

The Court of Appeal may vary, overturn or uphold a decision of the High Court.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The timelines for decision-making are as follows:

- complaint to accounting officer of the contracting authority: within 14 days after the submission of the complaint, as provided under section 96(6) PPA;
- Appeals Authority: within 45 days of receiving the complaint of a dispute, as provided under section 97(6) PPA;
- judicial review: applications for leave to file an application for judicial review must be determined within 14 days, as provided under r.5(4) of the JR Rules. However, in our experience, a judicial review itself takes one to three years, but the law does not provide any timing; and
- court of appeal: the law is silent on timing, but, in our experience, decisions follow one to six years from the date of filing a notice of appeal.

36 | What are the admissibility requirements?

Complaints or disputes to the accounting officer

Under r.96(1) of the PR, the accounting officer at the contracting authority has the power to review any complaint or dispute between the contracting authority and bidders. No exhaustive list of issues has been provided. The only restriction is that the accounting officer cannot entertain any complaints or disputes after the procurement contract has entered into force. No format for the complaint or dispute is provided for under the law.

Complaints or disputes to the Public Procurement Appeals authority (appeals authority)

Under r.97 of the PR, a tenderer who is aggrieved by the decision of the accounting officer may appeal to the Appeals Authority. The Appeals Authority also has the power to hear the following complaints or disputes:

- acceptance or disqualification of a tender;
- award or proposed award of contract;
- inclusion of unacceptable provisions in the tender documents;
- unacceptable tender process or practice;
- decision, act or omission of a contracting authority;
- blacklisting of a tenderer;
- rejection of all tenders; or
- any other matter that the Appeals Authority may deem appealable.

An appeal is instituted by submitting a notice of appeal in the form PPAA Form No.1, as set out in the first schedule to the PPAA Rules, followed by a statement of appeal by submitting PPAA Form No. 2 (annexed to the same schedule of the PPAA Rules).

Judicial review to the High Court

The judicial review process is initiated by filing an application for leave to apply for administrative orders; namely, mandatory, prohibition or the quashing of a decision. Following leave being granted, the application for judicial review must be filed.

The application for leave must be in the format set out in Form A, as in the first schedule to the Review Rules.

Court of Appeal

The decision of the High Court can be appealed to the Court of Appeal if the decision from the High Court erred in the application or interpretation of law. The bidder cannot challenge issues of fact at the Court of Appeal. In order to appeal the decision of the High Court, the aggrieved bidder must follow the following steps:

- file a notice of appeal within 14 days of the decision;
- simultaneously file an application seeking leave to appeal within 14 days of the High Court decision; and
- file the memorandum and record of appeal within 60 days of leave to appeal being granted.

37 | What are the time limits in which applications for review of a procurement decision must be made?

The time limits for applications for instituting review or appeals are as follows.

Complaints or disputes between contracting authority and bidders, arising in respect of procurement proceedings, disposal of public assets by tender and awards of contracts, must be made within 28 days from the date of the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute, or when that tenderer should have become aware of those circumstances, whichever is earlier (s. 96(4) PPA).

Complaints or disputes regarding decisions of the accounting officer must be filed within 14 working days from the date of communication of the decision (s.97(2) PPA).

If a bidder is aggrieved by a decision of a contracting authority, but the contracting authority has already entered into a contract with the preferred bidder, the accounting officer within the contracting authority no longer holds a mandate to resolve any disputes arising from the bidding process. In such circumstances, an aggrieved bigger can refer their dispute directly to the Appeal Board. The appeal must be lodged within 14 days of the aggrieved bidder becoming aware of the events forming the grounds of his or her grievance.

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Section 100 of the PPA provides that when a complaint or dispute has been received, the accounting officer must suspend the procurement process, pending determination of a complaint or appeal. No suspension shall occur if the contracting authority certifies to the PPRA that there is an urgent public-interest consideration that requires the procurement

to proceed. The Appeals Authority also has the power to suspend the procurement procedure, except where there is a public- interest certificate in place.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

In the system currently in place, when an automatic suspension is triggered it remains in force, unless there is a valid public-interest certificate in place. In our review of the decisions submitted to the Appeals Authority, there has been no successful lifting of a public- interest certificate issued by a contacting authority.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The only notification requirement is under r.235 of the PRA, which requires that unsuccessful bidders be notified with 30 days after communicating the award to the successful bidder.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

No. An applicant is not given access to a procurement file. However, r.238 of the PR allows for requests of information by bidders. Where any bidder for a contract, on which a decision has been made, makes a written request for information, he or she must be given a written statement that lists the material issues of fact and the broad reasons for the decision, as recorded in tender board's minutes. If a bidder has the low- est price but was passed over, written reasons for rejecting his or her bid must be provided. Any other request for information shall be considered on merit by the contracting authority and all other information shall be kept confidential between the tenderer and the contracting authority.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

It is not very commonplace for disadvantaged bidders to file review applications. This may be because of the lack of knowledge of the procedure or the time and cost involved in following up on a review filed with the Appeals Authority. According to the Appeals Authority report for the year 2016/2017, there were 44 appeals filed and for the year 2017/2018 there have been 30 appeals filed.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

No. The Appeals Authority only has the power to award compensation to a disadvantaged bidder under section 97(5)(f) of the PA for the expenses incurred because of the unlawful actions of the contracting authority. This position was provided in Appeal Case No. 35 of 2013–2014 *M/s Kihelya Auto Tractor Parts Company Limited and Tanzania Ports Authority* before the Public Procurement Appeals Authority.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The Appeals Authority does not have the express power to cancel or terminate a concluded contract. The Appeals Authority has the power to annul, in whole or in part, an unlawful act or decision of the contracting authority. The Appeals Authority has used this power to nullify a tender process in respect of a concluded contract. This had the effect of terminating the agreement that was deemed to have been made illegally.

Legal protection

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Any bidder aggrieved with the decision of a contracting authority (ie, an illegal direct award or a de facto award), may proceed to appeal the decision to the Appeals Authority. If they remain dissatisfied with the decision of the Appeals Authority, they may file a judicial review with the High Court. From the High Court, a further appeal may be lodged with the Court of Appeal.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

There are no fees for filing claims with the Accounting Officer. The fees for filing other claims and applications for appeals or judicial reviews are:

Appeal Board

- Notice of appeal: 50,000 shillings; and
- statement of appeal: 150,000 shillings.

High Court or Court of Appeal (leave to appeal)

- High Court – main registry: 100,000 shillings; and
- High Court – commercial division: 300,000 shillings.

Judicial reviews (leave to apply)

- High Court – main registry: 100,000 shillings;
- High Court – commercial division: 300,000 shillings;
- Court of Appeal – notice of appeal: 8,000 shillings; and
- Court of Appeal – record and memorandum of appeal: 165,000 shillings.

The fees set out above are filing fees alone, exclusive of counsel fees for representation. The filing fees for the High Court and Court of Appeal can vary depending on the volume of documents submitted.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

In July 2017, the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 (UCA) was introduced. This law was enacted in order to protect Tanzania's natural resources by ensuring any agreements made by the government of

the United Republic of Tanzania in relation to the ownership, extraction, exploitation, acquisition and use of natural wealth and resources contain terms that are conscionable. A term that is unconscionable has been defined under section 3 of UCA as being any that is contrary to good conscience, and the enforceability of which jeopardises, or is likely to jeopardise, the interests of the people of the United Republic of Tanzania.

Examples of terms that shall automatically be deemed to be unconscionable have been provided under section 6(2) of the UCA. These include those:

- aiming to restrict the right of the state to exercise full permanent sovereignty over its wealth, natural resources and economic activity;
- restricting the right of the state to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania;
- that are inequitable and onerous to the state;
- that restrict periodic reviews of arrangements or agreements that purport to last for a 'lifetime';
- securing preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor;
- that restrict the right of the state to regulate activities of transnational corporations within the country, and to take measures to ensure that such activities comply with the laws of the land;
- that deprive the people of Tanzania of the economic benefits derived from using natural wealth and resources to the benefit of the country;
- that are by nature empowering transnational corporations to intervene in the internal affairs of Tanzania;
- that are subjecting the state to the jurisdiction of foreign laws and fora;
- that expressly or implicitly are undermining the effectiveness of state measures to protect the environment or the use of environment friendly technology; or
- that aim at doing any other act the effect of which undermines or is injurious to welfare of the Tanzanian people or the nation's economic prosperity.

Under the UCA, all new agreements with the government pertaining to natural resources must be reported to the National Assembly. If the National Assembly is of the view that any of the terms in the reported agreement are unconscionable, it may resolve and advise the government to renegotiate the unconscionable terms.

The National Assembly has the power to also call for review any agreements that had been concluded prior to the UCA coming into effect and resolving for amendments to those agreements. The effect of the UCA is that where there is an agreement with the government pertaining to the ownership, extraction, exploitation, acquisition and use of natural wealth and resources, in addition to compliance with the public procurement laws, such an agreement must also be reported to the National Assembly to be checked to ensure that none of the terms are unconscionable.

* *The content of this chapter is accurate as at April 2018.*

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

For as long as it remains a member of the European Union (EU), the UK has an obligation to implement the EU procurement directives that regulate procurement in the public sector, certain utility sectors, the award of concession contracts and certain defence and security-related contracts as well as the availability of review procedures and remedies for breaches of procurement legislation (see the EU chapter for more details). Following the June 2016 referendum result in favour of the UK leaving the EU, and the UK Government's notification to the European Council of its intention to do so, the UK and the EU have agreed a Withdrawal Agreement. At the time of writing this has yet to be ratified, while the remaining members of the EU have agreed to the UK's requests to delay the UK's exit from the EU – originally set for 29 March 2019. Under these arrangements, the UK will remain an EU member until 31 October 2019 at the latest, so as to allow time for further political discussions to take place in Britain with a view to reaching a majority consensus in the UK parliament that would enable the Withdrawal Agreement's ratification. The UK will leave the EU before 31 October 2019 if the Withdrawal Agreement is ratified by both parties before then. If the Withdrawal Agreement is ratified, this will lead to the EU law continuing to apply to, and in, the UK as it if were still an EU member during a transitional period, which will expire on 31 December 2020 (with the possibility of that period being extended for a maximum of another two years). In the absence of such ratification and any other new agreement between the UK and the remaining EU members, the UK will leave the EU without a withdrawal agreement on 31 October, in which case EU law will cease to apply to, and in, the UK.

