Public Procurement

Contributing editor
Totis Kotsonis

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GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Public Procurement 2017

Contributing editor
Totis Kotsonis
Eversheds Sutherland

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Preface

Public Procurement 2017

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Public Procurement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 new chapters on Bolivia, Colombia, Egypt, Poland, Taiwan and new articles on Openness on Public Procurement, and Brexit.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Totis Kotsonis of Eversheds Sutherland, for his assistance with this volume. We also extend special thanks to Freshfields Bruckhaus Deringer LLP, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE DEAL THROUGH

London
June 2017

Openness in public procurement

Totis Kotsonis
Eversheds Sutherland

Introduction
The establishment of more open public procurement systems, that is, procurement systems that offer foreign suppliers access to the award of public contracts on the basis of no less favourable terms than to domestic suppliers, constitutes an essential part of attempts to liberalise further global trade. Openness in public procurement is important in that it leads to greater and more effective competition in the award of public contracts, thereby encouraging innovation, delivering better value for money and ultimately, contributing to long-term economic development. However, like global trade liberalisation more generally, it has been facing a number of challenges recently.

The basic aims of public procurement
In most countries, government purchasing is subject to some form of procurement legislation, often involving detailed rules on when and how to advertise contract opportunities and carry out contract award procedures. A key aim of public procurement legislation is to ensure fairness in the award of public contracts by mandating the award of contracts (typically subject to minimum value thresholds and other qualifications) by means of advertised competitive tender processes based on objective rules and criteria.

A fair procurement system, including provisions for effective remedies in the event of a breach of the rules, gives confidence to suppliers, encouraging them to participate in public contract award procedures, thereby leading to greater and more effective competition. In turn, as a 2011 report by the then UK competition regulator noted:

> *effective competition [in public procurement] can play an important role in promoting efficiency and innovation, resulting in enduring value for money. Competition can create a dynamic market in which end users choose those suppliers which offer the best value for money, and suppliers face appropriate incentives to offer better value for money or risk losing contracts or market share. This, in turn, can generate increased economic growth and greater prosperity. (*Commissioning and competition in the public sector, Office of Fair Trading, OFT1314, March 2011.)

The issue of openness in public procurement
Of course, the fairness of a public procurement system is separate from the question of its openness. It is perfectly feasible to have in place a public procurement regime based on fair and objective rules that, nonetheless, restricts participation in contract award procedures to local (or certain local) suppliers. Indeed, most domestic procurement systems entail the use of some form of domestic preferences or the reservation of certain contract awards to certain classes of local suppliers (such as SMEs).

Restricting access to government contracts in this way may encourage local job creation and economic growth by providing support to local industries and businesses. However, inappropriate or excessive reliance on this type of restrictions are only likely to yield short-term benefits. In the longer term, the quality of the competition for public contracts is likely to be compromised, reducing incentives for local suppliers to innovate and limiting the scope for obtaining best value for money. Such outcomes can then affect economic growth adversely and the competitiveness of national economies.

It is, therefore, not surprising that opening up public procurement is increasingly becoming an integral part of attempts to liberalise international trade and promote greater economic growth. In the context of the World Trade Organisation (WTO), the principle of openness in public procurement has found expression in the Agreement on Government Procurement (GPA). The GPA is an agreement between certain WTO members, including Canada, the EU, Japan, South Korea and the United States. It seeks to achieve greater liberalisation and expansion of world trade by means of the creation of an 'effective' multilateral framework for government procurement. This involves GPA parties opening up their public procurement markets, at least partly, to each other's suppliers and undertaking to ensure the conduct of transparent, impartial and fair public procurements.

Separately, many free trade agreements incorporate provisions that deal specifically with the issue of public procurement. Indeed, the European Commission considers that opening up public procurement is an important aim in trade negotiations and that lack of adequate access to public procurement markets constitutes a non-tariff barrier to trade.

And yet, as with attempts to liberalise further international trade, greater openness in public procurement has now run into difficulties.

Transatlantic disagreements and the 'Buy American, Hire American' US presidential executive order
Even before the election of Donald Trump to the presidency of the United States, the EU–US trade negotiations to conclude a Transatlantic Trade and Investment Partnership (TTIP) had stalled. The question of opening up further their respective public procurement markets to each other's suppliers proved particularly contentious. Both sides seemed to accept, in principle, that there was asymmetry in the openness of their respective procurement markets. However, they failed to agree as to the causes of such asymmetry and the measures that each side had to take to remedy this.

At the time of writing, it would seem unlikely that this issue will be resolved any time soon, not least as a result of the new President's 'Buy American, Hire American' April 2017 order.

Among other things, this order provides for the review of US trade agreements on the basis of which the US has allowed foreign suppliers to gain access to its government procurement markets in exchange for reciprocal rights for US suppliers abroad. Such agreements, essentially involve waivers from the Buy America/Buy American legislation (including the Berry Amendment in the defence sector), which seeks to promote domestically manufactured goods and domestically sourced construction materials in government procurements.

The White House has made it clear that, if the review concludes that any of these agreements works against US interests, in that it fails to provide US companies with 'fair and reciprocal' access to foreign government procurement markets, the president may decide to rescind or seek to renegotiate these. At stake in this context, is US participation in the GPA.

The US government's current assumption is that the GPA is not working in the interests of the United States. In support of this contention, reliance has been placed on preliminary evidence according to which, at US$837 billion, the value of procurements that the United States has opened up to suppliers from GPA parties, is almost twice as

large as the combined value (said to be approximately US$381 billion) of the next five largest GPA parties – Canada, the EU, Japan, Norway and South Korea.

This claim is likely to be contentious. Certainly, the EU's position in the context of the TTIP negotiations has been that, in general, the EU is guaranteeing greater government procurement access to US companies than the US does to EU companies.

One of the reasons put forward by the EU in support of this conclusion is the fact that under the GPA, access to the cumulatively more valuable non-federal US government procurements is limited, with only 37 of the 50 states agreeing to allow access to their procurement markets to foreign companies. In addition, no US city or county is covered by the GPA arrangements. This factor seems to be crucial, in that the value of procurements by some American cities is said to exceed the value of procurements by some states. According to the EU, other relevant factors in this context are the restrictions placed by the Buy America/Buy American legislation, which, as noted above, seeks to promote domestic goods and materials in government procurements, as well as SME set aside programmes, which limit competitions for certain government contracts to smaller US companies. There are currently no similar restrictions in relation to access to the EU government procurement markets.

Ultimately, if the US were to leave the GPA or seek its renegotiation this would almost certainly lead to other GPA parties taking retaliatory measures that would have the effect of limiting the ability of US suppliers to compete in foreign public procurement markets.

Brexit

The likelihood of the US seeking to rescind or renegotiate the GPA and other agreements that involve waivers from US domestic preference legislation, is not the only threat to the principle of openness in public procurement. The UK's exit from the EU might also affect the openness of the UK public procurement system and the basis on which UK procurement legislation currently offers full and equal access and protection to suppliers from other EU member states, as well as to suppliers that are nationals of other GPA parties in relation to the smaller pool of contracts that fall within the scope of the GPA.

The extent to which the openness of the UK procurement system might be affected as a result of Brexit, will ultimately depend on factors such as the provisions of a new free trade agreement between the UK and the EU but also the question of whether the UK will decide to rejoin the GPA in its own right. Currently, the UK is a party to the GPA by virtue of its membership of the EU. It would seem logical to assume that the UK would wish that, to the extent possible, UK suppliers continue to have access to as wide a pool of public contract award opportunities in foreign public procurement markets as before Brexit.

The argument that GPA membership is not necessary for the UK and that UK businesses wishing to continue benefitting from uninterrupted access to the EU/GPA public procurement markets could simply set up a subsidiary in an EU jurisdiction would not seem credible. First, it needs to be considered how realistic that option would be for most UK suppliers. Secondly, even assuming that this is an option for at least some of the larger businesses, such an approach is likely to lead to additional complexities and costs, putting them at a disadvantage vis-à-vis competitors. Potentially, there is also the question of whether, in the absence of reciprocal rights for EU suppliers in UK public contract awards, the EU might adopt measures that would, in effect, limit the ability of non-EU/GPA suppliers bidding for public contracts through 'letterbox' companies established for that purpose in an EU jurisdiction.

On that basis, membership of the GPA would seem to be a first necessary step in ensuring that UK suppliers continue to have access to important foreign public procurement markets post-Brexit. How easy or time-consuming that would be is currently unclear, with diverse views expressed on this point.

And then there is CETA ...

Despite these challenges, other recent trade developments can, in principle, contribute to greater openness in public procurement. More specifically, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada incorporates provisions that commit both sides to opening up their respective procurement markets beyond the levels that had been agreed in the context of the GPA. It also provides for establishing in Canada for the first time, a single electronic point of access for contract award notices (similar to the online notification system in the Official Journal of the EU), which will make it easier for suppliers not only in the EU but also Canada to access public contract opportunities.

It is well known, of course, that some aspects of CETA (not those relating to procurement) have faced opposition in parts of Europe, leading to the Walloon regional parliament's initial decision, subsequently reversed, not to adopt the agreement. While the European Parliament and Canada have now ratified CETA, so that it may enter provisionally into force, full ratification by all 38 competent parliaments (including regional parliaments) in the EU is still outstanding – a process that might take years to complete and which might face yet further challenges.

Conclusion

As it would be obvious from the above, various international developments are creating uncertainties not only in relation to world trade liberalisation generally, but also in relation to the future direction of multilateralism in public procurement and the openness of domestic procurement systems. It is to be hoped that these challenges would prove temporary and that in due course, further steps would be taken to achieve greater openness in domestic procurement systems, encouraging more innovation, better value for money and long-term economic development.

EVERSHEDS SUTHERLAND

Totis Kotsonis **totiskotsonis@eversheds-sutherland.com**

1 Wood Street
London
EC2V 7WS
United Kingdom

Tel: +44 20 7919 4500
Fax: +44 20 7919 4919
www.eversheds-sutherland.com

Brexit and UK public procurement law

Totis Kotsonis
Eversheds Sutherland

Introduction

Following the June 2016 referendum on the UK's membership of the EU, the UK government triggered article 50 of the Treaty on the Functioning of the European Union on 29 March 2017, thereby commencing the two-year formal process that will ultimately lead to the UK's exit from the EU.

On the day the UK ceases to be an EU member, subject to the terms of an EU–UK trade agreement, or those of an interim arrangement, EU law will cease to be applicable in the UK. At the same time, and so as to avoid legal uncertainty, the UK government intends to introduce the Great Repeal Bill. This will repeal the European Communities Act 1972 (ECA), which is the legislation that gives EU law direct effect in the UK, and convert the body of existing EU law (including case law) into domestic legislation.

This note considers the possible effects of Brexit on UK public procurement legislation. In brief:

- It is likely that domestic procurement legislation will require certain amendments, at a minimum, as a result of the UK's exit from the EU.
- It is possible that even if the UK is no longer required to implement in full the EU procurement directives in its national legislation, the EU might nonetheless insist, as part of the new trade agreement with the UK, that UK procurement law 'approximates' EU procurement legislation. Depending on the specific terms of such a requirement this might leave little room to amend substantively the existing procurement legislation.
- In circumstances where the UK is neither required to implement nor to approximate substantively EU procurement legislation, it would seem likely that, in due course, the UK would wish to explore the possibility of amending existing procurement legislation, so as to simplify procedures or introduce other flexibilities to the extent that this is deemed desirable and remains consistent with the requirements of the WTO's 'plurilateral' Agreement on Government Procurement (GPA), including the requirement to maintain an effective remedies system.

The Great Repeal Bill

EU public procurement legislation is already implemented into UK law by means of secondary legislation. Accordingly, the expectation is that in seeking to 'domesticate' existing EU law by means of the Great Repeal Bill, existing UK procurement legislation would remain substantially the same on the first day of Brexit.

At the same time, it will be necessary to make some changes to reflect the UK's new status as a country that is no longer a member of the EU. For example, procurement legislation currently provides that contracting authorities owe the same duty to suppliers from other member states of the European Economic Area (EEA), that is, the EU member states plus Iceland, Liechtenstein and Norway, as they do to UK suppliers. Would this continue to be the case after the UK's exit from the EU or would EEA members be accorded protection only to the extent that this is necessary to comply with the requirements of the GPA?

Similarly, the procurement regulations incorporate a number of provisions that reflect other single market requirements, such as in relation to technical standards or recognition of certificates from bodies in other EU member states. Would these arrangements continue after Brexit?

What would be the status of the European Single Procurement Document, the self-declaration document that contracting authorities are currently required to accept as preliminary evidence that a supplier meets the relevant requirements to participate in a procurement process?

Would the special provisions of the legislation that regulate joint procurements involving UK contracting authorities and contracting authorities from other EU member states continue to be relevant?

Incidentally, the UK's exit from the EU is also likely to require some minor changes to the EU procurement directives, such as the deletion of the part of Annex I to Directive 2014/24, which lists the UK's 'central government authorities'.

Ultimately, the extent to which such changes might be necessary would depend on the terms of the agreement that would regulate the UK's post-Brexit relationship with the EU.

A future UK–EU trade agreement

In this regard, it is worth noting that the EU's relatively recent trade agreement with the Ukraine provides detailed provisions on public procurement. These essentially require the Ukraine to implement (with some small exceptions) EU procurement legislation in its laws. According to the agreement, in this process of 'legislative approximation':

> *due account shall be taken of the corresponding case law of the European Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU acquis occurring in the meantime … The European Commission shall notify without undue delay Ukraine of any modifications of the EU acquis. It will provide appropriate advice and technical assistance for the purpose of implementing such modifications.*

How likely is it that similar provisions might be included in an agreement regulating the UK's future relationship with the EU?