Unless otherwise specified, this chapter describes the law as it stands at the time of writing, with the UK still a member of the EU. As noted above, EU law will continue to apply to, and in, the UK for a transitional period following the UK's exit from the EU if the Withdrawal Agreement is ratified before 31 October. In those circumstances, procurement legislation in the UK will continue to apply as described below until the expiry of that period.

As a result of devolution, EU procurement legislation, other than in relation to defence and security, is implemented separately in Scotland. This chapter deals with the set of procurement rules that apply to England, Wales and Northern Ireland, although in general, Scottish procurement legislation is in most material respects substantively similar to the rules that apply to the rest of the UK.

In brief, the relevant legislation is as follows:

- the Public Contracts Regulations (PCR 2015), which applies to public sector procurements;
- the Utilities Contracts Regulations (UCR 2016), which applies to procurements by certain regulated utilities;
- the Concession Contracts Regulations (CCR 2016), which applies to the procurement of works and services concession contracts; and
- the Defence and Security Public Contracts Regulations 2011 (DSPCR 2011), which applies to the procurement of certain defence and security contracts.

Unless otherwise specified, the responses to the questions below relate to the application of the PCR 2015. Separately, unless otherwise specified, references to 'the Regulations' should be construed as references to the four sets of regulations set out above.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

Yes. See question 1 for further details.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

In addition to implementing EU procurement legislation, the PCR 2015 incorporate national provisions that implement the 'Lord Young reforms'. These particular rules apply primarily to procurements that are below the value thresholds that trigger procurement obligations under EU legislation. The primary aim of these national rules is to make public procurement more accessible to SMEs. In seeking to do so, they impose, for example, a general prohibition on selection requirements for below-threshold procurements. Separately, they require information about contract opportunities to be published at a national level (even if a contract is above the relevant value threshold and must be published first in the Official Journal of the European Union (the OJEU)).

Proposed amendments

4 | Are there proposals to change the legislation?

The UK Government has published draft legislation which will amend the procurement rules in the event that the UK leaves the EU without a deal. The draft legislation is essentially concerned with making consequential amendments to the procurement rules so that these can continue to operate effectively once the UK ceases to be an EU member. For example, this provides for a new online portal (the UK e-notification service) on which contract notices will be published and which is intended to replace the current requirement for publication of such notices in the Official Journal of the EU. Other changes include the omission of the provisions that regulate joint procurements with authorities in other EU member states as well as a number of references to member states of the EU and the European Commission. More drastically perhaps, the proposed amendments to the Defence and

Security Public Contracts Regulations 2011 (which regulate the award of certain defence and security related contracts) will remove the automatic access rights which suppliers from the EU, Norway and Iceland currently enjoy in relation to the award of those contracts, as well as the protection and remedies which they currently enjoy under the law.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

This is an issue that has received only limited consideration in the UK courts. In the relatively recent case of *Alstom Transport v Eurostar International Limited* [2012] EWHC 28 (Ch), it was held that on the basis of the specific facts of that case, Eurostar could not be classified as a type of entity that could be subject to procurement regulation.

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The European Commission reviews, and if necessary revises, value thresholds every two years primarily so as to ensure that these continue to correspond to the thresholds established in the WTO's Agreement on Government Procurement. The current thresholds have been in place since 1 January 2018, and will be revised on 1 January 2020.

The PCR 2015 applies when the value of a works contract meets or exceeds £4,551,413. The value threshold for supplies and most services contracts is significantly lower at £181,302 (or £118,133 for most procurements by central government authorities). The value threshold for services contracts for social, educational, cultural and certain other types of services stands at £615,278.

The UCR 2016 applies when the estimated value of a works contract meets or exceeds £4,551,413 or £363,424 for supplies and most services contracts. The value threshold for services contracts for social and certain other types of services stands at £820,370.

The CCR 2016 applies when the estimated value of a works or services contract meets or exceeds £4,551,413. The same value threshold triggers the application of the DSPCR 2011 for the purposes of works contracts. The value threshold for supplies and services contracts under the DSPCR 2011 is £363,424.

All of the above figures are exclusive of VAT.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The Regulations (other than DSPCR 2011) incorporate provisions that regulate the modification of contracts following their award. These prohibit substantial modifications. In brief, a modification will be deemed substantial when it:

- renders a contract materially different in character from the one initially concluded;
- introduces conditions that, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure;
- changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract;
- extends the scope of the contract considerably; and
- involves the replacement of the original contractor (unless safe harbour provisions apply – see below).

At the same time, the Regulations incorporate certain provisions that specify the conditions that, if met, would not deem a modification to constitute a substantive modification and, as such, it would be permissible (generally referred to as the 'safe harbour' provisions).

These rules differ in certain respects, depending on whether the contract is subject to the PCR 2015 or the UCR 2016 or whether a concession contract is awarded by a contracting authority in the exercise of an activity that is not regulated under the UCR 2016. Briefly, modifications would not be deemed to be substantive where they:

- have already been provided for in the original procurement documents in clear, precise and unequivocal review clauses and provided these do not alter the overall nature of the contract;
- relate to the provision of additional requirements by the original contractor that are outside the scope of the original procurement but where a change of contractors is not possible for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting entity and the value of the modification does not exceed 50 per cent of the value of the original contract (this value rule does not apply to utility procurements);
- have become necessary as a result of circumstances that a diligent contracting authority could not foresee, the modification does not alter the overall nature of the contract and the value of the modification does not exceed 50 per cent of the value of the original contract (this value rule does not apply to utility procurements);
- are limited to the replacement of the original contractor with a new one in certain circumstances, including where this is the result of corporate restructuring, and the new contractor meets the original selection criteria and this does not entail other substantial modifications and is not aimed at circumventing the rules;
- are not 'substantial' within the meaning of the legislation; and
- are of a value that is below:
  - the relevant value threshold for the application of the rules; and
  - less than 10 per cent (for services or supplies) or 15 per cent (for works) of the value of the original contract, and provided there is no change to the overall nature of the contract. The value must be calculated cumulatively if there are successive modifications.

The second and third safe harbour provisions also require the publication of a 'modification of contract' notice in the OJEU.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Questions relating to amendments to concluded contracts are now regulated under the legislation, as explained in question 7. These provisions essentially codify and clarify further relevant case law of the Court of Justice of the EU (refer to the EU chapter for further details).

Separately, in England the courts have considered the question of substantive modifications in a number of cases including, *R (on the application of Kim Alexander Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), and *R (Edenred (UK Group) Limited) v HM Treasury and others* [2015] EWHC 90 (QB); [2015] EWCA Civ 326; [2015] UKSC 45.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

The Regulations do not regulate 'pure' privatisations, that is, the type of arrangement where the state chooses to sell off to the private sector an enterprise or other asset that was previously owned wholly or partly by the state. However, certain types of privatisation may constitute contracts that are subject to procurement regulation.

That might be the case, for example, in cases where the state grants the right to exploit state infrastructure to a private sector entity for a certain period of time in exchange for that entity operating the infrastructure under certain conditions, carrying out certain works to upgrade that infrastructure and sharing with the state the profits to be made in operating that infrastructure. Very often, this type of 'build, operate and transfer' arrangement would constitute concession contracts that would be subject to procurement regulation. Separately, outright sales of state infrastructure or other assets might also be subject to procurement regulation to the extent that they involve the buyer, for example, providing certain services to the state for payment or other pecuniary interest.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The setting up of a PPP in itself would not normally raise obligations under the Regulations. However, when the setting up of a PPP involves assigning to the private sector partner or to the PPP a contract for the carrying out of works or the provision of services (or less likely, the provision of supplies) the whole arrangement is likely to be subject to procurement regulation.

That would be the case, for example, when the PPP arrangements on the one hand, and a regulated works, services or supplies requirement on the other, are 'objectively separable' in that they are capable of being awarded separately but the contracting authority chooses to award a single contract instead. In those circumstances, the award of a single contract would be subject to procurement regulation irrespective of the value of the regulated element or the question of whether the regulated element constitutes or not the main subject of the single contract.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

Regulated procurements must be advertised in the OJEU and also nationally via the contracts finder online portal. National publication can only take place following publication of a contract notice in the OJEU. However, if 48 hours elapse after confirmation of the receipt of the notice by the EU Publications Office and the notice has not yet been published, contracting authorities are entitled to publish at a national level.

Contracting authorities must publish a notice on contracts finder within 24 hours of the time when they become entitled to do so.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Yes, there are. For example, the PCR 2015 provides that contracting authorities may only impose selection criteria that relate to the suitability to pursue a professional activity, economic and financial standing, and technical and professional ability. The legislation also sets out detailed rules as to how these issues may be taken into account at the selection stage of a procurement process and the type of evidence that contracting authorities may ask applicants to provide to prove compliance with specific requirements in this regard. In addition, the legislation imposes an over-arching obligation that contracting authorities' requirements at the selection stage should be related and proportionate to the subject matter of the contract.

Separately, the legislation allows, or in certain circumstances requires, contracting authorities to exclude economic operators where they have committed certain offences or find themselves in certain situations. The right or obligation to exclude is limited to a maximum of three years where discretionary grounds for exclusion apply and to five years where the grounds for exclusion are mandatory.

In addition, a supplier who finds itself in one of the circumstances that require or permit disqualification may avoid this if it can demonstrate to the satisfaction of the contracting authority that it has taken sufficient 'self-cleaning' measures (see question 14).

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

In the context of the tender procedures that permit contracting authorities to invite only a minimum number of bidders to participate in a competition, the legislation requires that bidders are shortlisted on the basis of objective and non-discriminatory criteria or rules that must be disclosed at the start of the process.

In terms of the minimum number of bidders that may be shortlisted, the legislation requires the shortlisting of a minimum of five bidders under the 'restricted procedure' and a minimum of three under the 'competitive process with negotiations', the 'competitive dialogue' and the 'innovation partnership'. However, where the number of bidders meeting the selection criteria and minimum levels of ability is below the minimum number set in the legislation, the contracting authority may continue the procedure by inviting the bidders who meet the minimum conditions for participation, provided that there is a sufficient number of qualifying bidders to ensure genuine competition.

Regaining status following exclusion

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The legislation provides that an economic operator who is in one of the situations that permit or require disqualification from the process may avoid disqualification to the extent that it is able to provide sufficient information that demonstrates that it has 'self-cleaned' in that, it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offence or misconduct.

It is for the contracting authority conducting the procedure to determine whether or not the self-cleaning measures taken are sufficient to justify not excluding the economic operator in question. In evaluating the sufficiency of the measures, the contracting authority must take into account the gravity and particular circumstances of the criminal offence

or misconduct. If the contracting authority considers the measures to be insufficient, it must provide the economic operator with a statement of the reasons for that decision.

Separately, the legislation provides for a derogation from mandatory exclusion, where the mandatory exclusion grounds are met, on an exceptional basis, for overriding reasons relating to the public interest.

Finally, past irregularities may only lead to an exclusion within a period of five years from the date of the conviction or three years from the date of the relevant event, depending on the type of irregularity.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The legislation imposes an obligation on regulated authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Similarly, a procurement must not be designed with the intention of excluding it from the scope of procurement legislation or of artificially narrowing competition by favouring or disadvantaging certain economic operators, for example.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

While the legislation does not impose an explicit obligation on contracting authorities to be independent and impartial, not acting in this manner would be inconsistent with the explicit obligation to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner.

Separately, general public law principles require that public bodies act fairly and rationally when making decisions.

Conflicts of interest

17 | How are conflicts of interest dealt with?

The legislation contains specific provisions that require contracting authorities to take appropriate measures to prevent, identify and remedy effectively conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure the equal treatment of all economic operators.

According to the legislation, the concept of 'conflict of interest' must include at least any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest that might be perceived as compromising their impartiality and independence in the context of the procurement procedure.

The legislation defines 'relevant staff members' as members of the contracting authority or a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement or who may influence the outcome of that procedure.

A conflict of interest that cannot be remedied effectively by other, less intrusive, measures constitutes a discretionary ground for exclusion under the PCR 2015 and CCR 2016 and may constitute such ground under the UCR 2016.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The legislation provides that a contracting authority must take 'appropriate' measures to ensure that the participation of a supplier (or an undertaking related to such supplier) who has been involved in the preparation of the procurement procedure will not distort competition.

Such measures must include the communication to all other suppliers participating in the competition of relevant information exchanged in the context of, or resulting from, the involvement of the supplier in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

The supplier in question must only be excluded from the competition where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. In addition, prior to any such exclusion, the supplier in question must be given the opportunity to prove that its involvement in preparing the procurement procedure is not capable of distorting competition.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

There are no official statistics available on this point. However, given that under the PCR 2015, the use of the open and restricted procedures is available to contracting authorities in all circumstances, it must be assumed that these two procedures are used more frequently than the other procurement procedures in the legislation that involve the conduct of negotiations (including dialogue) with bidders but that are only available when certain conditions are met.

As regards a preference between the competitive dialogue procedure and the competitive procedure with negotiation – both of which permit discussions with bidders and iterative bidding, it would appear that the former is more popular than the latter. The reason for this is that, subject to certain conditions, the competitive dialogue procedure permits some form of limited negotiations with the winner of the competition. On the other hand, there can be no negotiations following receipt of final tenders in a competitive procedure with negotiation.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

The Regulations do not contain any provisions that address this issue explicitly nor has this been considered in the UK courts. However, in dealing with these situations contracting authorities must do so in compliance with their obligation to treat suppliers equally and without discrimination and to act in a transparent and proportionate manner.

In Case C–538/07, *Assitur*, the CJEU concluded that an absolute prohibition on the participation in the same tendering procedure by related bidders breaches the principle of proportionality in that it goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency. Accordingly, and as recently confirmed in Case C-531/16, *Specializuotas transportas*, a contracting authority must allow related bidders an opportunity to demonstrate that, in their case, there is no real risk of practices capable of jeopardising transparency and distorting competition between tenderers occurring.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

Under the PCR 2015, the use of the competitive dialogue and the competitive procedure with negotiation are only available when any one of the following conditions applies:

- the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- the requirement includes design or innovative solutions;
- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of the risks attaching to them;
- the technical specifications cannot be established with sufficient precision; or
- in response to an open or restricted procedure, only irregular or unacceptable tenders were submitted.

The use of procedures involving negotiations is not subject to any special conditions under the UCR 2016.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 19.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Under the Regulations, a framework agreement is an agreement between one or more contracting authorities and one or more suppliers, the purpose of which is to establish the terms governing the contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

Framework agreements may be awarded by following any one of the procurement procedures available under the legislation.

Under the PCR 2015, the duration of a framework agreement must be limited to a maximum of four years other than in exceptional and duly justified cases. The rules that apply to framework agreements under the UCR 2016 are more flexible and provide, for example, for a maximum duration of eight years, which again may be exceeded in exceptional and duly justified cases. There are no framework agreement provisions under the CCR 2016.

24 | May a framework agreement with several suppliers be concluded?

Yes, contracting authorities are permitted to set up multi-supplier framework agreements. The PCR 2015 provides specific rules as to how to award 'call-off' contracts under such framework. In brief:

- a contract may be awarded without reopening competition where the framework sets out all the terms governing the provision of the requirements and the objective conditions for determining the framework supplier who will provide the requirement;
- where not all the terms governing the provision of the framework requirements are laid down in the framework agreement, competition must be re-opened among the parties to the framework. The legislation sets out the rules on the basis of which a call off competition must be carried out. This essentially provides for consulting framework bidders (capable of performing the contract) in writing and allowing them sufficient time to submit bids that must be assessed on the basis of the award criteria that had been disclosed in the framework procurement documents; and
- provided this possibility was set out in the framework procurement documents, a contracting authority may also reserve for itself the right to decide on the basis of objective criteria, that have been set out in the framework procurement documents, whether to award a contract without further competition (as per the first option above) or with further competition (as per the second option above).

The rules governing the award of call-off contracts under the UCR 2016 are less specific and essentially provide that contracts based on a framework agreement must be awarded on the basis of objective rules and criteria, which may include reopening the competition among the framework suppliers.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

The Regulations do not contain any express provisions on this issue. However, the view typically taken by contracting authorities is that as long as the consortium in its amended configuration still meets the original selection criteria, and the change does not lead to a distortion of competition, the consortium may be permitted to remain in the process (subject to the rules of the particular competition permitting such changes at the discretion of the contracting authority).

Separately, there is relevant CJEU case law on this issue (see question 25 of the EU chapter).

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The legislation seeks to encourage SME participation by imposing a number of obligations on contracting authorities, some of which go beyond the requirements of EU legislation. These include an obligation to:

- advertise certain procurements on the national online contracts finder portal where the value is over £10,000 for central contracting authorities and £25,000 for sub-central contracting authorities;
- the inclusion of prompt payment provisions requiring valid undisputed invoices to be paid by contracting authorities within 30 days; and
- the abolition of a pre-qualification stage for below EU threshold procurements and a requirement to have regard to guidance issued by the Cabinet Office on qualitative selection for above EU threshold procurements.

Government guidance encourages contracting authorities to divide the contract into lots. However, this is not legally mandatory. At the same time, where contracting authorities decide not to subdivide the procurement into lots, the reasons for this decision must be included in the procurement documents or documented in a report.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Contracting authorities may authorise or required bidders to submit variant bids that are linked to the subject matter of the contract, provided

they indicate their intention to do so at the start of the process. Where the submission of variant bids is permitted, contracting authorities must set out the minimum requirements that variants must meet and any specific requirements for their presentation. There is also an obligation to ensure that the chosen award criteria can be applied equally to variant bids as well as to 'conforming' bids.

28 | Must a contracting authority take variant bids into account?

Where the contracting authority has indicated that variants will be considered, it will be obliged to take into account variant bids that satisfy the minimum requirements set out in the contract notice and that are not excluded. If the contracting authority does not indicate that variants are permitted then such variants cannot be taken into account and evaluated.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The PCR 2015 and UCR 2016 provide that where the information or documentation submitted by a bidder is incomplete or erroneous, contracting authorities may, subject to national implementing legislation requirements, request the bidder concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such request is made in full compliance with the principles of equal treatment and transparency.

The question of what would be the most appropriate action in this kind of circumstance must be determined on a case-by-case basis. For example, where the rules of the competition prohibit bidders from changing the tender specifications or submitting their own standard terms of business, the most appropriate course of action would be disqualification from the competition.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The PCR 2015 and UCR 2016 provide that procuring authorities must award a contract to the bidder who has submitted the most economically advantageous tender, from the point of view of the contracting authority. Which tender is the most economically advantageous must be determined by reference to price or cost, or best price-quality ratio, which must be assessed on the basis of criteria that are linked to the subject matter of the contract in question. These may include, qualitative, environmental or social aspects.

The cost element may also take the form of a fixed price or cost on the basis of which suppliers will compete on quality criteria only.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The legislation does not define an 'abnormally low bid'. Instead, procuring authorities are effectively invited to take a view as to whether the price or cost of a bid appears to be abnormally low in relation to the works, supplies or services that constitute the requirement.

32 | What is the required process for dealing with abnormally low bids?

Where a contracting authority considers a tender to be abnormally low, it requires the relevant bidder to explain the price or costs proposed in the tender. The PCR 2015 and UCR 2016 provide a list as to the type of explanations that may be sought in this context and that may relate, for example, to the economics of the manufacturing process, any exceptionally favourable conditions available to the bidder or the possibility of the bidder having obtained state aid.

The contracting authority must then assess the information provided by consulting the bidder. The contracting authority may only reject the tender where the evidence supplied does not provide an adequate explanation for the proposed low price or costs. If the contracting authority establishes that the tender is abnormally low because it does not comply with certain applicable obligations (for example, environmental, social and labour laws) then it must reject the tender. Where the tender is rejected because the tenderer obtained state aid then the contracting authority will need to inform the Commission.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Review applications are heard by the national courts of the United Kingdom, for example the High Court in England and Wales. Decisions of the first instance review body may be appealed to the relevant appellate court, for example, in England and Wales this would be the Court of Appeal. In matters of public interest or matters involving a point of law of general importance, a further appeal may be permitted to the Supreme Court of the United Kingdom.