It is relevant to keep in mind that the Ukraine's approximation of EU public procurement law was linked to the reciprocal opening of the EU's and the Ukraine's public procurement markets to each other's suppliers. It is also relevant that the Ukraine is a country seeking to strengthen its relationship with the EU as much as possible.

The UK's position is obviously different, in view of Brexit. Also, if the UK were to remain a party to the GPA that would mean that it would continue to have at least some access to the public procurement markets of the EU (and indeed, the public procurement markets of the other GPA parties). The GPA is a voluntary agreement between certain members of the WTO that regulates the basis on which each GPA party grants access to its public procurement markets to the nationals of other GPA parties. It would seem likely that the UK will want to remain a party to the GPA as this would give UK suppliers some access to the government procurement markets of not only the EU member states but also those of the United States, Canada, Japan and South Korea. Access to the EU procurement markets would, however, be more restricted than now, given that the scope of the GPA is narrower than the scope of the EU procurement directives. That might mean that the UK would not be particularly interested in agreeing the type of detailed public procurement law provisions that have been incorporated into the EU's trade agreement with the Ukraine with the EU.

Ultimately, these issues would be determined as part of the negotiations for a new agreement with the EU. It might be, for example, that continued public procurement law compliance with the EU acquis is one of the EU requirements for granting the UK continued access to any part of its internal market.

UK procurement law post-Brexit and GPA compliance

On the assumption that post-Brexit, UK procurement law would not need to comply with the EU procurement legislation but only with the GPA, it would seem likely that in due course the UK government would want to consider the extent to which this might permit the simplification of procurement procedures or the introduction of other flexibilities into the legislation.

An obvious example where an amendment is likely, in those circumstances, is in relation to the procedures that permit negotiations with bidders. At the moment, public procurement regulations permit negotiations in the context of a 'competitive dialogue', and a 'competitive procedure with negotiations', as well as in the context of 'innovation partnerships'. It is possible that the UK might consider that these three procedures should be replaced by a new simpler negotiated procedure (of the type currently permitted under the more flexible procurement regime that applies to certain utility companies). Under such a procedure, a contracting authority would be at liberty to structure discussions with bidders in a way that meets its requirements for a particular procurement, subject to compliance with the principles of fairness and transparency.

In fact, the GPA rules would allow the UK to go even further so that, if deemed desirable, domestic legislation could provide that a contracting authority may reserve the right to carry out negotiations in circumstances where it appears from the evaluation that 'no tender is obviously the most advantageous' in terms of the specific evaluation criteria that had previously been disclosed. However, in considering its options in this regard, the government is also likely to be mindful of potential cost implications if it were to amend the legislation so as to make it easier for contracting authorities to negotiate contract awards.

There would be other areas too where the UK might decide to amend current public procurement legislation and still be compliant with GPA requirements. However, again, arguably there are limits to the extent to which the UK would deem it desirable to simplify legislation, even if on the face of it that might be permissible under the GPA.

For example, the GPA does not expressly require that there should be a standstill period, between the notification of the award decision and the conclusion of a contract. Be that as it may, it would seem unlikely that the UK would be minded to take away rights that bidders currently enjoy and remove provisions such as this that seek to ensure that public procurement in the UK is fair and transparent and underpinned by an effective remedies system. Among other things, such an approach is likely to affect adversely the confidence of the bidding community in the UK public procurement markets and be inconsistent with the 'open for business' message. It is for the same reasons that, post-Brexit, changes to the current procurement remedies regime should, in general, be limited, even if compliance with the EU procurement regulations is no longer required.

Overall, in the event that it is no longer necessary to implement EU procurement laws in the UK, it is likely that the government would seek to explore ways in which to make the procurement system more efficient. In this context, it would seem unlikely that any changes to current procurement legislation would be such as to affect adversely the fairness and transparency of the system.

Finally, it is worth keeping in mind that since Scotland has its own procurement legislation, it might be that, in the event that it is no longer necessary to implement EU procurement laws in the UK, the Scottish government might decide to amend its own procurement legislation in a different manner to that of the rest of the UK, although again, it would be expected that the Scottish government's approach would be consistent with the above conclusions.

EVERSHEDS SUTHERLAND

Totis Kotsonis **totiskotsonis@eversheds-sutherland.com**

1 Wood Street
London
EC2V 7WS
United Kingdom

Tel: +44 20 7919 4500
Fax: +44 20 7919 4919
www.eversheds-sutherland.com

Belgium

Emmanuel van Nuffel and Kevin Mununga
Daldewolf

Legislative framework

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

Currently, the law sets the general framework of public procurement law and is supplemented by royal decrees:

- the law of 15 June 2006 on public procurements in classic sectors and utilities sectors (water, energy, transport and postal services), Royal Decree of 15 July 2011 on public procurements in classic sectors, Royal Decree of 16 July 2012 on public procurements in utilities sectors, Royal Decree of 24 June 2013 on the opening-up at EU level of public contracts to be awarded by private entities benefiting from exclusive rights in the utilities sectors; and
- the law of 13 August 2011 on public procurement in the field of defence and security and the Royal Decree of 23 January 2012 on to the award of these public contracts.

A law of 17 June 2013 relates to the motivation of decisions awarding a public contract and the right of appeal.

A Royal Decree of 14 February 2013 relates to the general rules for the execution of public contracts.

The legislation is enforced by the administrative or civil jurisdictions, depending on the nature of the contracting authorities (public or private entity).

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

The legislation distinguishes public contracts depending on the areas of activity of the contracting authorities (classic sectors, utilities sectors, in the field of defence and security). See question 1.

Public contracts that fall 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 and equality. They must be put into competition according to specific rules of publication, depending on the interest that these contracts could represent for companies other than local.

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

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

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

Finally, Belgian law guarantees the participation of enterprises of member states of the GPA, within the conditions provided by the GPA. These enterprises enjoy rights equivalent to those enjoyed by Belgian businesses (see, article 21 of the Law of 15 June 2006).

4 Are there proposals to change the legislation?

Recently, three laws have been approved by the Belgian parliament in order to transpose EU directives of 26 February 2014, and to modify the current legal framework:

- the law of 17 June 2016 on public procurement, which transposes the Directive 2014/24 on public procurement and the Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors;
- the law of 17 June 2016 on concession contracts, which transposes the Directive 2014/23 on the award of concession contracts; and
- the law of 16 February 2017 amending the law of 17 June 2013 on the duty to state reasons, the information and remedies in public procurement and public contracts of work, supply and service, which transposes Directive 2014/23 on the award of concession contracts (which also modifies Directives 89/665 and 92/13 in order to include concession contracts in the judicial protection mechanisms).

The legislative process is not entirely finished, since the federal government has just tabled four royal decrees on the award and performance of public procurement and concession contracts. .

Nevertheless, the new legal framework is expected to enter into force on July 2017 when the four royal decrees will be finalised. Most of the important changes announced are briefly described below (see 'In Future').

Applicability of procurement law

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 law definition.

Besides public authorities, in the traditional sense of the term (federal state, territorial entities and bodies that have been set up by them to carry out public service missions), private entities that perform public service missions that are not industrial or business-related, are also subject to public procurement law when they act under the decisive influence of public authorities, or other contracting authorities, by controlling their decision-making bodies or their funding. Private entities that are not subject to public procurement law are identified because they are excluded under the legal definition.

To this date, the European Commission did not exempt a utility activity in Belgium from the application of Directive 2014/25.

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

Unless provided otherwise by the law, all public contracts are, in principle, subject to the legislation on public procurement. The threshold set by the Regulation (in Belgium: by royal decrees more specifically) only determines the application of the EU law and the scope of application of the negotiated procedures.

The estimated value of public contracts 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 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, for example, because of uncertain subsidies).

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

- for public work contracts: €5.225 million;
- for works or services concessions: € 5.225 million;
- for public supply contracts: €209,000 in classic sectors (€135,000 for public supply contracts entered into by federal contracting authorities) and €418,000 in other sectors; and
- for public service contracts: €209,000 in classic sectors (€135,000 for public supply contracts entered into by federal contracting authorities) and €418,000 in other sectors.

Below the EU thresholds, the legislation sets out other thresholds below which public contracts can be subject to less stringent rules to put a contract to competition and can be awarded in a negotiated procedure without publication of a contract notice (they must have been put into competition, except under specific circumstances):

- €209,000 (€418,000 in utilities sectors) for public contracts relating to financial services, research and development and all public service contracts that, under EU public procurement law, should not be put out to competition (services listed in Annex XVIIB of Directive 2004/17 and Annex IIB to Directive 2004/18); and
- €85,000 for all other public contracts (€170,000 in the utilities sectors).

The legislation does not set out any threshold below which a public contract could be entered into without an invitation to tender.

In future

The law of 17 June 2016 on public procurement generalises the negotiated procedure with prior publication to public supply contracts and public service contracts whose estimated value is below the European threshold amount, and to public works contracts whose estimated value is below €750,000.

As regards to concession contracts, a Royal Decree will specify the threshold for the application of the law of 17 June 2016.

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 legislation, the negotiated procedure without publication will apply in two cases (inspired by EU law):

- 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, and 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 by the European Court of Justice's judgment *Pressetext Nachrichtenagentur GmbH* (C-454/06) of 19 June 2008. Following this decision, any amendment to an existing public contract (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, etc) can be regarded as a public contract that should be put out to competition when causing a 'material contractual amendment', or substantial change, to the initial conditions of the original contract. 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.

The legislation has only partially considered this case law. With regard to the amendment of an existing contract, the Royal Decree of 14 January 2013 laying down general rules for the execution of public contracts states that any change in the subject matter of the contract is prohibited (eg, construction rather than renovation) and sets a limit value of 15 per cent of the contract's initial value (article 37).

Changes similar to a new public contract as identified by the European Court of Justice are only subject to the consent of the contracting authority and to an obligation to state reasons when these changes constitute a departure from the essential conditions of the contract.

The Belgian position relating to amendments to existing public contracts shall be subject to an in-depth review in the context of the transposition of the new Directives of 26 February 2014, which integrate and develop the case law of the European Court of Justice concerning the implementation of public contracts. The royal decree on the performance of public procurement will specify in more details the conditions under which a concluded contract can be subject to an amendment without a new procurement procedure.

Apart from cases where the negotiated procedure without publication is applicable, the issue of the legality of the amendment made to an existing public contract (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 this latter 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?

During the past year, the Council of State has applied the case law of the Court of Justice and the Directives regarding the modification of a public contract during its performance on multiple occasions. It uses a strict application of the *Pressetext* case of the Court of Justice:

- to sanction a substantial modification decided by a contracting authority. See for example, two judgments *SGI Security* of 1 February 2016 (No.233,677), and of 1 March 2016 (No.233,982), in which the Council of State decided that a contracting authority cannot extend an existing contract to a provision of service who has a different importance. 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 for 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 reestablish the economic equilibrium of the contract (see for example, the *Clear Channel* case of 3 March 2016, No.234,014); or
- to validate amendments that did not affect the economic equilibrium of the contract and would have not allowed the admission of applicants other than those initially selected (see for example, the *Clear Channel* case of 1 December 2016, No.236,642).

9 In which circumstances do privatisations require a procurement procedure?

In principle, the transfer of a state-owned company or of a public service should not be subject to a procurement procedure. However, this 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 in 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*, C-215/09).

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 the construction of a structure intended to be made available to the

contracting authority by means of a transfer with a deferred payment or by means of a lease agreement possibly paired with a purchase option, etc).

Such PPPs must be considered as public work contracts.

Since the decision of the Council of State in *Constructions Industrielles de la Méditerranée SA*, No. 145,163 of 30 May 2005, relating to the setting up of a company for the construction and operation of a waste incinerator, a PPP is generally considered to be subject to public procurement law.

A PPP could fall within the scope of other legal qualifications. However, it is still subject to fundamental principles and must be put out to competition.

In future

One of the vehicles of PPPs are concession contracts of services. As part of the transposition of EU directives, these contracts have been included in the new legislation on concession contracts, which is expected to enter into force by July 2017.

Advertisement and selection

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:

- above the EU threshold: the contract has to be published in the Official Journal of the European Union and the *e-Notification* (previously called *Bulletin des adjudications*); and
- below the EU threshold: the contract has to be published only in the *e-Notification* unless the law provides otherwise.

However, contracts which do not fall within the scope of the legislation on public procurement are subject to 'adequate publicity' 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 Official Journal of the European Union and the *e-Notification* in order to ensure the widest possible call for tenders.

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 entitled to set selection criteria in order to ensure that a tenderer is qualified to satisfactorily perform the contract. But, it may also abstain from doing so (except in case of restricted procedure where enterprises are selected in the light of these criteria).

When establishing such criteria, its action is framed by the legal provisions that determine which elements may be taken into account (turnover, references to similar public contracts, human and material resources, staff experience, etc). Within the framework of an open procedure or of a negotiated procedure in a single phase, the criteria must be set with reference to a minimum level.

These selection criteria must be relevant, linked to the subject matter of the contract and proportionate. The fact of 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 and the competitive dialogue, the contracting authority may limit the number of bidders that can participate in a tender procedure. The minimum number of bidders cannot be fewer than five in the restricted procedure and three in the negotiated procedure with prior publication and the competitive dialogue.

The number of candidates allowed to submit tenders must be sufficient to ensure genuine competition. In case the contract is subject to the 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.

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' should be transposed in Belgian law as part of the transposition of the EU Directives on public procurement and concession contracts. As long as this procedure is not fully transposed in Belgian law, a bidder cannot successfully use it against a contracting authority (CE, 12 January 2017, *RTS Infra*, No.237,029).

However, a contracting authority cannot automatically exclude an undertaking who fulfils one of the optional exclusion criteria. In order to comply with the principle of sound administration, the contracting authority has to verify if this situation raises serious doubt about the undertaking capacity to perform the contract. A decision to exclude by the contracting authority must be proportionate and state the reasons why the undertaking is to be excluded owing to the existence of optional exclusion criteria.