Complaints may also be made directly to the European Commission. The European Commission is not obliged to pursue the complaint but if it does, this may ultimately lead to infraction proceedings, under article 258 TFEU, against the UK government.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Not applicable.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The time taken for the proceedings to come to a full hearing will vary significantly depending upon the circumstances. It would not be unusual for it to take between 270–450 days for a claim to reach a full hearing. In urgent cases, the Court may order that the claim be expedited, in which case the period from issue of a claim form to judgment can be less than 90 days.

36 | What are the admissibility requirements?

Any economic operator (essentially any entity having or having had an interest in obtaining a particular contract) from a relevant state is able to bring proceedings under the Regulations if it suffers or risks suffering loss or damage as a result of the contracting authority's breach of the Regulations. Relevant states for these purposes include the member states of the EEA, signatories to the GPA (but only where the GPA applies to the procurement) and signatories to any other applicable bilateral agreement.

Other parties may apply for judicial review of the decision, for example, if they allege bias or serious procedural irregularity in relation to the decision-making process, but they must be able to demonstrate they have a sufficient interest in the outcome of the procurement. This can be a difficult hurdle to overcome.

37 What are the time limits in which applications for review of a procurement decision must be made?

This will depend on the type of remedy being sought. The Regulations require a claim seeking the remedy of 'ineffectiveness' to be made within a period of six months starting from the day following the date of the conclusion of the contact. Where the contracting authority has published a contract award notice in the OJEU, or has informed the relevant economic operator of the conclusion of the contract and provided a summary of the reasons leading to the award of that contract, the period for bringing a claim is shortened to 30 days from the date of publication of the contract award notice, or the date on which notice of the conclusion of the contract (together with a statement of reasons) was provided to the relevant economic operator.

Claims seeking a remedy other than 'ineffectiveness' must be started within 30 days beginning with the date on which the claimant first knew or ought to have known that grounds for starting the proceedings had arisen. The Court has the power to extend this period to up to three months where it considers that there is a good reason for doing so.

Suspensive effect

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Issuing a claim challenging the decision of a contracting authority triggers an automatic suspension that has the effect of preventing the conclusion of the relevant contract provided the contracting authority has become aware that a claim has been issued and the relevant contract has not already been entered into.

The contracting authority can apply to the Court to lift this suspension. When considering whether to lift an automatic suspension, thereby allowing the contracting authority to continue to conclude the contract, the Court will consider whether the claim raises a serious issue to be tried, whether damages would be an adequate remedy for the claimant, and whether the balance of convenience favours maintaining or lifting the suspension. In essence, the Court is considering whether it is just in all the circumstances to confine a claimant to a claim in damages. In England, the courts have recently considered the question of the adequacy of damages in the context of *Lancashire Care NHS Foundation Trust and Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 TCC.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

While there are no official statistics available as to the percentage of applications to lift the automatic suspension that are successful, it appears that overall a clear majority of such applications are, in fact, successful.

Notification of unsuccessful bidders

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Prior to the conclusion of the contract, the contracting authority must notify each candidate and tenderer of its decision to award the contract. The notice must contain information in relation to the criteria, the reasons for the decision (including characteristics and relative advantages of the successful tenderer and the scores awarded to the recipient and the successful tenderer) and the name of the tenderer to be awarded the contract. This information must be provided at least 10 days before the contract is concluded, assuming the information is provided by electronic means. If the information is not provided by electronic means, the contracting authority must wait at least 15 days before concluding the contract.

Access to procurement file

41 Is access to the procurement file granted to an applicant?

There are no express provisions in the Regulations on this point. Claimants may request early disclosure of relevant documents or make an application to the Court seeking an order requiring the disclosure of such documents. Courts are likely to require the early disclosure of key documents relevant to a claimant's complaint at an early stage in proceedings, subject to issues of proportionality. The recent High Court decision in *Bombardier Transportation UK Limited v Merseytravel* [2017] EWHC 726 (TCC) demonstrated the willingness of the UK courts to order the disclosure of documents that would allow an unsuccessful tenderer to investigate the contracting authority's comparative treatment of its tender, either to confirm existing unequal treatment concerns, or to establish new freestanding allegations.

Courts are also aware of the commercial sensitivity of many documents relevant to procurement processes and will, where relevant, order that disclosure is made subject to agreed confidentiality undertakings. Also relevant in this context is the fact that in July 2017, the Technology and Construction Court published a guidance note on procedures for public procurement cases. Among other things, this encourages contracting authorities to provide their key decision-making materials at a very early stage of proceedings or during any pre-action correspondence.

Disadvantaged bidders

42 Is it customary for disadvantaged bidders to file review applications?

No it is not. Although the practice of making claims seeking reviews of public procurement processes has become more prevalent in recent years, the number of such claims continues to be small in comparison with most other EU jurisdictions. It is often said that these low numbers do not reveal the true level of challenges to UK contract award procedures as a number of claims are settled out of court.

Violations of procurement law

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Economic operators who have suffered loss or damages as a consequence of a breach of procurement law may be awarded damages to compensate them for such loss. In order to recover damages, the relevant economic operator must establish that there has been a breach of the Regulations and that the breach has caused the economic operator to suffer loss or damage. The recent Supreme Court decision in *Nuclear Decommissioning Authority v Energy Solutions EU Ltd* clarifies that damages will only be available if the relevant breach of the Regulations is 'sufficiently serious'. For these purposes, a breach will be sufficiently serious if it has an impact on the outcome of the procurement.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

The Regulations set out the limited circumstances in which a Court may make a declaration of ineffectiveness in relation to a concluded contract. These include where:

- the contract was awarded without the prior publication of a contract notice, in circumstances where one was required; and
- there has been a breach of the automatic suspension or standstill obligations depriving the claimant of the possibility to pursue pre-contractual remedies and this is combined with an infringement of the Regulations that has affected the chances of the claimant to obtain the contract.

Where a declaration of ineffectiveness is granted, the contract is prospectively ineffective as from the time the declaration is made. Accordingly, it will be illegal to perform any obligations that are outstanding at the time when the declaration is made. This remedy is rarely granted, with only two examples of such a declaration being granted in the UK at the time of writing, the most recent being by the English Court of Appeal in the case of *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532 (a decision relating to a land development agreement between a local authority and a developer).

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Awarding contracts covered by the Regulations without any procurement procedure would constitute a breach of the Regulations (unless an exemption permitting direct negotiations applies) and would entitle affected economic operators, subject to limitation periods, to seek a declaration of ineffectiveness or damages.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

For a claim that includes a claim for damages, the cost of issuing a claim form will depend on the amount of damages being claimed. For any claim over £200,000 the cost of issuing a claim form will be the maximum £10,000. An additional fee of £528 will be payable if the claim includes a claim for non-monetary relief, such as a declaration of ineffectiveness or an order setting aside a decision to award a contract. Additional fees will be payable at various stages of the claim, such as if an application is made for an interim order for specific disclosure or the matter proceeds to a hearing. Total fees, including legal fees, will vary depending upon the nature and complexity of the issues in dispute. Fees ranging from tens to hundreds of thousands of pounds are not uncommon. To the extent that a claimant is successful, it may be able to recover a proportion of its fees from the contracting authority. Typically a successful claimant would hope to recover in the region of 65 per cent of its total costs from the defendant. If the claimant is unsuccessful, it would usually expect to pay a similar proportion of the defendant's total costs.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The Faraday Court of Appeal judgment (see question 44) has clarified further the law as regards the circumstances in which land deals, which are in principle exempt from procurement legislation, may trigger obligations under the procurement rules. More specifically, in order to benefit from the land exemption, agreements for the transfer of interests of land should not provide (including as a result of the possible exercise of an option) for directly enforceable obligations to develop the land in accordance with plans approved by the relevant contracting authority. If such possibility forms part of the arrangements agreed, the arrangements would constitute a mixed contract, consisting partly of obligations for the carrying out of works or services, which are, in principle, subject to procurement regulation, and the grant of rights relating to land, which are not. In line with the legal principles that regulate mixed contracts, whether the whole arrangement would then be subject to procurement regulation would depend on whether the two elements of the transaction are objectively separable. If they are objectively separable, but the authority, nevertheless, wishes to combine the two elements, the entire transaction would, in principle, be governed by the relevant procurement regulations. If the obligations to develop the land are not objectively separable from the grant of the interest in land, whether or not procurement regulations would apply would be determined by reference to the 'main subject matter of the contract'.

The government has published draft amending legislation that will come into effect in the event that the UK leaves the EU without a deal. These amendments are essentially concerned with ensuring that the procurement legislation continues to operate, despite the UK no longer being an EU member. In the longer term, the extent to which post-Brexit procurement legislation might be amended substantively will depend partly on the type of trade agreement that the UK and the EU ultimately reach. Relevant in this context is also the fact that the UK's application to accede to the WTO's plurilateral Agreement on Government Procurement (GPA) as an individual party, once the country exits the EU, has now been accepted by the other parties to that agreement. Accordingly, any future amendments to domestic procurement legislation will also need to remain consistent with GPA obligations.