The procurement procedures

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 the legislation transposing EU law or a modification induced by EU law, the legislator recalls the EU origin of its intervention as well as the applicable fundamental principles.

For instance, article 1 of the Act of 15 June 2006 expressly states that it is ensuring transposition of Directives 2004/17 and 2004/18, while article 5 prescribes the treatment of undertakings in compliance with:

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

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

Impartiality is a general principle of law that applies generally to public action.

It also applies to the contracting authority in the course of the award procedure of 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, the contracting authority's lack of impartiality must be concretely established, consisting of the possibility of exercising a decisive influence on the decision.

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 (official, public officer or adviser) and cover hir or her personal interest (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 (the fact of owning interests or of being empowered with the decision-making powers of an undertaking being a candidate or a tenderer, directly or through an intermediary).

A person being in a conflict of interest shall recuse himself or herself.

Following some high-profile cases, the legislator or the government occasionally intervened to regulate precisely the action of public officials or agents (eg, 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; Circular of 21 June 2010 of the Federal Public Service of the

Chancellery of the Prime Minister on ethics and conflicts of interest; or the Act of 8 May 2007 approving the United Nations Convention against Corruption; 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).

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 from responding to the call for tenders. Following the judgment of the European Court of Justice of 3 March 2005 in the *Fabricom* cases (C-21/03 and C-34/03), this legislation had to be amended.

The current legislation provides for a general prohibition of participation in the award procedure for any company involved in the study or in the design of the tender as well as for any candidate or tenderer related to such a company, provided that the involvement of the tenderer in the preparation procedure gives it an advantage (over other tenderers) that impedes or distorts competition.

This presumption is rebuttable and the contracting authority shall allow the company concerned to rebut it.

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 (except 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.

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 (criterion of the 'economically most 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.

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

For the award of complex contracts, such as PPPs, the competitive dialogue procedure is replacing the negotiated procedure with publication (which was used by default).

In future

The negotiated procedure with prior publication will be generalised to public supply contracts and public service contracts whose estimated value is below the European threshold amount and to public works contracts whose estimated value is below €750,000. See question 6.

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, they must all be considered irregular.

Submission of several bids is also prohibited in the case of a consortium. Indeed, the company member participating in a consortium cannot submit a competing bid, alone or together with another consortium.

However, the prohibition does not apply to subcontractors, since a tenderer may simultaneously be the subcontractor of a competing tenderer.

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

The competitive dialogue procedure has been transposed from EU law.

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.

The competitive dialogue procedure is reserved to the award of particularly complex contracts, where the contracting authority is unable to identify a priori the technical solutions that would meet its needs. Since this procedure has been recently introduced, no significant Belgian case law 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: publication; setting of selection and award criteria and of the technical requirements in the tender documents; prohibition of any amendment to the bid, except for the modification of non-significant elements that are not likely to distort competition, etc.

In future

To transpose Directives 2014/24 and 2014/25, the new law on public procurement amends this current framework, and provides that the competitive dialogue can be used in new cases, especially in the following situations: 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; when technical specifications cannot be established with sufficient precision by the contracting authority; or when only irregular or unacceptable tenders are submitted (in such situations, contracting authorities are not required to publish a contract notice).

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 three procedures that permit negotiations with bidders: the negotiated procedure with prior publication; the negotiated procedure without prior publication; and the competitive dialogue.

However, one should note that the negotiated procedure without prior publication is exceptional and the conditions of its application are subject to a restrictive interpretation. The negotiated procedure with prior publication is most often used by contracting authorities.

In future

The law of 17 June 2016 on public procurement generalises the negotiated procedure with prior publication to public supply contracts and public service contracts whose estimated value is below the European threshold amount, and to public works contracts whose estimated value is below €750,000.

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

A framework agreement is a tool that enables the contracting authority to award a public contract for works, supplies or services of a repetitive nature and whose ultimate scope 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, etc).

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

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

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 since 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.

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 only 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. However, tender documents must allow for this possibility.

Moreover, a change in a bidding consortium also carries the risk of losing the capacity that has determined the possibility to participate in a procurement procedure.

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 does not provide for specific mechanisms designed to further the participation of small and medium-sized enterprises (SMEs) in the procurement procedure.

However, the legislation contains general tools that can be used by SMEs to access the public procurement procedure: consortiums 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 gain 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 abilities criteria (sufficient human and material resources, experience in similar contracts, turnover, etc) are assessed by combining the capabilities of each member of a group.

Moreover, the legislation states that the tenderer may integrate 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. Apart from the case where the award of several lots to the same tenderer is due to an insufficient level of capabilities, the limitation of the number of lots awarded to the same tenderer shall be assessed by the contracting authority at its sole discretion; however, such a limitation must be authorised by the tender documents.

In future

Among the measures transposed as part of the transposition of EU directives, the contracting authorities will have to consider the division in lots of a public procurement if its value is superior or equal to the European threshold. More precisely, the contracting authorities will have to indicate, in the contractual documents, their decision not to subdivide the contract in lots.

The new law should allow the contracting authorities to limit the number of lots that can be awarded to only one tenderer.

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

The legislation makes a distinction between three kinds of alternative bids, mandatory (imposed by the tender documents), optional (imposed by the tender documents but not mandatory) and free (at the tenderer's initiative).

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

Free 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 'free' 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.

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 who strictly complied with the requirements laid down in the tender documents. The process makes the bid irregular from a technical perspective.

The standard terms of business of a company are generally not consistent 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 favour economically the tenderer who claims their application in relation to its competitors, who, in turn, 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 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.

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

The legislation identifies the award criteria through specific examples (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, etc).

Contracting authorities are in principle free to choose the elements they will be using in order to identify which offer best fits their needs, the only legal limit to this end being classically a criterion connected to the object of the public contract concerned, relevant (within the meaning of 'adequate for the purpose of comparison of the bids') and 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 IT contract).

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, abnormally low bids result from a misunderstanding of the needs of the contracting authority and 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).

The judge in charge of public procurement considers that where the price is considered as abnormally low and the justifications given by the bidder are not acceptable, the bid must be rejected, even when the abnormality only affects a quantitatively insignificant part of the bid (Council of State, 26 February 2015, *nv ASWEBO*, No. 230,345).

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

Assessment of the normality of the prices is a process that occurs in several stages:

- verification of prices: a phase common to all public contracts where the contracting authority asks, if needed, for clarification on the price composition (that does not yet constitute a request for providing justification);
- request to the tenderer for further information: the abnormality of a 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 where it asks the tenderer to provide for any information likely to justify its prices. The justification must be concrete and specific to the tenderer (technical processes applied, technical solutions, etc); 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 basis of the sole criterion of price (adjudication procedure) when deviation from the average prices of the other bids exceeds 15 per cent; and
- assessment on the regularity of the bids: the contracting authority must reject bids whose price was 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 whose price is obviously abnormal.

Review proceedings

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 before a civil judge (private entities that cannot be regarded as an administrative authority). The qualification as administrative authority cannot be confused with that of 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 whose appeal has been rejected in the 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 the public contract and grant compensation (see question 43).

However, only the civil judge has the power to annul a contract that has been concluded in violation of the 'stand-still' period that a contracting authority has to observe before the conclusion of a contract.

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 the tendering conditions to the award decision). This request generally enables the freezing of the procedure and reintegration of the candidate who has been excluded or the tenderer whose offer has been rejected.

The suspension is implemented through interim proceedings, within 15 days of the publication, the notification or the knowledge of the relevant decision. Suspension requests are processed relatively quickly: from less than 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 has to be an act likely to adversely affect the claimant (a decision likely to affect the undertaking's situation; an opinion is not an act likely to adversely affect the claimant). Appeal 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;
- 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, etc);
- 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;
- 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 *Espace Trianon SA*, C-129/04, ECJ, 8 September 2005).

Suspension requests are not subject to the usual conditions for interim proceedings (urgency, serious and not easily reparable damage), but the judge can proceed on the balance 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 are as follows:

- 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 Official Journal of the European Union 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 moment when the plaintiff became aware of the contested decision.

However, as a consequence of the *Idrodinamica* case of the EU Court of justice (of 8 May 2014, case C-161/13, ECLI: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.

Update and trends

Application of EU fundamental principles to transactions that do not fall within the scope of public procurement Directives
In the *Kinepolis Mega* case of 23 December 2015 (No. 233,355), the Council of State confirmed that EU fundamental principles are applicable to awarding the right to occupy public property in order to undertake an economic activity. As the occupation of public property relates to issues of the internal market, the principles of equal treatment, non-discrimination and transparency, which are core principles of primary EU law (the freedom to provide services and the freedom of establishment), require that the contracting authority publishes the contract proposal beforehand along with award criteria. This judgment reinforces the case law of the Council of State.

In the same vein, in a decision pronounced at the end of July 2016, the Court of appeal of Brussels ruled that the Belgian railways service (SNCB) did not comply with the EU law requirements and, more specifically, the transparency principle when it concluded a concession contract. This contract covered more than 1,700 billboards and hundreds of digital advertising screens in various SNCB train stations. The Court of Appeal of Brussels ordered the removal of all these billboards.

Transposition of the EU Directive on concession contracts
As noted above, the law of 16 February 2017 transposes the EU Directive on concession contracts. It extends to concessions contracts legal protection mechanisms provided in Directives 89/665 and 92/13.

However, this law has not yet come into force. Therefore, an action against a decision awarding a concession contract remained governed by general procedure rules, which do not allow the introduction of an application for suspension after the conclusion of the concession contract. As a result of two recent cases (of 25 November 2016, No. 236,553, *Le Botanique* and of 21 March 2017, No. 237.728, *Le Botanique*; both cases concerned the operation of a renowned concert hall in Brussels), the Council of State rejected an application for suspension against the decision of the city of Brussels to award a concession contract to ASBL Brussels Expo.

In future, contracting authorities will have to observe a 'standstill' period during which interested enterprises will be able to lodge an action before the Council of State or the civil judge. This solution will certainly enhance the protection of enterprises.

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, in this particular case, 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
- below the EU thresholds, a works contract whose value exceeds half the EU threshold (€2,593,000; extension of the standstill period).

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 majority of lawsuits are rejected by the Council of State 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).

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 40). For these public contracts, the contract may only be entered into at the expiry of the time limits to submit a request and if no request has been submitted, or after the rejection of the suspension request that has been submitted.

The Act of 17 June 2013 on remedies transposes Remedies Directives 89/665 and 92/13, as modified by Directive 2007/66, and Title IV regarding Remedies Directive 2009/81 on public procurement in the field of defence and security.

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 who has 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 that the contracting authority 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.

If the contracting authority is an administrative authority, the appellant has a general right of access to documents held by the administrative authority (Act of 11 April 1994 on disclosure by the administration). Nonetheless, periods of access to administrative documents set within this framework are not compatible with the time limits set to submit a request (suspension or annulment) in the context of public procurement.

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, it is not always the case in practice.

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

Currently
If a violation of public procurement law has been established, the bidder that has been irregularly foreclosed can lodge an action for compensation, unless it obtained a suspension in the meantime and the contracting authority made a new decision to correct the illegality.
The action has to 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 contract being implemented.

In future
After the entry into force of the law of 16 February 2017 amending the law of 17 June 2013 on the duty to state reasons, the information and remedies in public procurement and public contracts of work, supply and service provides, in case the contracting authority is an administrative authority, an enterprise will also have the choice to lodge an action for compensation before the Council of State within 60 days of the notification of the judgment of the Council of State that found the decision illegal. However, both actions (compensation before the civil judge and compensation before the Council of State) are not cumulative: an enterprise must make a choice beforehand.

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 40), the Act of 17 June 2013 provides for an action for declaration of

ineffectiveness (similar to an annulment) 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 can 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).

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

Public contracts subject to the standstill period (see question 40) illegally awarded can be subject to remedies (deadline starting from the knowledge of the award decision), in particular, a suspension request. The Act of 17 June 2013 sets out that the suspension of the award decision automatically entails the suspension of the contract.

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

The judicial protection mechanisms provided for by the Act of 17 June 2013 do not apply to contracts that do not fall within the scope of public procurement law (eg, service concessions). They are nonetheless ruled by the mechanisms originating from the general law, with their limitations (finding of illegality, and, if needed, compensation). However, one cannot exclude the possibility that the civil judge in charge of public contracts decides to extend, by judicial decision, the mechanisms of jurisdictional protection stemming from public procurement law to situations of flagrant violation of the obligation to put out to competition, pursuant to the equivalence principle (ECJ, 12 March 2015, *eVigilo Ltd*, C-538/13).

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

The basic amounts before the Council of State are as follows: €200 (for an application) and €700 (for the indemnity procedure, but the amount varies from €140 to €2,800).

The basic amounts before the civil judge are a few hundred euros to enter the hearings schedule (*droits de mise en role*) and for the bailiffs' charges; €1,440 (for the indemnity procedure, but the amount varies from €90 to €12,000).

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

DALDEWOLF

Emmanuel van Nuffel **evn@daldewolf.com**
Kevin Mununguu **kml@daldewolf.com**

Avenue Louise 81
1050 Brussels
Belgium

Tel: +32 2 627 10 10
Fax: +32 2 627 10 50
www.daldewolf.com

Bolivia

Alejandra Guevara and Jorge Inchauste
Guevara & Gutierrez SC

Legislative framework

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 only a supreme decree and, as a consequence, 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 of awards of public procurement contracts to foreign companies and the limitations to the negotiation of certain types of contracts), the Bolivian government issued a series of other regulatory supreme decrees whereby certain ambiguities were corrected. An example of one of these regulations 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 an entity called the Service for the Development of Productive Public Companies (SEDEM). The creation of PPEs and SEDEM, in turn, 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.

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. Regulations that, 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 that 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.

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 GPA. In this regard, it is worth mentioning that Supreme Decree 181 provides principles that are manifestly the opposite to the governing principles of the GPA, mainly 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.

4 Are there proposals to change the legislation?

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

Applicability of procurement law

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

Law 466, also called the Law of Public Companies. This law 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 power in Bolivia has the faculty to create and incorporate public entities and companies. In this regard, any state-owned enterprise, mixed enterprise, joint ventures and intergovernmental state enterprises, or any other legal entity in which the Bolivia state takes part and carries out its activities within 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.

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: 1–20,000 bolivianos;
- national support for production and employment: 20,001–1 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.

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 of a new procurement process as long as the following conditions are met:

- the modifications are supported by technical and legal reports and contained in a modification contract;
- the modifications must not exceed 10 per cent of the principal amount; and

- there may be a maximum of two modifications, provided they do not exceed the term of the main contract.

In case of construction contracts (EPCs), modifications may be carried out through change orders, and 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 regulation applicable to concluded contracts or discusses modifying contracts in depth.

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 to the subject at the moment only focuses on expropriation and nationalisation of private entities.

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

At the moment, there are no PPP regulations applicable in Bolivia. This situation has mainly been caused by the current administration, which relies on public works. Projects such as massive hydroelectric and gas production companies are funded by public finances as well as loans from international organisations such as the Inter American Bank, the China Investment Bank and others.

However, based on current economic markers, there is a remote possibility that Bolivia will use the experience of neighbouring countries, such as Ecuador and Peru (which created a public entity specifically in charge of PPPs), and start looking into the possibility of creating regulation for PPPs, which would then be applicable to future projects such as the transatlantic railroad, which will need the participation of foreign financial entities as well as foreign governments. If this is the case, then based on applicable international case law and practice, it is very likely that public procurement procedures will be enforced for PPPs.

Advertisement and selection

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).

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 of 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 less 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.

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, this article divides such conditions into two categories, those which cannot be regulated and those which, 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 who are associated with consultants who advised in the elaboration of the content of the DBC; bidders declared as bankrupt; 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 who, 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 entity; and
- suppliers, contractors and consultants with whom contracts have been 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

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.

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.

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, providing that public officials are prohibited from acting when their private interests conflict with those of the entity where they provide their services, and enter into contracts or conduct businesses with the public administration directly, indirectly or on behalf of a third

person; and are prohibited from 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 such process, under any reason or circumstance; and that individuals or companies, or their corresponding subsidiaries, contracted by the convening entity to provide goods, perform works or provide general services, may provide consulting services in respect thereof.

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. As a consequence, the prohibition is absolute.

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 for foreign bidders to take 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 because there is no minimum or maximum amounts to these types of contracting procedures and offices such as SEDEM, as well as strategic development sectors (mining, hydrocarbons, energy, telecom) developed their own regulations, whereby they may be allowed to turn to foreign bidders whenever the specific services or goods that are needed cannot be found in Bolivia.

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.

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.
- 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 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 negotiation most regularly used in recent practice is the one carried out by means of negotiation tables and inverse fairs.

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 above 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.

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 consortiums 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 consortiums in order to take part in procurement procedures, we believe that such a change would lead to the rejection of such consortium.

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

With regards 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 only submit 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 lots a single bidder may be awarded.

Update and trends

With the creation of SEDEM, new regulations have been created in order to allow such entity to directly contract with foreign providers, who, otherwise, would have had to overcome too many obstacles in order to be able to provide their services or goods in Bolivia.

However, such opportunities can, sometimes, be a double-edged sword, given that practice has shown and recent news demonstrated that loopholes in applicable legislation provide an opportunity for nepotism and sidestepping rules that should allow for more transparency, such as the comparison between offers, the negotiation of public procurement contracts and the publication of bidders' information at SICOES.

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.

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.

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 are 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.

31 What constitutes an 'abnormally low' bid?

There is no definition of what constitutes an 'abnormally low' bid. However, 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 the 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 compliance guarantee is increased by the bidder 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

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 organised in a ratings commission, each member being 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 recourse, 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.

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 to 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 period of 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.

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 the 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 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.

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.

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

Article 22 of Supreme Decree 181 provides that once the adjudication has been made, the proposals that were not awarded will not be 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.

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

Given that there is no public information available with regards 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.

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.

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 indeed 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'.

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.

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.

Alejandra Guevara **aguevara@gg-lex.com**
Jorge Inchauste **jinchauste@gg-lex.com**

Calle 15 de Calacoto
Edificio Torre Ketal, Piso 4
Oficina 402
La Paz
Bolivia

Tel: +591 2 277 0808
Fax: +591 2 279 6462
www.gg-lex.com

Brazil

Claudia Elena Bonelli, Ana Cândida de Mello Carvalho and Adriana Ferreira Tavares
TozziniFreire Advogados

Legislative framework

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

The main legal framework for public procurement in Brazil is set forth by Federal Law 8,666/1993 (the PPL), which establishes general procurement rules applicable to the acquisition of goods and services (including construction) by federal, state and municipal government entities. Within the PPL limits, state and municipal governments also have the authority to regulate public procurement.

Other specific laws applicable to public procurement are:

- Federal Act No. 10,520/2002, which regulates the reverse auction for acquisition of ordinary/standardized goods and services;
- Federal Decree No. 7,892/2013, which regulates the price registry system;
- Federal Law No. 12,462/2011, which sets forth an integrated and alternative procurement proceeding, known as the Differentiated Regime of Public Procurement (RDC), applies to specific construction services related to the 2016 Olympic Games, urban mobility projects, projects included in the Federal Government's growth acceleration program (PAC) and public security projects; and
- Federal Law No. 13,303/2016 and Federal Decree No. 8,945/2016, that set forth procurement rules especially applicable to Brazilian state-owned and mixed-capital companies, as well as their subsidiaries. In addition, such entities may issue their own regulation on the matter.

Enforcement or controlling entities can be divided into:

- internal control entities: the contracting entities themselves have authority to initiate administrative proceedings relating to contractual breaches and, as a consequence, impose penalties;
- external control entities: it is the administrative review of the government acts and contracts by:
  - Courts of Audits (federal, the Portuguese acronym is TCU; state; and exceptionally by municipal courts, whenever the case), which are part of the Legislative Branch;
  - the Office of the Comptroller General (CGU), which is subordinated to the Office of the Presidency of the Republic; and
  - the Public Prosecution Office (both at federal and state levels), an independent controlling agency.

Judicial courts also have authority to enforce the PPL and related laws, both directly or reviewing administrative decisions issued as a result of internal or external control, within the period of the statute of limitations applicable to each government act or contract.

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

Yes, there are also public procurement rules applicable to sectors such as defense, energy, oil and gas, among others. States, the federal district and municipalities may also enact their own laws and rules on public procurement proceedings, as long as they do not conflict with or modify the content of the PPL.

Some sector-specific procurement laws are listed below:

- Presidential Decree No. 2,745/98, which sets forth the simplified procurement rules and regulates contracts to be executed by Petrobras;
- Federal Law No. 12,232/2010, which regulates the hiring of advertising services; and
- Federal Law No. 12,598/2012, which regulates the acquisition of strategic defence products by the armed forces;

Specifically related to long-term projects, Federal Laws No. 8,987/1995 and 11,079/2004 set forth rules for the concession of public services and public-private partnerships (which also abide by the standard PPL in matters not specifically regulated by these laws).

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

Brazil is not a signatory of the GPA and is not subject to the EU procurement directives.

4 Are there proposals to change the legislation?

Yes. There are several proposals to change the PPL and related laws. The main bill currently under analysis by the Brazilian Senate is Bill No. 559/2013, which proposes to replace PPL and its related laws. After being approved by the Senate last December, 2016, Bill No. 559/2013 was sent for analysis and approval of the House of Representatives.

As soon as the House of Representatives received Bill No. 559/2013, it was registered with a new number (Bill No. 6814/2017). Its approval by the House of Representatives is expected by the end of 2017, when it will have to be sanctioned by the President of the Republic before being enacted as the New Brazilian Public Procurement Law.

Applicability of procurement law

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

All government bodies, special public funds, autonomous government entities, public foundations and all other entities controlled directly or indirectly by the federal, state, federal district and municipal-level governments have to comply with the PPL.

More recently, Federal Law No. 13,303/2016 and Federal Decree No. 8,945/2016 were enacted to govern the public procurement carried out by Brazilian state-owned and mixed-capital companies, as well as their subsidiaries. This new legal framework released those entities from abiding by PPL.

Although Federal Law No. 13,303/2016 (and its regulation) is very recent and no case precedents have been issued based on it yet, case precedents and scholar's opinions issued based on the previous legal framework have concluded that public procurement proceeding is not required when state-owned or mixed-capital corporations are developing their core economic activities. In such cases, it is understood that the procurement requirement jeopardises the development of core economic activities by those corporations and, consequently, their competition with private companies in their respective markets. The PPL will apply, however, in connection with activities that are means to allow government-owned and mixed-capital corporations to develop their core activities.

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

The PPL provides for exceptional situations in which the mandatory public procurement proceeding is waived for reasons of public interest or not required by law.

Cases in which procurement is waived are listed under sections 17 to 24 of the PPL. Some examples can be referenced for illustrative purposes:

In terms of contract value, procurement is waived for engineering services and works estimated with a maximum value of 150,000 reais and non-engineering services or works with a maximum value of 65,000 reais (section 24 of the PPL).

Procurement is also waived: whenever national security can be compromised by the procurement proceeding; purchase or restoration of specific works of art; printing of official gazette and similar products; for acquisition of material and services by the armed forces, whenever standardisation is required by the logistics support structure, among others.

There are also cases in which the procurement is not required because competition is not feasible: sole source supplier; technical services of singular nature to be rendered by undisputedly specialised companies; artistic services.

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

No. Contract extension is exceptional according to the PPL. As a rule, when a government contract expires, the contracting authority must carry out a new procurement proceeding to contract the same scope. However, if the maintenance of the contracted party can be justified in terms of efficiency or economy to the contracting authority, the extension may be feasible.

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

No. Even though Brazilian law does not allow the term extension of government contracts already expired, there are some case precedents in which both the Superior Court of Justice (STJ) and the Court of Audits (TCU) understood that, in view of emergency or public calamity situations, the public administration may hire the same contractor based on a waiver of the bidding process. These emergency contracts must be limited to a 180-day term, counted as of the occurrence of the emergency or calamity, being forbidden its term extension.

9 In which circumstances do privatisations require a procurement procedure?

Privatisation of companies directly or indirectly controlled by the federal government, states, federal district and municipalities; of public services that are subjected to concessions, permissions and authorisations; of public financial institutions and also of public assets shall be previously authorised by law. Federal Law No. 9,491/97 regulates these matters on a federal level, requiring a public procurement proceeding, to which PPL rules will apply on a subsidiary basis. States, the federal district and municipalities enact their own laws to regulate privatisation of their holdings and assets.

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

Previous public procurement procedure is always mandatory for public-private partnerships (section 10 of Federal Law No. 11,079/2004).

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

A summary of every single government contract resulting from public procurement proceedings must be published in the Official Gazette of the government entity that carried out the tender until the fifth business day of the month following the agreement execution date.

If, however, the hiring by the government entity was based on a waiver or non-requirement of the bidding process, the term for publication of the summary of the agreement is of five days. The publication of the summary of contract in the relevant Official Gazette is a pre-requisite for the effectiveness of government contracts. Therefore, if the contract summary is not published, the agreement is not considered to be in force.

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. Contracting authorities must abide by PPL to set qualification criteria for the bidders who aim at participating in a tender procedure. According to article 27 of the PPL the bidders must provide documents to attest: legal qualification; technical qualification; economic and financial qualification and fiscal and labour good standing. Articles 28 to 32 of the PPL provide all the requirements concerning the qualification documents for public procurement proceeding purposes.

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

No. As a general rule, it is not possible to limit the number of bidders in a certain tender under Brazilian PPL provisions. We note that, in the particular case of the invitation to bid – convite (which is a specific type of tender set forth in article 22 of the PPL), the law limits the minimum number of bidders to three, but does not establish a maximum limit.

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?

Pursuant to the PPL, the bidder can be excluded from a bidding process by blacklisting, or temporary suspension from participating in other bidding processes.

In case of the temporary suspension, the penalty term is up to two years. Thereafter, the bidder can start participating in bidding process again. If the bidder is blacklisted, there is no specific term provided in the PPL. The blacklisting will remain for as long as the grounds for the imposition of the penalty remains or until the company is rehabilitated with the same authority that imposed the blacklisting penalty.

In addition, other rules may apply within government contracts, such as the ones provided in case of Federal Law No. 10,520/2002 (the Reverse Auction Law). According to the Reverse Auction Law and its corresponding Decree (Decree No. 5,450/2005), the government entity may impose the penalty of prohibition of contracting with federal authorities for up to five years in the hypotheses provided under article 28 of Decree No. 5,450/2005. Additionally, pursuant to article 23 of Federal Law No. 12,846/2013 (the Brazilian Clean Companies' Law), all the penalties imposed to private companies have to be registered with the National Register of Blacklisted and Suspended Companies (CEIS).

Although Brazil does not establish a definition or concept for 'self-cleaning', the penalties imposed are, as a rule, temporary. Therefore, as soon as the penalty applied by the government entity expires or finishes; the company is able to participate in tenders again.

The procurement procedures

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

Yes, the fundamental principles governing the public procurement proceeding are: equality of bidders, selection of the most advantageous proposal for the public administration, legality, impersonality, morality, publicity, administrative probity and the binding nature of the request for proposals (article 3 of the PPL).

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

Yes. The PPL requires the contracting authority to be independent and impartial, in view of the principles of the equality of bidders; legality and impersonality (see question 15). It also requires the contracting authority to define objective criteria for selection of the winning bidder.