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LEGISLATIVE FRAMEWORK

Relevant legislation

1 What is the relevant legislation regulating the award of public contracts?

There is a broad array of federal statutes that pertain in whole or in part to public procurement. These include, in relevant part:

- the Armed Services Procurement Act of 1947 (10 USC Sections 2301–2314, see discussion below);
- the Berry Amendment (10 USC Section 2533(a); Department of Defense requirement relating to procurement of American products);
- the Buy American Act (41 USC Sections 8301–8305; subject to exceptions, restricts the purchase of supplies that are not domestic end products for use within the United States and generally creates preference for public procurement of US-made products);
- the Clinger–Cohen Act (Federal Acquisition Reform Act of 1996) (40 USC 1401; designed to improve the way the federal government acquires, uses and disposes information technology);
- the Competition in Contracting Act (codified in various provisions of 10, 31, 40, and 41 USC; see discussion below);
- the Contract Disputes Act of 1978 (41 USC Sections 1701-1709; establishes the procedures for handling claims related to federal contracts);
- the Federal Acquisition Streamlining Act of 1994 (codified in various provisions of 10 and 41 USC; implemented the 'best value' standard, replacing the 'lowest bid' standard);
- the Federal Property and Administrative Service Act of 1949 (40 USC Sections 471-514 and 41 USC Sections 251-260; see discussion below);
- the False Claims Act (31 USC Sections 3729 – 3733; establishes liability and imposes treble damages on persons who knowingly submit false claims to the federal government);
- the Small Business Act (as amended, 15 USC ch 14A; requiring that a fair percentage of work performed under government contracts be set aside for small businesses);
- the Truth in Negotiations Act (10 USC Section 2306a; providing full and fair disclosure by contractors in the conduct of negotiations with the government, including the requirement that contractors submit certified cost and pricing data for larger contracts); and
- the Tucker Act (28 USC Sections 1346(a) and 1491; waiving sovereign immunity so as to allow claims by private parties with respect to government contracts to be brought against the federal government).

In general, the Armed Services Procurement Act of 1947 (ASPA), the Federal Property and Administrative Services Act of 1949 (FPASA), and the Competition in Contracting Act (CICA), together form the three statutory foundations of government contract law and the federal acquisition process:

- the ASPA governs the acquisition of all property (except land), construction, and services by defence agencies;
- the FPASA governs similar civilian agency acquisitions; and
- the CICA, applicable to both defence and civilian acquisitions, requires federal agencies to seek and obtain 'full and open competition' wherever possible in the contract award process; only in seven circumstances may a federal agency award a contract using a sole source contractor or 'other than full and open competition'.

Various other federal statutes, including those noted above, address specific issues related to public procurement but are not comprehensive in nature.

Moreover, every year new procurement-related provisions typically are added in annual authorisation and appropriations legislation and enacted into law (eg, the defence authorisation and appropriations statutes). These provisions often deal with topical issues that arise from time to time. In some years the provisions relate to stronger oversight of public federal procurement or higher penalties for violations; in other years, provisions might relate to restrictions on foreign-produced products. The Berry Amendment, noted above, as well as the Clinger–Cohen Act, were promulgated or amended through annual authorisation legislation.

Fortunately, private parties seeking to do business with the federal government do not have to examine each applicable law because federal laws related to public procurement have been implemented in the Federal Acquisition Regulation (FAR), codified in Title 48 of the Code of Federal Regulations. The FAR sets forth, in comprehensive fashion, the uniform policies and procedures for acquisitions by all federal departments and agencies, and implements or addresses nearly every procurement-related statute or executive policy. In doing so, the FAR reaches every stage of the acquisition process.

Sector-specific legislation

2 Is there any sector-specific procurement legislation supplementing the general regime?

There has, from time to time, been specific legislation enacted to address procurement issues in particular sectors or with respect to particular types of contracts. For example, the Weapons Systems Acquisition Reform Act of 2009 governs how the Department of Defense procures major weapons systems. Additionally, numerous federal departments and agencies have adopted agency-specific supplements to the FAR, which may not conflict with or supersede relevant FAR provisions. One exception is the US Post Office, which has its own implementing rules, known as the Postal Service's Supplying Principles and Practices.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Not applicable.

Proposed amendments

4 | Are there proposals to change the legislation?

Although there are no major proposals to change the overall legal framework for government procurement, as noted, virtually every year changes are made in federal laws or the FAR. For example, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration have proposed an amendment to the FAR regarding commercial contract clause requirements and flow-down (see FAR Case 2018-019). In addition, in 2018, the FAR Council, which manages, coordinates, controls, and monitors the maintenance and issuance of changes in the FAR, issued proposed rules to amend the FAR to implement regulatory changes made by the Small Business Administration which revised and standardised the limitations on subcontracting, as well as proposed rules to enhance whistle-blower protection for contractor employees.

The FAR council also recently finalised a rule to clarify the prohibition on the charging of employees recruitment fees, to further implement the FAR policy on combating trafficking in persons. See Federal Register Volume 83, Number 244, pages 65,466-65,478. Under the rule, contractors and subcontractors (and employees and agents of the foregoing) are prohibited from charging employees recruitment fees.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

By its terms, the FAR only applies to procurement transactions entered into by 'Executive Agencies' of the federal government (FAR Subpart 2.101), a term that, as defined therein, does not apply to 'mixed ownership Government Corporations'. Such mixed ownership Government Corporations are defined in the Government Corporation Control Act, 31 USC Section 9101, to mean:

- the Central Bank for Cooperatives;
- the Federal Deposit Insurance Corporation;
- the Federal Home Loan Banks;
- the Federal Intermediate Credit Banks;
- the Federal Land Banks;
- the National Credit Union Administration Central Liquidity Facility;
- the Regional Banks for Cooperatives;
- the Rural Telephone Bank;
- the Financing Corporation;
- the Resolution Trust Corporation; and
- the Resolution Funding Corporation.

Moreover, the FAR also expressly exempts certain types of transactions. Specifically, by its terms, the FAR applies to 'all acquisitions as defined in part 2 of the FAR, except where expressly excluded' (FAR Subpart 1.104 (Applicability)). The express exemptions from the FAR for types of transactions are for 'grants and cooperative agreements covered by 31 USC Section 6301, et seq' (FAR Subpart 2.101 (Definition of 'Contract')).

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

While the FAR does not entirely exempt contracts on the basis of value, it does create certain streamlined types of contracting rules, with less burdensome procurement obligations for contractors, on contracts below certain threshold values. This is known as Simplified Acquisition Procedures (FAR Subpart 13). Generally, the threshold limit for Simplified Acquisition Procedures is US$150,000 (FAR Subpart 2.1). Threshold exceptions exist, for example, for contracts relating to defence against nuclear, chemical, or biological attack (US$750,000 in the US; US$1.5 million outside the US) and peacekeeping operations (US$300,000) (FAR Subpart 2.1).

Specific limits are also set for 'micro-purchases', which are defined as 'an acquisition of supplies or services using simplified acquisition procedures, the aggregate of which does not exceed the micro-purchase threshold of US$3,500', with limited exceptions (FAR Subpart 2.1).

The treatment of commercial item contracts under commercial law

Under the FAR, the federal government may procure commercial items from contractors on terms that are similar to non-government commercial contracts. Commercial items are defined broadly to include items of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and services of a type offered and sold competitively in the commercial marketplace, as well as the combination of items and services that are customarily combined and sold in combination to the general public (see FAR Subpart 2.101 (Definition of 'commercial item')). As a result of the Federal Acquisition Streamlining Act of 1994 (FASA), the FAR has been revised to contain policies and procedures applicable only to commercial items, and to identify certain exemptions from government contracting laws and regulations for commercial item contracts. For example, see FAR Parts 13–15 for policies and procedures on solicitation, evaluation and award for acquisition of commercial items that more closely resemble the commercial items.

There are certain requirements that commercial item contracts must meet in order to receive preferential treatment under the FAR. For example, the contract must exceed the micro-purchase threshold and the acquisition of commercial items must not be directly from another agency of the federal government (see FAR Subpart 12.102). In addition, the commercial item contract must either be a firm-fixed-price contract or fixed-price contracts with economic price adjustment. A time-and-materials contract or labour-hour contract may be used in certain limited circumstances (see FAR Subpart 12.207).

Despite the preferential treatment afforded to them, commercial item contracts (and subcontracts) are required to incorporate a small set of FAR provisions in their contracts. Many federal agencies also have their own FAR supplement provisions. For example, the Department of Defense FAR Supplement (DFARS) applies to the acquisition of commercial items by the Department of Defense. In addition, there are a limited number of unique requirements that apply to all government contracts, regardless of whether the contract is for commercial items, including, among others, Equal Employment Opportunity contract clauses, the Anti-Kickback Act of 1986, and prohibitions on human trafficking.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Amendments are permitted in certain circumstances enumerated below, but generally (and subject to limited exceptions) contracts cannot

be extended past their specified terms or scope of work without new competitive bidding procedures (see FAR Subpart 6.1).

- Contract modifications (changes). Contract modifications (frequently referred to as 'mods') are common actions under the FAR and can relate to contract cost, delivery schedule, fees, terms and conditions, and personnel. Changing technologies, funding and mission requirements may create the need for changes to a contract. Whenever an executive agency wants something different than what was envisioned for the original contract or something unforeseen occurs, a modification may become necessary (see generally FAR Subpart 43).
- Commercial item contracts. When using FAR Part 12 procedures for the acquisition of commercial items, the government does not have authority to unilaterally require changes. The commercial item clause at FAR Subpart 52.212–4, contract terms and conditions – commercial items, requires that both parties agree to changes in the terms and conditions of a contract. When this occurs, a supplemental agreement has been created.
- Non-commercial item contracts. The changes clause (see FAR Subpart 52.243) is the cornerstone of the government's ability to modify a contract for non-commercial items. It provides the government with authority that is unmatched in private-sector contracting. This clause allows the government to unilaterally make changes in the contract without requiring the contractor's concurrence.
- Contracts for non-commercial items may be modified by use of a change order, which is a unilateral order signed by the contracting officer directing the contractor to make changes using the authority of the various changes clauses. If the change order causes an increase or decrease in the cost of, or time required for, performance of any part of the work under the contract, the contracting officer must make an equitable adjustment in the contract price, the delivery schedule, or both.
- Where a contracting officer requires an increase or decrease in the scope of work beyond what is contained in the statement of work, which will result in a change to the cost of the contract, the modification is considered 'bilateral' and must be agreed to and signed by both the government and the contractor.
- Contract extensions. Generally, subject to limited exceptions contracts issued pursuant to the FAR by Executive Agencies, at the time of solicitation, can be awarded with periods for extension (see FAR Subpart 17.2). It is very common to see FAR-based contracts issued with such built-in extensions (eg, with a base period and multiple additional option periods that the Executive Agency, at its option, can execute). In addition, contracts often include provisions (eg, FAR Subpart 52.217–8) that allow the Executive Agency to unilaterally extend the contract for short periods, up to six months, at prevailing rates under the contract even if option periods in the contracts have not been executed.
- Extensions of contracts beyond their terms (ie, beyond options set forth therein) or beyond the periods allowed under contract clauses for temporary extensions would generally be viewed as sole source contracts (ie, an exception to the competition requirement) and as such would need to be justified (ie, as if it were a new contract).