17 How are conflicts of interest dealt with?

Conflicts of interest involving ministers and other high ranked public officials, as well as presidents, vice-presidents and directors of government-owned and mixed-capital corporations are governed by Federal Act No. 12,813/2013. Situations that characterise conflict of interest are defined under such law, as well as potential penalties.

Illegalities practiced in connection with the public procurement proceeding may also characterise administrative improbity acts. Federal Law No. 8,429/1992 defines the following acts as administrative improbity acts, among various others:

- to cause the illicitness of the public procurement proceeding, or waive the procurement proceeding in cases not provided under law;
- to allow, facilitate or concur to the illicit enrichment of a third party; or
- to cause the public administration to enter into partnerships with private entities without the due legal formalities.

Finally, the PPL also provides for conducts that characterise procurement crimes (article 89 et seq), such as:

- waiving or not requiring a procurement proceeding in cases not provided under the PPL, or failing to comply with the formalities required for the waiver or non-requirement of the procurement;
- frustrating or defrauding, through adjustment, combination or any other behavior, the competitive nature of the procurement, in order to obtain for himself, herself or others, benefit from the award of the procurement object;
- advocating, directly or indirectly, a private interest before the Administration, giving cause to the opening of a procurement or the execution of a contract that are later invalidated by decision of the Judiciary Branch;
- admitting, allowing or causing any modification or advantage, including a contract extension, in favour of the contracted party, during the performance of government contracts, which is not provided by law, request for proposals or contract;
- preventing, disturbing or defrauding the performance of any act of a procurement proceeding;
- violating the secrecy of a proposal submitted in a procurement proceeding or allowing a third party the conditions to do the same;
- removing or attempting to remove a bidder, through violence, serious threat, fraud or by offering any kind of advantage; and
- defrauding a procurement for the purchase or sale of goods, or the resulting contract, by raising prices arbitrarily or selling, as true or perfect, counterfeit or damaged commodity.

In addition to the provisions in Federal Law No. 8,429/1992, the rules set forth in Federal Law 12,846/2013 (the Brazilian Anticorruption Law) provides that any legal entity (especially companies and corporations established in Brazil) that carries out harmful acts against any national government (federal, state, municipal or of the Federal district), as well as foreign governments, may be held liable under the administrative and civil standpoints. The Anticorruption Law also sets forth that civil and administrative liability shall apply to companies engaging in acts of corruption of public officials in Brazil and abroad, as well as in illegal conduct in connection with governmental bids and governmental contracts.

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

Some parties are prohibited under PPL rules from participating, directly or indirectly, in the tender, as well as from performing the works or services or supplying the goods in connection to them: the individual or company responsible for preparation of the basic or detailed engineering project; the company of which the individual who prepared the basic or detailed engineering project is a manager, shareholder, technical manager or subcontractor; and the public official or director of contracting government body or entity or individual responsible for the procurement proceeding.

However, an example under legislation that allows the involvement of a bidder with a project prior to the tender is the Expression of Interest Proceeding (the PMI), which was ruled by the government by means of Federal Decree No. 8,428/2015. The PMI allows private companies to perform feasibility studies for infrastructure projects, at their own expenses, upon authorization of the relevant government entities. By issuing this regulation, the federal government follows the track of many states and municipalities, which have already regulated and used the PMI to generate new infrastructure projects under their jurisdiction. The concept of PMI has legal grounds in the Concession of Public Services Law (Federal Law No. 8,987/95) and the Public-Private Partnership Law (Federal Law No. 11,079/2004). Such concept allows: companies performing the studies for a government entity to participate in the future concession tender launched by such entity; and companies performing the studies to be later remunerated by the future winning bidder, to the extent the studies have been used in the final project model and in case the winning bidder is not the same company that performed the studies.

However, the use of the PMI for structuring new infrastructure projects seems to increase the level of public acceptance and public perception of the project's credibility. The PMI also allows projects to be closer to the reality of the sector of the project, especially from technical and economic perspectives.

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

The PPL provides for the following types of public procurement, to be determined by the contracting authority depending on the value or the nature of the goods and services to be acquired or sold:

- competitive bid: to hire works and engineering services worth 1.5 million reais or more and other services worth 650,000 reais or more;
- request for quotation: to hire works and engineering services with value of or less than 1.5 million reais and other services worth 650,000 reais or less;
- invitation to bid: to hire works and engineering services worth 150,000 reais and other services worth 80,000 reais or less;
- contest bid: technical, scientific or artistic work, upon payment of a prize or remuneration to the winners;
- auction: to sell useless public goods or legally seized or confiscated goods, as well as publicly owned real estate; and
- live auction: to acquire ordinary or standardised goods and services.

The aforementioned types of public procurement procedures and the circumstances in which they must be adopted by the Public Administration are expressly provided by law. competitive bid, request for quotation and invitation to bid must necessarily be used in case of civil works, engineering services and other complex works, and the choice between them shall be made based on the work's value. On the other hand, the choice between contest bid, auction and live auction results solely from the nature of the relevant scope, regardless of its respective value.

The choice among the different types of public procurement procedures does not lie within the public administration's sole discretion and may vary according to the complexity and value of the agreement, requiring an analysis on a case-by-case basis. The more complex the object of the agreement is, the more complex is the public procurement procedure to be used by the public administration.

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

One company cannot participate in the public procurement proceeding through more than one consortium or, at the same time, individually and through one consortium. Also, it is common that requests for proposals prohibit the submission, by related parties (or companies belonging to the same economic group, of separate proposals in the same public procurement proceeding.

For additional prohibitions, see question 18.

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

Government contracts are very similar to adhesion contracts and, therefore, cannot be freely negotiated between the public administration and private parties involved.

The PPL determines that the request for proposals in a public procurement proceeding must include the contract draft, setting forth all contractual terms and conditions to be adhered to by the bidders, in case they are selected as the winning bid as a result of the public procurement proceeding. The PPL also indicates mandatory clauses of a

government contract, and limits the conditions under which those contracts can be executed.

Price negotiation can take place in very specific occasions, such as in the live auction procedure (*pregão*). In this particular case, after all proposals are open, the auctioneer can negotiate only the price proposal, exclusively with the winner bidder.

For competitive dialogue comments, see question 22.

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 PPL does not have provisions that allow negotiation between the bidders and the government authority; an exception is made for the price negotiation set forth in the Live Auction Procedure, as detailed in question 21.

Currently, there is nothing similar to the competitive dialogue in the legal framework related to public procurement proceedings. However, as mentioned in question 4, there are ongoing proposals to the change the PPL and related laws such as the Bill No. 559/2013 (which was recently forwarded to the House of Representatives with the new number Bill No 6814/2017).

If the Bill passes there will be provisions on competitive dialogue as one new type of public procurement; based on the draft of the bill proposal the competitive dialogue would be a type of bidding in which the Public Administration will be able to dialogue with previously selected bidders aiming at finding one or more alternatives capable of meeting the Public Administration needs and the bidders may submit a final proposal after the end of the dialogue.

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

Brazilian legal framework provides for a type of contracting which is similar to the framework agreement: the Price Registry System. Price Registry is governed by Federal Decree No. 7,892/2013 and it provides for the possibility of the government entity executing with the winner bidder, as a result of the public procurement proceeding, a type of 'commitment to supply' by a certain price, a certain quantity of goods or services. This commitment to supply is called 'Price Registry Minutes', and is valid for one year. During the validity term of the minutes, the government entity may or not request the supplier to supply the goods for the registered price, up to the quantity initially requested.

This type of contracting is mainly applicable to goods and services that are used by the government entity or many entities on a regular basis; or which quantities are unpredictable in view of the nature of the goods or services to be hired.

24 May a framework agreement with several suppliers be concluded?

No. As a rule, the Price Registry System, which is similar to the framework agreement, may be executed with only one supplier.

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

The consortium members have to be defined by the time the consortium submits its proposal to the government entity during a public procurement proceeding. After the proposal submission, change in the consortium configuration is no longer allowed.

As soon as the contract is signed, consortium members may be replaced by other companies with equivalent capabilities, provided that the request for proposals and contract authorise it and the equivalent capabilities are duly demonstrated. It is an exceptional situation, for which the prior consent of the contracting government entity is normally required.

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. Supplementary Law No. 123/2006 sets forth specific mechanisms to foster the participation of small companies in the public procurement proceedings, among which: preference to contract a small company in case there is a tie between two or more proposals, one being from a small company; and if the scope of the contract is estimated at up to 80,000 reais, the government entity may opt to carry out a public procurement proceeding directed only to small companies; as well as other initiatives.

For purposes of the public procurement proceeding, the scope to be contracted by a government entity must be divided into as many lots as technically and economically feasible, according to section 23, first paragraph of the PPL. In view of that, as long as the independent lots are considered technically and economically feasible as such, the object must be divided, aiming at assuring the broadest competitiveness to the public procurement proceeding.

There are no limits as to the number of lots a single bidder can be awarded. The government entity will analyse each lot individually according to the judgment criteria set forth in the RFP and will award the lot to the best proponent for each lot. In view of this, if one bidder submits the best proposal to all lots being procured, it could, potentially, be awarded all of them.

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

Alternative bids are not allowed in the public procurement proceeding legal framework.

28 Must a contracting authority take variant bids into account?

This is not applicable to the Brazilian legal framework.

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

The public administration will only analyse and judge the proposal that fully complies with the requirements provided by the request for proposals, according to the PPL (article 43, item IV). Therefore, bids which are incompatible with the terms and conditions of the RFP or non-responsive must be rejected by the Bid Commission.

Therefore, if bidders submit their own standard terms of business and these terms does not comply with the requirements of the public notice, the bidder will not be considered qualified to contract with the contracting entity.

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

Once the public procurement proceeding is concluded, the object of the proceeding must be awarded to the winner bidder, that is, the bidder that submitted the best bid according to criteria defined under the request for proposals and, also, complied with all qualification requirements.

The winner acquires the right to enter into a contract with the government entity which carried out the public procurement proceeding, and no changes in the order under which bidders have been qualified are allowed.

The criteria for the award of a tender to a bidder must be previously specified in the request for proposals and chosen from the list of criteria provided by PPL: lowest price; best technique; a combination of technique and price, or; highest bid or offer, in cases of sale of goods or concession of the right of property use.

31 What constitutes an 'abnormally low' bid?

The abnormally low bid is qualified by the PPL as the one with prices clearly unfeasible compared to the estimated market price researched by the government entity in the procurement preparatory phase, or compared to costs of inputs (section 48, item II).

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

If a bid is considered abnormally low, the Bid Commission will require the bidder to present documentary evidence that the costs of inputs are compatible with market prices and that the rates are compatible with the performance of the contract's scope. If the bidder cannot evidence feasibility of the bid, it will be rejected by the Bid Commission and may be subjected to administrative penalties in some cases.

Review proceedings

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

Bidders and third parties have the right to challenge the request for proposals, whenever the government entity commits irregularities in applying the rules of the PPL to the public procurement proceeding (section 41 of PPL).

Moreover, section 109 of the PPL entitles bidders to file an administrative appeal against administrative acts that have:

- qualified or disqualified a bidder;
  judged the proposals;
- declared the public procurement proceeding null and void;
- terminated the agreement by the sole decision of the public administration; or
- imposed the administrative penalties of warning, temporary suspension of the right to participate in public procurement proceedings or fines.

The PPL also allows interested parties and contractors to file a complaint against a decision rendered by the public administration when no other appeal is available. In case of a blacklisting penalty, interested parties and contractors may request reconsideration of the blacklisting decisions to the state ministry or to the municipality and state secretaries.

The administrative appeals described above shall be filed with the government body or entity that has carried out the public procurement proceeding or executed the administrative contract with the private party. The only exception to this rule is the blacklisting reconsideration request, which shall be filed with the state ministry or state and municipality secretaries, as the case may be.

In addition, the interested parties and third parties may file a complaint addressed to the applicable audit courts, which are administrative courts responsible for controlling acts performed by government entities involved in public procurement proceedings and administrative agreements.

Public procurement proceedings may also be judicially challenged. Different kinds of lawsuits and requests may be filed according to the peculiar characteristics and stages of each case. For example, it is possible to file a writ of mandamus, the scope of which is to declare that a given decision granted by a government entity or authority was illegal and could damage the bidder. The writ of mandamus can only be filed if there is an unquestionable right and no further evidence will be necessary during the proceeding.

An annulment lawsuit should be filed if there were irregularities in the public administration award or administrative proceeding. If the award or the proceeding was illegal, the bidder should file a declaratory lawsuit to declare it null and void. Parties may also file a lawsuit requesting indemnification for damages.

Finally, in any judicial strategy the bidder may request injunctions to cease the effects of the award of the government contract, or to obtain any other urgent measures in order to avoid damages. To obtain an injunction, the bidder should demonstrate that there is a risk of ineffectiveness of the future decision if the proceeding is delayed and that its right is likely to be recognised in the end of the proceeding.

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

Yes, based on the fact that there are multiple entities incumbent upon ruling the legality of the public procurement proceeding, it is possible to have different remedies being granted by more than one authority within the review application related to the same tender.

Due to the fact that many controlling entities may initiate administrative proceedings relating to contractual breaches and also impose administrative penalties; it is possible that within the review application concerning the same tender, conflicting decisions issued by different authorities coexist (for example, contracting entity and the court of audits).

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

An administrative review proceeding may take six months to one year to be concluded, while a judicial proceeding could take between six months to 10 years, depending on the case.

The analysis will always have to be carried out on a case by case basis, provided that, although the bidder has between five to 10 days to file its review application or appeal (depending on the case), the PPL and its related laws do not provide for a specific term for the government entities and authorities, including audit courts and judges, to decide on the administrative or judicial review proceedings.

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?