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Yes. A leading case on this question is *AT&T Communications, Inc v Wiltel, Inc*, 1 F3d 1201 (Fed Cir 1992), where the court looked at whether the modification of a contract was so substantial as to change the nature of the contract, thus requiring a new competition. There, the Federal Circuit held that the scope of the parties' intent should be determined by looking at the original solicitation and original contract, as other evidence provided by the offeror could be self-serving.

Privatisation

9 In which circumstances do privatisations require a procurement procedure?

In general, under article IV, section 3, clause 2 of the US Constitution, the federal government can only dispose of government-owned property of any type if authorised by Congress. The primary statute authorising such sales is the FPASA, 40 USC 10, which authorises the sales of 'excess' and 'surplus property' (ie, property not required to meet the needs or responsibilities of the government). The FPASA then specifies that such property, if not needed by some other US government department or agency, can be disposed of by sales, exchange, lease, permit etc. Generally, subject to certain exceptions, the law provides that such disposals may be made only after public advertisement of the solicitation.

Sales of assets not surplus or excess are governed under other statutes enacted for the privatisation of specific asset classes and typically require competitive bidding. See, for example, the Energy Policy Act of 1992, Pub. L. 102–486 (authorising the sales of US nuclear enrichment capabilities for private use through an initial public offering).

Moreover, inherently governmental functions may not be privatised (see FAR Subpart 7.5). Individual agencies make determinations as to whether functions are inherently governmental, and the Office of Management and Budget may review those determinations.

Public-private partnership

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

PPPs are uncommon for federal contracts and there are no express rules regarding procurement procedures for them.

ADVERTISEMENT AND SELECTION

Publications

11 In which publications must regulated procurement contracts be advertised?

The contracting officer is required to advertise contracts with a value in excess of US$25,000 through the government-wide point of entry (GPE). This can be found on the federal government's website FedBizOpps (FBO at fedbizopps.gov) (FAR Subpart 5.102). As an alternative, the Secretary of Commerce will publish the notice for solicitation in the *Commerce Business Daily* 41 USC Section 416. For sealed bidding, the agency publicises the Invitation for Bid (IFB) through display in a public place, announcement in newspapers or trade journals, publication in the federal government's *Commerce Business Daily*, and by mailing the IFB to those contractors on the agency's solicitation mailing list.

Participation criteria

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

When evaluating whether an interested party is qualified, the contracting officer will evaluate a number of factors, including the party's financial resources, past performance on contracts, ability to comply with the terms of the contract (including the skills, systems of production, and

safety programmes necessary), record of ethical behaviour and experience (FAR Subpart 9.104). The FAR affords the contracting officer considerable discretion in shaping the procurement – with respect to the choice of procurement method, deadlines (which are not set by law or regulation but set in the actual solicitation) and the criteria for the acquisition.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Yes. In general, the FAR requires competitive bidding subject to certain limited exceptions that allow sole source procurements, restrictions on types of bidders or less than full and open competition in limited circumstances (FAR Subparts 6.301, 6.302). Moreover, when bids are solicited on a competitive basis through the sealed bidding process, the use of unnecessarily restrictive specifications that might unduly limit the number of bidders is prohibited (FAR Subpart 14.101(a)). Under the competitive negotiation process (see question 21), once proposals are received, the contracting officer may limit the number of bidders based on the contractors the officer deems competitive (see FAR Subpart 15).

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Contractors barred or suspended on the basis of criminal convictions or other misconduct will typically need to wait until the end of the term of the debarment (typically three years, and up to five years for violation of the Drug Free Workplace Act) or suspension (typically between 12 and 18 months, unless legal proceedings have been initiated within that time period). The suspending or debarring official has authority to terminate the debarment or suspension. For example, a contractor may have the debarment or suspension shortened or revoked if it changes its ownership or management, eliminates the causes for which the penalty was imposed, or has the civil or criminal judgment that led to the penalty reversed (FAR Subpart 9.4–4). Additionally, while there is no 'self-cleaning' concept per se in the FAR, it is possible for an official of an agency, in its discretion, to enter into an administrative agreement in lieu of debarment with a contractor, which imposes special compliance obligations on the contractor but allows it to nevertheless bid and perform going forward.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes. Both the relevant federal statutes and the FAR embody these principles.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes. The FAR requires that all 'contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same' (FAR Subpart 1.102–2).

Conflicts of interest

17 | How are conflicts of interest dealt with?

The most developed area of conflict of interest law is under the FAR, which has rules governing 'organizational conflicts of interest' (OCI). Thus, to the extent that the agreement or arrangement being crafted falls under the FAR (ie, because it is an 'acquisition' covered by the FAR), the OCI rules would be applicable. The OCI rules generally pertain to situations where, because of other activities or relationships, an organisation is unable to render impartial assistance or advice to the government; an organisation's objectivity in performing government contract work is or might otherwise be impaired; or an organisation has an unfair informational advantage (FAR Subpart 2.101). Significantly, under the FAR, there are few bright lines and it is left to each contracting officer to determine whether a 'significant' OCI exists

In general, the following situations may arise:

- impaired objectivity – a firm's advisory work for a government agency under a government contract could entail evaluating its own work or that of an affiliate or competitor, either through an evaluation of proposals or an assessment of performance (FAR Subpart 9.505–3);
- unequal access to information – a firm has access to non-public information as part of its performance of advisory services for the government, and that information might provide the firm a competitive advantage in a future competition; these are also known as 'unfair competitive advantage' OCIs (FAR Subpart 9.505–4); and
- biased ground rules – a firm, as part of its performance of advisory services for a government agency, has helped to set the ground rules for a government contract by, for example, writing the statement of work or defining the specifications. The firm that drafted the ground rules might have a competitive advantage in a future competition governed by those rules (FAR Subparts 9.505–1 and 9.505–2).

If a significant OCI exists, it is the responsibility of the contracting officer to 'avoid, neutralize, or mitigate significant potential conflicts before contract award' (FAR Subpart 9.504(a)). A contracting officer's failure to adequately address OCIs risks unravelling an award in a bid protest. For example, the GAO sustained a recent bid protest where the US Department of Health and Human Services failed to meaningfully assess an OCI that was identified by an awardee at the beginning of the procurement process (*AdvanceMed Corp.*, B-415062 (17 November 2017). In the opinion, the GAO noted that it will not substitute its judgment for that of the agency, provided the agency meaningfully considers whether a significant conflict of interest exists. As a practical matter, all contractors should actively search for potential OCIs, disclose them to the contracting officer, and ensure that the contracting officer considers the OCI and adequately documents any decision regarding resolution of the OCI.

In general, case law will allow the use of organisational 'firewalls' and similar measures to mitigate OCIs involving 'unequal access to information', but not OCIs based on bias or impaired objectivity. In practice, however, since contracting officers have broad discretion, some do permit 'mitigations' to be used to address such situations on a case-by-case basis. Thus, whether an OCI exists is very much a case-by-case, fact-specific matter.

If the contracting officer finds that it is in the best interest of the US to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted. The waiver request and decision shall be included in the contract file (FAR Subpart 9.504). The grant of a waiver in one contract, however, is not a guarantee that OCIs identified in a subsequent contract will be deemed by the contracting officer, or a losing bidder, to be sufficiently 'neutralized or mitigated' (*AdvanceMed Corp.*) ('[T]o the extent that the agency may have considered a similar type of

conflict in the award of a task order in a different jurisdiction does not discharge its obligation to meaningfully consider whether a significant conflict of interest exists for this specific procurement.').

Bidder involvement in preparation

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Contracting officers are not permitted to knowingly award a contract to a government employee or a company owned or substantially owned or controlled by a government employee, except in cases where there is a 'most compelling reason to do so, such as when the government's needs cannot reasonably be otherwise met' (FAR Subpart 3.603).

In the event that a bidder is involved in drafting government tender documents or shaping government specifications, such circumstances would, depending on the facts and circumstances, give rise to an organisational conflict of interest in the nature of bias (where the potential bidder helped shape the ground rules in its favour) or unequal access to information (ie, that it would have an informational competitive advantage in bidding). Whether an OCI arises is a fact-specific inquiry (see question 17.)

Procedure

19 What is the prevailing type of procurement procedure used by contracting authorities?

The FAR establishes several basic methods of contracting. The three most common are sealed bidding, competitive negotiation and simplified procedures.

Separate bids in one procedure

20 Can related bidders submit separate bids in one procurement procedure?

There is no general bar on such bids, but certain restrictions do apply. Generally, under the FAR, related bidders can submit bids, and contracting officers can accept them, unless they determine that it is contrary to the government's interests or would somehow unfairly advantage the affiliated offerors. Moreover, in fixed-price contracts, each individual bidder must submit a certificate of independent price determination, stating that the prices in the offer were set independently, without, for purposes of restricting competition, consultation, communication or agreement with any other bidder or competitor (FAR Subpart 52.203–2). The certificate must also state that each offeror did not consult, communicate or agree with another offeror for purposes of restricting competition, regarding the intention to submit the offer or the methods or factors used to calculate the price in the offer. Additionally, potential bidders need to evaluate such bids on a case-by-case basis, taking into account all relevant facts and circumstances, pursuant to FAR rules on organisational conflict of interest and antitrust rules concerning bid rigging.

Negotiations with bidders

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

In the competitive negotiation process, the contracting officer may engage in discussions with offerors and, in evaluating proposals, may also consider non-cost factors (such as managerial experience, technical approach or past performance). The negotiating process begins when the officer issues a request for proposals (RFP). An RFP must, at a minimum, state the agency's need, anticipated terms and conditions of the contract, information the contractor must include in the proposal, and factors and significant subfactors that the agency will consider in evaluating the proposals and awarding the contract – which vary from one contract to another. All interested parties may then submit proposals. Evaluation of the proposals includes an assessment of the proposals' relative qualifications, based upon factors and subfactors specified in the solicitation.