The main rule applicable to the challenge of the request for proposals, previously detailed in question 33, is the deadline to third parties of five business days before the date scheduled for the opening of proposals. However, interested parties have a term of only three business days before the date scheduled to the opening of proposals. Specific types of tenders may have specific terms.

Regarding administrative appeals and complaints, the deadline is five business days, counted as of the notice of the appealed act or transcription of the minutes of the session performed by the Bid Committee. The term for filing a blacklist reconsideration request is 10 days counted as of the notice of the blacklisting decision.

The imposition of administrative sanctions may occur both during the public procurement proceeding and during the execution of the contract. The statute of limitations for the imposition of administrative penalties is generally five years.

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 administrative appeal questioning the following subjects will have an automatic suspensive effect, according to section 109, second paragraph, of the PPL:

- a decision qualifying or disqualifying a bidder; or
- a decision judging the proposals.

In other cases, the suspensive effect will be granted at the government entity's discretion, upon motivated decision, provided that there are reasons of public interest to justify it.

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

The number of successful administrative appeals within a year may vary according to the government entity with jurisdiction on the matter, as well as the scope and the size of the tender. According to our past experience, administrative appeals aiming at challenging clauses of the request for proposals or the qualification of other bidders tend to have the suspension effect granted more frequently than appeals focused on challenging the decision issued by the Bid Committee after evaluating the proposals, which may be subject to judicial lawsuits.

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

Yes, all bidders must be notified of the result of the public procurement proceeding before the winner bidder is called upon to execute the contract with the procuring government entity.

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

The official records of the public procurement proceeding are available to the public in general as well as to the bidders. The official records are usually kept with the Bid Committee, which will certify all acts performed during the proceeding and file all documents regarding the procurement.

The public procurement proceeding must comprise a formal administrative proceeding, duly recorded, docketed and numbered, containing the corresponding government entity authorisation, a brief description of its purpose and the origin of the financial resources required to pay for the relevant project (section 38 of the PPL).

An electronic reverse auction, in which the proceeding is carried out through an electronic system (eg, the Comprasnet or e-Licitações websites), also requires that all acts performed are duly registered and certified through official paper records by the Bid Committee.

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

Yes. Even though it is not possible to assess how many administrative appeals or judicial lawsuits were filed within a typical year, it is correct to affirm that, as a general rule, the disadvantaged bidder tends to challenge the decision issued by the Bid Committee aiming at becoming qualified or having their proposals analysed.

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

Yes, disadvantaged bidders can claim damages. However, they must be able to evidence that damages were effectively suffered as a direct result of the procurement law violation occurred in that specific case.

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. According to article 109 of the PPL the appeals may be filed in order to challenge:

- qualification requirements of other bidders;
- judgment of the bids;
- revocation or cancellation of the tender;
- denial of the request for the registration in the enrolment records
- termination of the contract, as provided in article 79, item I; and
- imposition of penalties.

Owing to this, if after the analysis of the review application the government authority understands that one of the hypotheses set forth in article 109 occurred as well as any illegality was committed within the tender proceeding or during the contract execution, the government authority may declare the bid null and void based on the provisions set forth in articles 78 and 79 of the PPL as the case may be, resulting in contract nullity. The result, however, should be that services effectively rendered under the contract until the nullity is recognised should be indemnified to the contractor by the contracting authority in case contractor did not give cause to the nullity.

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

Yes, legal remedies are available in those cases. See question 33.

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

Bidders do not have to pay for filing the administrative application for the review of a procurement decision.

TOZZINIFREIRE ADVOGADOS

Claudia Elena Bonelli **cbonelli@tozzinifreire.com.br**
Ana Cândida de Mello Carvalho **amcarvalho@tozzinifreire.com.br**
Adriana Ferreira Tavares **adferreira@tozzinifreire.com.br**

Rua Borges Lagoa, 1328
São Paulo
CEP 04038-904
Brazil

Tel: +55 11 5086 5000
www.tozzinifreire.com.br

Bulgaria

Boryana Boteva and Galabina Ruseva
Sabev & Partners Law Firm

Legislative framework

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), in force as of 15 April 2016, which revoked and replaced the previous PPA of 2004. 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 the Council of Ministers (Bulgarian government) in force as of 15 April 2016 as well. There is further secondary legislation containing more detailed implementing provisions.

There are two other laws that are relevant to public procurements in general:

- the Prevention and Disclosure of Conflicts of Interest Act (PDCIA) (adopted in 2008), and
- the Law on Management of Funds from European Structural and Investment Funds (adopted in December 2015), which applies in cases where the beneficiaries of such funds are not contracting authorities under the PPA.

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.

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, now the PPA 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.

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 EU directives. It also includes specific provisions regarding performance or advance payment guarantees to be provided by the contractor upon signing the public procurement contract (article 111 PPA).

4 Are there proposals to change the legislation?

A substantial legislative change has most recently been implemented by the enactment of the new PPA (see question 1). There are no pending or expected proposals in the near future for new legislation changes.

Applicability of procurement law

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

The approach of the Bulgarian PPA is to list 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 contracts concluded between the National Health Insurance Fund and healthcare providers in the meaning of article 58 of the Health Insurance Act (article 14(8) 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 not to constitute 'public law organisations' in the meaning of, and for the purposes of, the PPA, thus, excluding such institutions from the category of contracting authorities.

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 some of which the law establishes national levels for 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 176–185 PPA):

Object	Values in lev* (between specified thresholds) – per type of contracting authorities	
	Public (general)	Sectoral
Works	270,000–5 millon	270,000–5 million
Supplies and services	70,000–264,033	70,000–817,524
Services under Annex 2 to PPA	70,000–500,000	70,000–1 million
* Fixed rate of the Bulgarian National Bank: €1 = 1.95583 lev.		

Collection of offers by advertisement or by invitation to specific persons
This is applicable in the following cases (article 20, paragraph 3 and articles 186–195 PPA):

Object	Values in lev (between specified thresholds) – per type of contracting authorities	
	Public (general)	Sectoral
Works	50,000–270,000	50,000–270,000
Supplies and services, excluding services under Annex 2 to PPA	30,000–70,000	30,000–70,000

Contracts with lowest value

Finally, there is a category of contracts with lowest value, which may be directly awarded (article 20, paragraph 1 point 5 and paragraphs 4 and 6, PPA) – and therefore are deemed excluded from the scope of procurement law:

Object	Values in lev (below specified thresholds) – per type of contracting authorities		
	Public (general)	Sectoral	Defence and security
Works	50,000	50,000	5 million
Supplies and services	30,000	30,000	817,524
Services under Annex 2 to PPA	70,000	70,000	
Design contests	70,000	70,000	-

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?

As a rule, under the revoked PPA of 2004 any amendments to signed public procurement contracts have been prohibited, except in certain exhaustively listed cases (article 43 of the revoked PPA). There is a quite 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. As yet, there are no court judgments having mandatory force rendered under the new law.

9 In which circumstances do privatisations require a procurement procedure?

The PPA does not cover the privatisation as a process of transfer of public assets. This process, including privatisation procedures, is regulated by a special law – the Privatisation and Post-privatisation Control Act. However, since the adoption of the 2016 PPA, the privatisation bodies have to engage contractors with respect to services related to privatisation procedures (eg, preparation of due diligence reviews, valuations and information memoranda) by conducting public procurement procedures under the PPA.

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

In 2012, the Bulgarian parliament adopted the Public-Private Partnership Act (PPPA), in force as of 1 January 2013. The PPPA provides that the selection of a private partner has to be conducted by a public procurement procedure in accordance with the PPA, as supplemented by certain specific requirements established in the PPPA. In 2016, the PPPA was substantially amended following the adoption of the new PPA. As yet, there is no sufficient practice on the implementation of the PPPA.

Advertisement and selection

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, 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 42 of the PPA and article 24 of the RIPPA.

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 proof for 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 decrease the number of the candidates meeting the selection criteria, who will be invited for submission of offers or conducting dialogue. The contracting authorities may also set forth a maximum number of candidates intended to be invited. The law requires the number of the invited candidates to be sufficient, so that a real competition is ensured. Therefore, the minimum number of invited candidates in a restricted procedure has to be five, and in a competitive procedure with negotiation, competitive dialogue and partnership for innovations the minimum must be three (article 105 PPA). The contracting authority must set clear and non-discriminatory criteria for reducing the number of candidates.

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 new 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

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.

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 to be in a conflict of interest situation 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).

17 How are conflicts of interest dealt with?

From 1 January 2009, the rules of the PPA have been supported by the PDCIA. Article 3 of the PDCIA lists 25 categories of public officers, for which there are numerous restrictions and requirements regarding identification and prevention of conflicts of interest set out in the PPA and other laws.

Conflict of interest is dealt with through the requirements that the members of the tender commissions and juries, and their consultants, have no private interest (in the meaning of the PDCIA) in awarding the contract to a given candidate or bidder, and that there are no relationships with candidates, bidders, their subcontractors or members of their bodies (article 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 such candidate or bidder from participation in the procedure (article 54(1)7 and article 157(1)3 PPA). The contracting authority is also allowed not to accept a proof of technical and professional ability submitted by a candidate, if it originates from a person having a legitimate interest that may lead to an advantage in the meaning of article 2(3) of the PDCIA.

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) of the 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 minimum: the publication on the buyer profiles of the entire information related to the preparation of the procedure or of links to relevant sources; 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 and it is submitted by a person that has 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).

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 70 per cent of the public procurements under the PPA have been contracted following open procedures. In the 2015 annual report of the PP Agency, it is noted that 7,659 out of a total 11,122 procedures were completed through open tenders. The rest are distributed as follows: 3,006 negotiated procedures without prior publication, 423 negotiated procedures with prior publication, 24 restricted procedures and nine design contests.

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 for a candidate or bidder, it 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 from participation in the procedure candidates or bidders that are related parties (article 107, point 4 PPA).

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

The PPA regulates negotiated procedure without prior publication, competitive dialogue and competitive procedure with negotiation as well as 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) of the PPA and negotiated procedure without prior publication only in cases set out in article 79(1) of the 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) of the 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 2015 annual report of the PP Agency, 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 law or administrative acts (for example, supply of electricity, heating or water). Another important part includes cases where the contracting authority needs to take urgent actions in situations caused by unforeseeable events.

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 with regard to price 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 period 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 77–78 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.

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 be awarded only to a bidder as it is as of the time of the bid's submission. 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 of 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.

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 expressly provide for any preferential terms for the participation of small and medium-sized enterprises 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 (articles 12 and 190 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 in separate lot 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 has to specify whether bids can be submitted for one, more or for 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 small and medium-sized enterprises.

Another option for small and medium-sized enterprises is to participate in public procurement procedures as subcontractors (article 66 PPA).

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

A contracting authority may allow or request submission of alternatives in the bids and this has to be specified in the notice or invitation for a given procurement (article 53 PPA). In such cases, the contracting authorities have to specify in the tender documentation the minimum requirements the alternative bids have to 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.

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 a bidder, whose offer is not in compliance 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 48–49 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 or 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 certification bodies (article 68 PPA).

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 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, as well as 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.

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 assessment and is more than 20 per cent more favourable than the average value of the proposals in the other bids on the same element (article 72(1) PPA).

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 law; it is five days from the receipt of the request of the contracting authority (article 72(1) PPA).

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

Pursuant to article 72(4) and (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 the 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 TFEU.

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

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 law (article 196 PPA). 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).

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 its merits and granting or refusing to grant the remedies provided for in the law. The SAC acts as cassation instance in possible subsequent proceedings on appeals against rulings or decisions of the CPC. As such, the court is bound to review only the defects 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 asses 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).

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 of the institution of the proceedings, except for the cases related to procurements that are with values above the thresholds established in the EU directives (as per article 20(1) PPA), 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 has to 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 does not institute a proceeding if:
- the appeal is submitted after the expiry of the 10-day period;
- the irregularities with regard 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; or
- the appeal is withdrawn before the institution of the case.

In the above cases the CPC sends the appeal back to the appellant by a ruling, which is subject to appeal before the SAC within three days of its notification to the appellant.

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.

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 has to decide on the interim measure request within seven days from the institution of the proceeding. The CPC decision on the interim measure is also subject to appeal before the SAC within three days from the notification to the parties and the court has to review such appeal and rule thereon within 14 days. The appeal 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 2015 annual report of the CPC, in 2015 the CPC ruled on 100 requests for provisional enforcement and has allowed such in 67 cases (ie, for 67 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.

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). 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. Furthermore, a 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 law (article 112(8) PPA).

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

Pursuant to article 42 PPA, each contracting authority is obliged to maintain a buyer profile on its website 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 the 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(3) PPA).

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 2014–2016, the number of submitted appeals was as follows: 1,735 in 2014, 914 in 2015 and 1233 in 2016. At the same time, based on statistics published by the PP Agency, the total number of announced procurement procedures during 2014 was 11,881, in 2015 it was 11,122, and in 2016 it was 10,235. These statistics show that appeals vary between 10 and 15 per cent of the total number of procurement procedures in a year.

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 voidance 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.

The contract may remain in effect in certain cases, where there is an enforceable decision of the CPC imposing a sanction of 10 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) PPA).

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 of the PPA. In this case, any person having a legitimate interest may claim voidance of the contract. See question 44.

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, as follows:

Procurement value (lev)	Reviewing authority / Filing fee (lev)	
	CPC	SAC (cassation)
Up to 1 million lev	850	425
1 million lev–5 million lev	1,700	850
Over 5 million lev	4,500	2,250
* Fixed rate of the Bulgarian National Bank: €1 = 1.95583 lev		

The fees for legal counsel to be engaged in review proceedings under the PPA are subject to agreement with the client on a case-by-case basis and may vary substantially. However, it must be noted that in Bulgaria there is a tariff establishing minimum levels of attorneys' fees – in force since 2004 and substantially amended in 2014 and 2016. As an example, in a case concerning the award of a procurement contract with a value of 1 million lev, the minimum fee would be 1.25 per cent per one reviewing instance. If the value of the procurement is 10 million lev, the fee would drop down to 0.4 per cent.

Sabev & partners Law firm

Boryana Boteva **bboteva@sabevandpartners.com**
Galabina Ruseva **gruseva@sabevandpartners.com**

42 Petar Parchevich Street, 2nd floor
Sofia 1000
Bulgaria

Tel: +359 2 980 0412 / +359 2 980 0413
Fax: +359 2 980 0457
www.sabevandpartners.com

Canada

Ben Mills, Paul D Conlin and Drew Tyler
Conlin Bedard LLP

Legislative framework

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 are dependent 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, being the federal government, provincial governments and territorial governments; all of whom 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. The World Trade Organizations' Agreement on Government Procurement (as revised in 2014) includes provincial-level procurement obligations. The Comprehensive Economic Trade Agreement with the European Union (which was recently approved by the European Parliament and the bill to implement the agreement in Canada is before the Canadian Senate) includes 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 Agreement on Internal Trade, the North American Free Trade Agreement, the World Trade Organization's Agreement on Government Procurement, the Free Trade Agreement between Canada and the Republic of Colombia, the Free Trade Agreement between Canada and the Republic of Chile, the Free Trade Agreement between Canada and the Republic of Panama and the Free Trade Agreement 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. 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.

Procurements conducted by a province or sub-provincial governmental organisation are subject to obligations set out in intra-national and international trade agreements, including the Agreement on Internal Trade, the New West Partnership Trade Agreement, the Trade and Cooperation Agreement between Ontario and Quebec and the World Trade Organization Agreement on Government Procurement (Revised).

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 of Canada). 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.

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

The Defence Production Act is sector-specific legislation associated with 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 IT services and equipment.

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 Government Contracts 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 $25,000 (or $100,000 in respect of contracts that involve architectural and engineering services). The Government Contracts 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.

4 Are there proposals to change the legislation?

There are no current proposals to change the legislation. The government has indicated an intention to adopt the Trans-Pacific Partnership (which is a multilateral trade agreement between Pacific-Rim countries that includes procurement disciplines, but the overall status of this agreement is in doubt owing to positions taken by the United States). Also, the Comprehensive Economic Trade Agreement (which is a trade agreement with the European Union that includes procurement disciplines) was approved by the European Parliament in February 2017, and the legislative process to implement the agreement in Canada is underway. The Comprehensive Economic Trade Agreement is consistent with the procurement obligations set out in the GPA and also expands coverage to government entities that are not currently covered by the trade agreements now in place.

Applicability of procurement law

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.

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 hresholds at www.tbs-sct.gc.ca/hgw-cgf/business-affaire/gcpagc/notices-avis/2013/13-5-eng.asp. There are sectoral specific monetary thresholds for goods, services and construction.

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 quantifies 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 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 Supreme Court of Canada was required to consider a situation where a bid was selected for contract award that, on its face, was compliant with the requirements of the procurement process. However, subsequent to contract award, the procuring authority learned that the selected bidder did not meet certain technical reqirements. The procuring authority, despite this issue, nonetheless continued with the contract. This was challenged by another bidder. The majority of the Supreme Court of Canada (in a rare 5 to 4 spit 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.

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, 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.

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

Canada does utilise private-public partnerships (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.

Canada's procurement legislation and trade agreements currently in force are silent on PPPs. Nevertheless, the selection of a private enterprise as a partner to a PPP will be covered by a trade agreement insofar as the procuring government entity and the goods or services provided by the private enterprise fall within the scope of the trade agreement. In such cases, the selection of the private partner entity must meet the basic procurement procedures and requirements of the applicable trade agreements.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

The government advertises opportunities on https://buyandsell.gc.ca/ and https://www.merx.com/

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 that are 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.

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. 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 consist 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 procurement procedures

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

Yes.

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.

17 How are conflicts of interest dealt with?

Conflicts of interest are dealt with internally to 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.

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.

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.

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).

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.

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 amongst 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.

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.

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 the procurement process. 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.

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.

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 non-compliant with the terms of the solicitation.

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. The specified offences include such things as competition law offences, bribery of government officials and tax evasion.

31 What constitutes an 'abnormally low' bid?

Canadian laws and the 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 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

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 of Canada 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 of Canada 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 of Canada 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.

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 of Canada or a Superior Court of a Province are quite 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.

Update and trends

Canada 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. The specified offences include such things as competition law offences, bribery of government officials and tax evasion. Where the bidder cannot provide such a certification, the bidder will be ineligible to participate in the solicitation process. This certification must be maintained throughout the term of the contract, which means that the government reserves the right to terminate a contract for cause if the supplier (or an affiliate of the supplier) is convicted of a specified offence in Canada or abroad.

Also, Canada is in the process of implementing the Comprehensive Economic Trade Agreement. Legislation regarding the implementation of this agreement is currently before the Canadian Senate. This agreement expands upon procurement disciplines already in place pursuant to earlier agreements (such as the North American Free Trade Agreement) and includes subnational procurement obligations.

Issues associated with anti-avoidance, the use of security exemptions, disclosure requirements in the context of debriefs and production requirements in the context of inquiries have all come before the Tribunal in recent months and resulted in decisions that reinforce Canada's obligations under the Trade Agreements and, overall, have strengthened the bid dispute process before the Tribunal.

While not a trend, the Tribunal recently considered a case involving a military procurement of significant value. The Tribunal determined that the complaint was valid. However, the Tribunal did not make any order that would affect the contract resulting from the procurement as it would have affected operational needs of the Canadian Forces. Rather, the Tribunal chose to make a monetary award, proceedings relating to which are still ongoing.

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 Canada 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 are appealable to the Federal Court of Appeal.

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 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.

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.

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.

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.

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 its 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 of Canada 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 of Canada is reluctant to exercise this jurisdiction. 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.

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.

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 is dependent upon the complexity of the case and can range from $50,000 to in excess of $300,000 in legal fees.

Ben Mills **bmills@conlinbedard.com**
Paul D Conlin **pconlin@conlinbedard.com**
Drew Tyler **dtyler@conlinbedard.com**

220 Laurier Avenue West
Suite 700
Ottawa ON K1P 5Z9
Canada

Tel: +1 613 782 5777
Fax: +1 613 249 7226
www.conlinbedard.com

China

James Cheng and Zoe Qiao

Shanghai Lee, Tsai & Partners Attorneys at Law

Legislative framework

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 and the Bidding Law. The Government Procurement Law 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) 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 provincial level and below.

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 the ministry in charge of the 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.

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

China has not acceded to the GPA as of the end of March 2017 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 are included. Other GPA participants are still not satisfied with the coverage of government procurement bodies, particularly state-owned enterprises.

The MOF repeated its intention to continue negotiations for accession to the GPA in its 2016 Government Procurement Report, 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. These include article 10 of the Government Procurement Law, which states that foreign goods, projects and services are to be used only when they are not available within China. They also cannot be acquired on reasonable commercial terms, even though they are available within China, or are to be procured for use abroad. Article 8 of the MOF Bidding Rules states that suppliers who participate in bidding activities for government procurement of goods or services, shall, in principle be domestic suppliers who provide domestic goods or services.

Furthermore it has been the practice for 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 trademark of indigenous innovation products 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.

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 2017, these measures have not been promulgated and have not been rendered effective.

In March 2014, the Legal Affairs Office of the State Council released the draft Amended Provisions on the Scope and Threshold of Construction Projects for Bid Invitation (the Draft Amended Provisions) for comment. The Draft Amended Provisions, among others, sought to further clarify the scope of construction projects, raise the thresholds for mandatory bidding requirements and prohibit local government and ministries of the State Council from stipulating a greater scope and threshold for their own procurements. These amendments to the provisions remain incomplete as at the end of March 2017.

Applicability of procurement law

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

'Government procurement' under the Government Procurement Law 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, etc. Public service institutions are non-profit entities established by government authorities, using state-owned assets to engage in education, science, culture or other 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 state-owned enterprises are not considered 'purchasers' (ie, contracting authorities) under the Government Procurement Law, the Bidding Law and its implementing

rules still apply to state-owned enterprises engaging in bidding activities to procure a construction project.

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

The Government Procurement Law is not applicable to procurement of goods, projects and services that do not fall within the 'centralised procurement catalogue' or do not 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 Government Procurement Law 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.

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 both parties to a concluded contract cannot arbitrarily amend, suspend or terminate a contract. The Government Procurement Law requires parties to a concluded contract to amend, suspend or terminate that contract if the performance of the contractor is against national and public interest.

9 In which circumstances do privatisations require a procurement procedure?

Privatisation of a state-owned asset does not follow the Government Procurement Law 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.

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 Government Procurement Law 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 the construction project by the method of bidding are subject to the Bidding Law.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

According to article 50 of the Government Procurement Law Implementing Rules (the GPL Implementing Rules), contracting authorities shall announce details of the government procurement contract on media designated by the MOF within two working days of signing the contract, except for content that involves national or business secrets. Media platforms designated by the MOF include the China Government Procurement Website (www.ccgp.gov.cn), *China Financial and Economic News*, *China Government Procurement* and *China State Finance* magazines.

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 Government Procurement Law 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 Government Procurement Law 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 project has been confirmed by the State Council or local government to be 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.

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 Government Procurement Law 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

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

Article 3 of the Government Procurement Law and article 5 of the Bidding Law iterate the principles of transparency, fair competition, justice (including equal treatment), honesty and trustworthiness.

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

The Government Procurement Law requires the contracting authority to adhere to the principles as outlined in question 15. Article 12 of the Government Procurement Law also addresses conflict of interest scenarios (see question 17).

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 Government Procurement Law requires procurement personnel and related personnel that have a conflict of interest with a bidder to recuse themselves from the bidding process. If one 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.

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, or project management, supervision or testing. This does not apply to a 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.

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

Article 26 of the Government Procurement Law provides that procurement procedures used by contracting authorities include: (i) public bidding; (ii) invited bidding; (iii) competitive negotiations; (iv) single-source procurement; (v) requests for quotations; and (vi) 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.

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

According to the GPL Implementing Rules, related bidders that share 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 independently form another consortium with other bidders to participate in the same government procurement activities. The Bidding Law contains similar provisions; violation of theses rules will render such bids void.

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

Pursuant to the Government Procurement Law 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 or no qualified bidder or 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 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 or 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: (i) the project is technically complex or has a special nature which renders certain details or requirements unable to be confirmed, or (ii) 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.

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

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 which 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 Government Procurement Law nor the Bidding Law addresses the issue of a framework agreement.

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

The Government Procurement Law 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.

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 MOF and the Ministry of Industry and Information Technology 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.

Micro, small and medium-sized enterprises are defined according to the number of employees, operating income and total assets. Using the construction industry as an example, micro, small and medium-sized enterprises comprise enterprises that have an operating income under 800 million yuan or total assets under 800 million yuan.

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.
- 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 the bidding requirement. However, the relevant laws do not provide for a limitation on the number of lots a single bidder may be awarded.

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

The MOF Bidding Rules allow a contracting authority to request bidders to provide alternative offers. This must be indicated on the bid invitation, which would also need to specify appropriate evaluation and comparison methods. Unless set out in the bid invitation, a bidder may not put forth alternative bids; 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.

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, either of which fails to meet the substantive requirements and conditions set out in the bid invitation documents, their bid will be deemed invalid.

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: (i) public bidding; (ii) invited bidding; (iii) competitive negotiations; (iv) single-source procurement; (v) requests for quotations; and (vi) competitive dialogue. The award criteria for the respective methods are as follows:

Evaluation methods for bids

Evaluation methods of bids under the GPL Implementing Rules are the lowest price method and 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:

- Lowest price method: assuming that substantive conditions set forth in the bid invitation documents are satisfied, the winning bidder will be the bidder that offers the lowest price.
- Comprehensive scoring method: assuming that all 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.

The MOF Bidding Rules provide for another evaluation method: the cost-performance ratio method. After reviewing tender documents, a total score for each valid bidder is calculated by adding the scores of each key factor other than the price (including technology, financial conditions, reputation, track record, services, and level of response to the bid invitation documents), divided by the bidder's bidding price. The bidder with the highest cost-performance ratio is awarded the contract.

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 Government Procurement Law, guarantee the quality of the procurement project and agree on a reasonable price.

Apart from 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.

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', but there are no provisions that expressly define such a term.

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

Under the MOF Bidding Rules, where a bid is evaluated by way of the lowest price method, if the price offered by the would-be winning bidder is so low or unreasonable that it is likely to jeopardise the product quality or the good-faith performance of the procurement contract, the evaluation committee may request the bidder to provide an explanation and supporting documents to justify its low price, failing which the evaluation committee may disqualify the relevant bidder from the bidding process.

In construction projects, a bidder cannot submit a bid price below costs, otherwise the bid evaluation committee shall disqualify such a bid.

Review proceedings

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 Government Procurement Law

A supplier with a query regarding government procurement activities may raise the query with the contracting authority, which shall respond within a reasonable time. Legislation does not expressly provide whether relief may be sought by a bidder that is 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, and 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.

Update and trends

MOF officers have publicly announced several important tasks for government procurement in 2017, including the following:

- The MOF released the Draft Measures on Government Procurement Supplier Challenge and Complaint Review Procedures on 13 February 2017 for comments. The most important focus of this draft is to further specify the way challenges regarding government procurement are handled. The public comment period ended on 10 March, and there have been no further developments at the time of writing.
- The MOF amended the Administrative Measures on Government Procurement Evaluation Experts on 18 November 2016, setting strict standards on the qualifications of experts, establishing mechanisms for disqualifying experts, refining the random selection rules, increasing the supervision of evaluation experts and clearly stipulating payment and standards for remuneration of experts.
- The Chinese government continues to promote PPP projects. Other than traditional areas of collaboration in basic facilities and municipal construction, the State Council office further requests provincial governments to promote the construction and operation of medical institutions, nursing homes, educational institutions, cultural facilities and fitness facilities using a PPP model.