Typically, in practice, the contracting officer will evaluate the offeror's cost or price proposal; the offeror's past performance on government and commercial contracts; the offeror's technical approach; and any other identified factors for award (FAR Subpart 15.305). During the evaluation period, the contracting officer and source selection team may communicate with the offerors to clarify ambiguities in the proposal, other concerns, or the offeror's past performance (FAR Subpart 15.306). The contracting officer may award a negotiated contract without any further negotiations (ie, 'discussions'). However, if the contracting officer intends to conduct discussions, he or she will preliminarily identify the offerors that fall within the 'competitive range'. The competitive range is comprised of all the most highly rated proposals (FAR Subpart 15.306(c)). To assist in determining the competitive range, the contracting officer may engage in limited communications with all offerors. After establishing the competitive range, the contracting officer will notify each excluded offeror and proceed to conduct 'discussions' with the remaining offerors.

Under the FAR, the 'primary objective' of discussions is to maximise the agency's ability 'to obtain best value, based on the requirement and the evaluation factors set forth in the evaluation' (FAR Subpart 15.306(d)(2)). During the discussions, the contracting officer must indicate to each offeror the significant weaknesses, deficiencies or other aspects of the proposal that could be altered to enhance the proposal's potential for award (FAR Subpart 15.306(d)(3)). The scope and extent of these discussions are generally left to the judgment of the contracting officer. However, the contracting officer must not engage in conduct that favors one offeror over another; reveal an offeror's technical solution; reveal an offeror's price without permission; disclose the names of persons providing information about the offeror's past performance; or furnish sensitive source selection information (FAR Subpart 15.306(e)). After discussions begin, the contracting officer may eliminate from consideration any offeror originally in the competitive range but no longer considered among the most highly rated offerors (FAR Subpart 15.306(d)(5)). Further, the contracting officer may request that offerors revise their proposals to clarify any compromises reached during negotiation (FAR Subpart 15.306(d)(3)). At the conclusion of the discussions, the contracting officer will request a final proposal revision from each offeror still in the competitive range. Finally, the contracting officer will undertake a comparative analysis of the final offers in accordance with the evaluation procedures set forth in the RFP, and select the offeror whose proposal is most advantageous to the government. The documented award decision should contain an analysis of the trade-offs accomplished by negotiations and the reasons why the awardee's proposal represents the best value to the agency (FAR Subpart 15.308).

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The competitive negotiation process is the most frequently used procurement procedure. The other procedures, such as sealed bidding, do not permit negotiations with bidders.

Framework agreements

23 What are the requirements for the conclusion of a framework agreement?

Under the FAR, federal departments and agencies often issue broad omnibus contracts that allow purchases to be made under them from time to time through the term of the agreement. While such 'indefinite

delivery contracts' come in varying forms, the FAR contains a preference for making awards to multiple contractors for such contracts (ie, to maintain competition). The available forms include 'definite-quantity' contracts (for delivery of a definite quantity of supplies or services for a fixed period); requirements contracts (for filling all purchase requirements during a specified period); and 'indefinite quantity' contracts that establish stated maximum and minimum quantities for a fixed period (see FAR Subpart 16.5 generally). The indefinite delivery contract (IDIQs) is regularly used by US departments and agencies. The FAR also establishes other mechanisms such as basic agreements and ordering agreements that establish a range of contractual clauses that would apply in subsequent contracts between the parties, but do not necessarily establish minimum or maximum quantities to be purchased (see FAR Subpart 16.701). These include blanket purchase agreements (BPAs) (see also FAR Subpart 13.303).

24 | May a framework agreement with several suppliers be concluded?

Yes. In general, the FAR (Subpart 16.5) affords executive agencies the authority to, and states a preference for, the execution of a number of indefinite delivery contracts. In such cases, there typically can be further competition among contract holders through task orders under terms specified in the overall contract. Pursuant to this authority, executive agencies have created a range of varied, flexible contract vehicles for such situations where the precise amounts to be ordered are not known in advance, and task orders are issued over a number of years to specifically procure precise amounts. In some cases, agencies (such as the General Services Administration) establish a 'supply schedule' of goods, from which all executive agencies can order.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

This depends on the nature of the bidding consortium and the relative role of the member of the consortium to some extent. Contractor teaming arrangements can take various forms, with an actual joint venture being formed (that would serve as the bidder), or as one participant taking a lead role, with the other participant or participants acting as subcontractors.

In general, one bidder cannot be substituted for the party that submitted the bid once a bid is submitted. If the bidder is a joint venture, in general, all members must remain on the team or the bidder can potentially be disqualified. The situation is different with respect to subcontractors. Contractors typically enter into teaming arrangements with prospective partners or subcontractors prior to submitting an offer, but also may enter into such arrangements during the bidding process or after submission of an offer, as long as the companies fully disclose their relationship and arrangement (FAR Subpart 9.6). If a subcontractor is not expressly included in the bid, their substitution should not be problematic. If a subcontract was included in the bid, the situation is more complex. This can affect the evaluation of the bid (ie, as one subcontractor's past performance will be different from another's) and also raises questions of contractual liability between the parties under whatever teaming arrangements were agreed upon. Regardless of whether the arrangement is made prior to the submission of the offer or after the submission (but prior to the award), the arrangement must be identified and the relationship between the contractors fully disclosed (FAR Subpart 9.603).

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Under the Small Business Act and regulations promulgated thereunder by the Small Business Administration (SBA) and the FAR (Subpart 19), executive agencies are required to foster the participation of small business concerns as prime contractors and subcontractors in contracting opportunities. To this end, executive agencies are required to 'set aside' certain contracts for small and disadvantaged businesses, and contractors awarded other contracts are required in most cases to establish a small business plan designed to facilitate subcontract awards to small businesses. Contracting officers can partially set aside contracts where the requirements for full set asides are not met. In addition, there are rules within FAR Subpart 19 allowing for the division of contracts into lots.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Solicitations may allow for alternative or variant bids (FAR Subpart 15.203(a)(2)). In the case of an alternative bid submission, the evaluation approach must consider the potential impact of the variant bids.

28 | Must a contracting authority take variant bids into account?

No, but they are permitted to do so. See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Under the sealed bid process, modifications shall result in a rejection of a bid unless the invitation for bids expressly allowed alternative bids.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The FAR affords the contracting officer considerable discretion in shaping the procurement with respect to the choice of the procurement method, deadlines, and specific criteria. Under FAR Subpart 15.304, however, the contracting officer is required, subject to limited exceptions, to consider price or cost; the 'quality' of the product or service being offered (including, among other things, technical performance and compliance with solicitation requirements); the past performance of the party; and compliance with socioeconomic goals such as small business participation (including past performance and the specific plan for the bid being submitted).

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

Under the FAR, as interpreted by the courts, contracting officers apply the concepts of 'cost realism' and 'price realism' in evaluating contract proposals, and protestors often challenge awards on these bases. Specifically, under cost realism, contracting officers independently review and evaluate each offeror's proposal 'to determine whether the estimated proposed cost elements are realistic for the work to be

performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal' (FAR Subpart 15.404–1(d)). Similarly, under price realism, a concept not expressly included in the FAR, courts have upheld the right of agencies to determine whether proposed prices are too low or otherwise indicate a misunderstanding of the agency's requirements. Agencies are not required to conduct a price realism analysis unless specified in the solicitation. And, unlike in a cost realism analysis, an agency cannot adjust an offeror's proposed prices for evaluation purposes in a price realism analysis. The nature and extent of a price realism analysis are within an agency's discretion.

32 What is the required process for dealing with abnormally low bids?

See question 31.

REVIEW PROCEEDINGS

Relevant authorities

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

A disappointed bidder may choose between three fora in which to seek the review of an award: the federal agency that made the award; the US General Accounting Office (GAO); or the federal courts (generally, the US Court of Federal Claims). The protestor can challenge a procurement award made by a federal agency on grounds that the award is arbitrary and capricious, constitutes an abuse of discretion, is otherwise not in accordance with the law or is 'without observance of procedure required by law' (5 USC Section 706(2)(A)(D)). In practice, many protests are based on alleged violations of the FAR or the terms and conditions of the solicitation itself, which the FAR requires the contracting officer to follow in making an award. A successful protest can result in reconsideration of the decision to award the contract or in the actual award of the contract to the protester in lieu of the original awardee. Even though a successful protester may not ultimately be awarded the contract, the government agency may have to pay the protester's bid and proposal costs.

In 2018, the GAO received 2,474 bid protests but sustained only 15 per cent of them. Although the success rate of GAO protests is relatively low, US government procuring agencies do with some frequency adopt some type of voluntary corrective action in response to protests, which typically results in the dismissal of the protest and further action by the procuring agency of various types depending on the circumstances. In 2018, for example, the GAO sustained protests or agencies took corrective action in 44 per cent of the total protests received (*GAO Bid Protest Annual Report to Congress for Fiscal Year 2018*, B-158766 (27 November 2018)).

Unfavourable decisions reached by the federal agency or the GAO may be appealed to the US Court of Federal Claims, the results of which may, in turn, be appealed to the US Court of Appeals for the Federal Circuit.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Generally, because the US government has not waived its sovereign immunity, it cannot be sued for money damages with respect to the contract actions of federal agencies. Therefore, remedies are limited to reconsideration of the award or the payment of bid and proposal costs to the protestor if it wins, regardless of the review authority hearing the protest.

Timeframe and admissibility requirements

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

According to the terms of the FAR, agencies are required to provide 'inexpensive, informal, procedurally simple, and expeditious resolution of protests', and should use 'best efforts' to resolve agency protests within 35 days of filing (FAR Subparts 33.103(c) and (g)). Final decisions on protests made to the GAO are required by statute and GAO regulation to be made within 100 days of filing at the GAO (see 31 USC Section 3554(a)(1); 4 CFR Section 21.9(a)). The filing of a supplemental or amended protest may often have the effect of extending a decision by the GAO beyond the 100 day deadline (see 4 CFR Section 21.9(c)). Proceedings before the US Court of Federal Claims are not subject to such deadlines or time frames, but in general the Court is, in practice, often willing to expedite such bid protests given the circumstances.

One way in which the GAO's decision may be expedited is through the use of alternative dispute resolution (ADR) mechanisms (4 C.F.R. § 21.10(e)). Examples of ADR include negotiation assistance (prior to the filing of an award) or outcome prediction (after the filing of a protest). In outcome prediction ADR, the GAO will advise the parties of the likely outcome of the protest and make recommendations for corrective action, if any, but will not then prepare a full written determination. Generally, the GAO will not conduct outcome prediction ADR unless the parties indicate a willingness to take the appropriate action to resolve the protest (either through withdrawal of the protest by the protestor or corrective action by the agency).

36 What are the admissibility requirements?

The standard for determining standing to protest a procurement action is prescribed by statute. Specifically, standing is limited to an 'interested party', defined as an 'actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract' (31 USC Section 3551; see also 4 CFR Section 21.0). In the event that the protestor lacked the potential to receive the award even if it prevailed on its protest, it is not an interested party.

37 What are the time limits in which applications for review of a procurement decision must be made?

The time limits vary depending on the forum in which the protest is brought:

- Court of Claims: challenges filed in the US Court of Federal Claims are not subject to specific time limits for filing;
- agency protests: protests based on alleged apparent improprieties in a solicitation shall be filed with the agency making the award before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest that is not timely filed (FAR Subpart 33.103(e)); and
- GAO protests: the rules for filing of pre-award and certain post-award protests are very similar to those of agency awards. For post-award protests in competitive procurements where a debriefing is requested and required, the parties have until 10 days after the debriefing is held (4 CFR Section 21.2(a)(2)). The GAO may also consider protests that are not timely filed where good cause is shown or where the protest 'raises issues significant to the agency's acquisition system' (4 CFR 21.2).

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The answer varies by forum. There is no automatic right to a suspension for bid protests filed with the US Court of Federal Claims (although the Court does have the authority to issue preliminary injunctive relief to stay the underlying award being challenged pending its consideration of the matter or to use its suasion to convince the US Government to agree to a suspension voluntarily, which does happen at times in practice).

On the other hand, automatic stays do apply to protests before the agency and the GAO in certain circumstances. Specifically, pre-award protests filed on a timely basis with either the agency or the GAO do serve to stay the award of a contract by a federal agency once that agency has received notice that a protest has been filed (31 USC Section 3553(c)(1); 4 CFR Section 21.6; FAR Subpart 33.104(b)). In situations involving a post-award protest, an agency must 'immediately suspend performance or terminate the awarded contract' upon receiving notice of a timely filed protest (ie, within 10 days of the contract award date, or within five days of the agency offering a post-award briefing, whichever is later) (31 USC Section 3553(c); 4 CFR Section 21.6; FAR Subpart 33.104(c)). Significantly, a new law modifies this standard for protests involving only contract awards made by the United States Department of Defense (DoD). Specifically, the recently enacted sections 818(b) and (c) of the Defense Authorization Act of 2018 established 'enhanced debriefing rights' for disappointed offerors on contracts awarded by the DoD, which affords them the right to ask questions within two days after a post-award debriefing and establishes that the agency must deliver its written responses to those questions within five days. The agency shall not consider the debriefing to be concluded until it delivers its written responses to the disappointed bidder. Where such an enhanced debriefing is held on a DoD contract, the five-day period for the purpose of the automatic stay only begins to run until *after* the enhanced briefing is complete (ie, when the agency has delivered its written responses to questions to the disappointed bidder). The DoD recently issued a Memorandum on 'Class Deviation – Enhanced Postaward Debriefing Rights' (2 March 2018), which implements the new law. Thus, as a practical matter, for DoD awards, the enhanced debriefing rights may extend the timelines for automatic stays in cases where the agency takes time in answering the debriefing questions.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

A contracting agency may 'override' the automatic stays described above by making a determination in writing that '[c]ontract performance will be in the best interests of the United States', or that 'urgent and compelling circumstances that significantly affect the interests of the United States' are impacted and do not permit waiting for a resolution of the merits of the protest (see FAR Subparts 33.104(b)(1)(i), 33.104(c)(2)(i) and (ii)). Such attempts by agencies to override an automatic stay are relatively rare, accounting for less than 5 per cent of all protests in a typical fiscal year (according to recent GAO statistics).

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Unsuccessful bidders must be notified pre-award to the extent that their bid is determined to be outside of the competitive range, or within three days after the contract award if the bid was deemed to be competitive but ultimately not accepted. See, for example, FAR Subparts 14.409–1(a)(1), 15.503(b)(2).

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Counsel to applicants, but not the applicants themselves, are typically granted access to the administrative record of the award pursuant to the terms of protective orders (see 4 CFR Section 21.4). Applicants may also have the opportunity to supplement the administrative record in certain circumstances upon appeal to the US Court of Federal Claims.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

The number of bid protests fluctuates, and disappointed bidders do not always file protests to challenge an award for any number of reasons (eg, lack of a cogent basis for a protest, the cost involved, fear of alienating a key government customer, and other considerations). In general, the number of protests tends to rise in periods of budgetary restraints as contractors are more likely to challenge awards in periods where fewer awards are issued.

According to statistics maintained by the GAO, during fiscal year 2016, 2,789 total cases were filed at GAO, including 2,621 protests, 80 cost claims and 88 requests for reconsideration. This reflects a 6 per cent increase year to year. The GAO reported further that while more than 22 per cent of those cases filed were sustained, 46 per cent of the cases filed resulted in some form of relief being obtained by the protestor (referred to as an overall 'effectiveness rate').

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The federal government cannot be sued for monetary damages associated with contract actions of federal agencies. Rather, remedies are limited to reconsideration of the award or the payment of bid and proposal costs to the protestor if it prevails.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes, a contracting officer may cancel or terminate a contract or solicitation where it 'determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation' (FAR Subpart 33.102(b); see also 4 CFR Section 21.8(a)). Those remedies may also be recommended to the contracting officer by the GAO in the event that the underlying protest is filed at the GAO (4 CFR Section 21.8(a)).

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes, in 'sole source' contract situations, a contracting agency's decision may be challenged by interested parties upon the basis that the decision to award the contract on a sole source basis was arbitrary, capricious or an abuse of discretion or violated applicable law or procedure. The agency is afforded a significant amount of deference, however, and in order to prevail, a protestor must establish that the decision had no

rational basis and there is no coherent or reasonable explanation for the award.

Typical costs

46 What are the typical costs of making an application for the review of a procurement decision?

There are a wide range of costs associated with filing a protest, depending on the nature and complexity of the contract, the number of issues involved in the protest and other factors. Hence, it is difficult to discern 'typical costs' of such protests. As a general matter, however, protests pursued at the contracting agency typically involve less time and expense, whereas challenges pursued at the GAO afford more process (including the ability for counsel to review and comment on the administrative record of the award) and, as a consequence, are more expensive to prosecute. Actions in the US Court of Federal Claims generally are the most time and cost-intensive given the lack of explicit timelines and the prospect that additional discovery or fact finding proceedings can take place. Although an interested party is not required to exhaust its available remedies at the agency level prior to seeking review at the GAO or the US Court of Federal Claims, it is not uncommon for protestors to pursue more than one level of review (where feasible given timeliness restrictions discussed above), which ultimately results in the accumulation of time and expense.

UPDATE AND TRENDS

Emerging trends

47 Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

The FAR and cybersecurity

In 2016, the DoD, General Services Administration and National Aeronautics and Space Administration issued a final rule to add a new FAR subpart (4.19) and contract clause (52.204-21). The rule imposes a set of 15 basic security controls for 'covered contractor information systems' (ie, information systems that are owned or operated by a contractor) that process, store or transmit Federal contract information. This is defined broadly to include 'information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government'. Acquisition of commercially available off-the-shelf items is exempt from these baseline requirements.

For DoD contractors, a more robust set of requirements under DFARS 252.204-7012 have gone into effect as of 31 December 2017 to safeguard 'covered defense information'. This provision requires rapid reporting of breach incidents and obligations regarding post-incident investigation, as well as requirements for compliance with the National Institutes for Standards and Technology (NIST) Special Publication 800-171 (Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations).

In addition, the federal government has issued a final rule in 2016 to govern the treatment of 'controlled unclassified information' (CUI), which is information held by the government that is sensitive but unclassified. This rule currently only applies to federal government agencies and puts the burden on the agencies to ensure that its agreements with contractors that involve CUI include a provision requiring the contractor to handle CUI in accordance with this rule. Pursuant to FAR case 2017-016, a new FAR clause is currently being drafted to extend the CUI rule to government contractors. It is expected that the FAR CUI clause will be consistent with the DFARS in that it will rely on the NIST framework for the security requirements.

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Alternative procedures for government contracting

The DoD can utilise Other Transactional Authority (OTA) as an alternative to strict FAR regulations. OTAs were designed to allow the DoD to attract, and gain access to, non-traditional suppliers. This flexible authority allows the DoD to tailor the transaction to the specific circumstances involved rather than using the standard contract terms and conditions typically used in government contracts, and also allows the DoD to exempt the agreement from the requirements in the FAR as well as cost accounting standards and to negotiate terms on issues like intellectual property and data rights on a project-specific basis. Thus, thorny issues like intellectual property rights can be separately addressed. Recently, OTAs have given the DoD flexibility to adapt to changing commercial industry standards and emerging technology. Generally, OTAs are used in contracts for prototypes and research or IT, where the rate of change in the industry outpaces the amount of time it takes to go through the traditional acquisition process.

The use of OTAs has grown significantly in recent years after Congress expanded the scope of OTA authority. Now, DoD agencies can use OTAs for contracts worth up to U$500 million. OTAs can also be used for contracts exceeding U$500 million in value provided the agency receives approval from the Under Secretary of Defense for Research and Engineering or the Undersecretary of Defense for Acquisition and Sustainment. Contractors seeking to take advantage of the expedited procurement process generally need, for all practical purposes, to be a member of a consortium that the government seeks out for procurement of emerging technologies.

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