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.

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 to 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 Handling of Complaints of Suppliers of Government Procurement (the Complaint Measures), the admissibility requirements for a complainant to raise a complaint are as follows:

- the complainant must be participating in the government procurement activities in question as a supplier;
- 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 complaint has been filed with the competent MOF with jurisdiction;
- the matter has not been complained about and processed by the MOF before; and
- other requirements stipulated by the State Council's 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.

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 Government Procurement Law 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.

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.

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

Under the Government Procurement Law 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 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.

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.

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 stated requirements.

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 Government Procurement Law and causes damages to a party's interests, it shall be held civilly liable under the relevant law. However, the above 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 Government Procurement Law states that '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.

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.

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

Generally speaking, the costs include 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 and/or translator for attending the hearing.

理慈 Shanghai Lee,Tsai & Partners

James Cheng **jamescheng@leetsai.com**
Zoe Qiao **zoeqiao@leetsai.com**

14F-D, No.567, Weihai Road
Shanghai 200041
China

Tel: +86 21 6288 1138 / 6288 2988
Fax: +86 21 6288 2989
www.leetsai.com.cn

Colombia

Ximena Zuleta, Santiago Lizarralde and Catalina Moncada

Dentons Cardenas & Cardenas Abogados

Legislative framework

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

Public contracts in Colombia are subject to the general public contractual law regime, that is, Law 80 of 1993, amended and complemented by Law 1150 of 2007. The decrees that regulate such laws have been compiled in Decree 1082 of 2015.

Other relevant laws, which have amended and complemented Law 80 of 1993 and Law 1150 of 2007 are: Law 816 of 2003 (to protect the national industry); Law 1474 of 2011 (the Anti-corruption Statute); Decree-Law 19 of 2012 (the Procedure Reduction Act); Law 1753 of 2015 (National Development Plan 2014–18); Law 1508 of 2012 (public-private partnerships (PPPs) and concession contracts); Decree 1676 of 2016 (trade agreements applied to public procurement processes); and Law 1778 of 2016 (anti-transnational corruption regulation).

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

There are specific regulations for certain sectors, such as: (i) defence and national security, which are governed by Decree 1082 of 2015 and Decree 1965 of 2014; (ii) public utilities, which are generally ruled by private law; (iii) telecommunications concessions are regulated by Law 1341 of 2009; (iv) infrastructure for transportation, safe drinking water and basic sanitation are subject to Law 1682 of 2013, modified by Law 1742 of 2014; (iv) PPPs are subject to Law 1508 of 2012, Law 1682 of 2013, Law 1742 of 2014, Law 1553 of 2015 (the National Development Plan), Decree 3049 of 2013, Decree 476 of 2014, Resolution 1464 of 2016, and Decree 1082 of 2015; and (v) mining concessions are governed by Law 685 of 2001 and Decree 1073 of 2015.

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

Due to the fact that Colombia is only an observer and is still not a signatory of the WTO Agreement on Government Procurement (GPA), its public procurement regime does not directly supplement that agreement.

4 Are there proposals to change the legislation?

There are two proposals to change current legislation. One is endorsed by the National Procurement Agency and intends to collect in one statute all regulations that rule Colombia's public procurement system. This bill is aligned with the OECD principles regarding efficient public procurement; it has not been submitted to Congress yet.

The Minister of Transportation promoted the other proposal, which aims, among other things, to: (i) adopt standard bidding documents; (ii) reduce the potential liability of the owner's representatives, which is too broad in the current legislation; and (iii) include specific provisions on conflicts of interest. The bill has reached the second debate out of the four that are required to pass in Congress.

Applicability of procurement law

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

The following entities have been ruled not to constitute contracting authorities:

- Semi-public corporations where the government holds less than 50 per cent of its shares;
- industrial and commercial corporations when they are in direct competition with the private sector;
- public utilities companies;
- public healthcare providers;
- education institutions; and
- financial entities.

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

Public education institutions that require contracts under 20 minimum wages are excluded from the scope of procurement law.

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

Yes. A concluded contract can be amended if there are valid reasons to do so, with the following restrictions: (i) the amendment has to be in writing; (ii) the scope of the contract cannot be modified substantially; (iii) the term of the contract cannot be amended if it has expired; and (iv) the contract cannot be amended for more than 50 per cent of its original value. For PPPs, which include concession contracts, the amendments may not exceed 20 per cent of the initial value.

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

Yes. There is abundant jurisprudence referring to the amendments to concluded contracts. Some of the principles set forth are as follows:

Parties to a government contract cannot be compelled to sign amendments to the contract.

Amendments to contracts may be carried out by executing *otrosís* and additional contracts. *Otrosís* are executed to amend non-essential provisions of the contract, such as the duration of the contract or its value. On the other hand, additional contracts are executed to amend essential contractual provisions; they are usually executed to amend the contact's object or scope, to add activities, works, goods or services that were not provided in the contract, but are closely related to its original scope.

If the amendment to the contract – for instance, an extension of time – causes damages to the contractor or breaches the financial equilibrium of the contract, the contractor must expressly state those circumstances when the amendment is executed and must reserve its right to claim them in the future. Otherwise, it is understood that the contractor waives all claims caused prior to or upon the execution of the amendment.

9 In which circumstances do privatisations require a procurement procedure?

Privatisations – the total or partial sale of state-owned shares in any given company – must comply with a special procedure, described in Law 226 of 1995. The government must design and implement, in each particular privatisation, a programme for the sale of the state-owned shares that guarantee the democratisation of state-owned property, publicity and free competition, the protection of public funds and the continuation of the service. Special conditions and preference are granted to the state-owned company's employees, ex-employees, labour unions, pension funds, etc.

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

Public initiative PPPs always require a procurement procedure, a public bidding very similar to the procurement procedure established in the General Public Procurement Statute (Law 80, 1993).

Private initiative PPPs that require government funding always require a procurement procedure (public bidding). PPPs that do not require government funding require a procurement procedure (abbreviated selection) when third parties, different from the originators, express their interest in the project.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

Government agencies have to publish the administrative act whereby the procurement process is summoned, and all documents related to the tender, in the Electronic System for Public Procurement (SECOP).

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. Contracting authorities can only set objective criteria to assess whether an interested party is qualified to participate in a tender procedure. They can only require the compliance of requirements such as legal, financial and technical capacity.

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

Yes. Exceptionally, government agencies may limit the number of bidders that can participate in a tender procedure by means of a prequalification process that is not applicable to all forms of public procurement tenders. During the prequalification stage, government agencies verify the bidder's legal and financial capacity, technical experience and other relevant criteria. Upon conclusion of the pre-qualification process, the government agency shall publish a list with the pre-qualified bidders, who will be the only ones allowed to participate in the tender.

In merit-based selection proceedings, one of the procurement procedures provided under Colombian law for the selection of consulting and architecture services, government agencies may limit the number of pre-qualified bidders. In those cases, the agency has to announce the number of bidders it will select beforehand. In the event the number of bidders who comply with the pre-qualification requirements exceeds the limit, the government agency must draw by lot the names of those who will be considered as pre-qualified bidders.

In public initiative PPPs, including concession contracts, in which costs exceed 70,000 minimum monthly wages (approximately US$17 million), a stage for pre-qualification is allowed before the public bidding process. In these cases, if there are four or more bidders that fulfil the pre-qualification requirements, the pre-qualification list must be drawn. If only two or three interested bidders fulfil the pre-qualification requirements, the government agency may or may not draw a list of pre-qualified bidders. In this case, the government agency may continue with the public tender, without limiting the participation to pre-qualified bidders. In any case, to draw a list of pre-qualified bidders, it is necessary that at least two interested parties fulfil the pre-qualification requirements.

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?

There is no 'self-cleaning' concept recognised under Colombian law.

In Colombia, bidders are excluded from government tender procedures:

- for a five-year term, when a contractor causes the unilateral cancellation of a government contract owing to a serious breach;
- for a three-year term, when a contractor has been subject to the imposition, by governmental entities, of a certain number of fines and penalties during the course of one year;
- for a five-year term, when a contractor refuses to execute an awarded government contract, without just cause;
- for a five-year term, when someone has been sentenced to the penalty of interdiction of certain rights and public functions or has been sanctioned with dismissal;
- for a 20-year term: individuals who have been sentenced for committing crimes against the public administration, for acts committed against the Colombian Anti-corruption Statute, acts contemplated in international anti-corruption conventions executed and ratified by Colombia, or companies that have been declared administratively liable for transnational bribery. This bar is extended to the companies in which such individuals act as administrators, legal representatives, board members and controlling shareholders, to parent companies, subsidiaries and branches of foreign companies; and
- for a five-year term, when the owner's representatives breach their obligation to submit to the governmental entity information regarding the contractor's breach of contract or facts or circumstances that may constitute acts of corruption.

Only upon the expiry of such terms (three, five or 20 years), will the bidder regain the status of a reliable bidder.

The procurement procedures

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

Yes. In Colombia all tender procedures have to comply with several principles, mainly: due process, equality, economy, responsibility, objectivity and transparency. Also, the national treatment principle is applicable to foreign bidders from countries that also apply national treatment to Colombian bidders.

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

Yes. Colombian legislation provides that the award of any contract has to be based upon objective criteria. No subjective criteria should influence the award of any tender.

17 How are conflicts of interest dealt with?

Colombian law does not provide an explicit definition for conflict of interests in government procurement. The law sets forth circumstances that constitute impediments to and incompatibilities with taking part in government tender proceedings and entering into government contracts. Some of those circumstances relate to possible conflicts of interest.

For instance: (i) former members of the board of directors or public officials of the contracting agency who acted in a directive, consulting, or executive position in the prior year; (ii) individuals who are relatives (up to certain levels defined in the law) of the public officials — at the directive, advisory or executive levels — or of the members of the board of directors of the contracting agency; and (iii) the spouse or permanent companion of the public official at the levels of manager, adviser, executive, or of a member of the board or board of directors, or of those who exercise functions of internal control or fiscal control.

Public officials who have a direct interest in the award of a contract, or in which their spouse, permanent partner or relatives within the fourth degree of consanguinity, second of affinity or first civil degree have an interest, must abstain from participating in the tender. Failing to do so may be deemed as a disciplinary misconduct.

The proposal to change the legislation, that seeks to be aligned with OECD principles and has been endorsed by Colombia Compra Eficiente, as mentioned in question 4, provides an express definition for conflict of interests. According to the latter, a conflict of interest occurs when there is a contradiction between general interest and the particular interest of a public official involved in the award of a contract. Additionally, the proposed bill contains a list of impediments and incompatibilities, which adds to the impediments and prohibitions provided under current legislation.

In the event any of the above situations of conflicts of interest take place, the bid must be rejected by the contracting agency.

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

During a tender process, government entities publish draft bidding documents and interested potential bidders have the right to make comments and suggest specific changes to the bidding requirements, the specifications and the contract minutes, among others. It is common and lawful for government entities to amend bidding documents as a response to this type of bidder's involvement in the preparation of final bidding documents. Any other type of involvement of a bidder in the preparation of final bidding documents is against the law.

An unlawful involvement of a bidder in the preparation of a tender procedure is considered one of many forms of bid rigging, severely penalised by the antitrust and criminal legislation.

Whoever has taken part in the preparation of a tender procedure, as a consultant of a governmental entity, is barred from taking part in the bidding process.

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

Public bidding is the prevailing type of procurement procedure used by contracting authorities. The general rule is that the selection of the contractor must go through public tender processes, unless the law sets forth another type.

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

No. Related bidders cannot submit separate bids. It may be considered a form of bid rigging with severe antitrust and criminal consequences.

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

In Colombia there is no negotiation between bidders and government agencies. In all public procurement processes, the tender documents include the minutes of the contract to be awarded. Once awarded, the bidder has the obligation to execute the contract according to the terms of the minutes included in the tender documents. However, as explained above, during the tender process, bidders have the right to suggest and request changes to the tender documents, including the terms of the contract minutes. Such requests may or may not be accepted by the government agency. Only PPPs of private initiative invoke such 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?

Colombian legislation does not provide for any procedure that permits negotiations with bidders.

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

Framework agreements were recently introduced in Colombian procurement regulation. Currently, the National Procurement Agency, Colombia Compra Eficiente, is the only government agency with the capacity to tender, award, execute and administer framework agreements.

Framework agreements are executed by Colombia Compra Eficiente and one or several providers of goods and services of uniform technical characteristics. Such agreements contain the identification of the goods or services, the maximum acquisition price, the minimum guarantees, the term for delivery and the conditions by which buyers (governmental agencies) may become part of the agreement. The execution of the agreements is preceded by a tender process in which all interested suppliers may participate, upon the compliance of certain legal, financial and technical requirements.

Governmental entities who wish to acquire the goods or services included in a framework agreement must inform Colombia Compra Eficiente of such interest and must place purchase orders. Governmental agencies, at the national level, are required to acquire all goods and services, which are included in a framework agreement, through that mechanism.

24 May a framework agreement with several suppliers be concluded?

Framework agreements may be concluded with several suppliers.

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

Once the bid has been submitted to the governmental entity, the member of a bidding consortium may not be changed. Once the contract has been awarded and executed by a consortium, its members may only be changed, in very exceptional circumstances, if there is an express authorisation from the governmental entity.

The law provides that if a member of a consortium becomes suddenly barred from government contacting, it must assign its share in the consortium to a third party, with an express authorisation from the governmental entity. Such assignment may not occur among the members of the consortium.

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 specific mechanisms to further the participation of small and medium-sized enterprises in procurement procedures. For instance, contracting authorities may limit the participation of bidders only to small and medium-sized enterprises and to small and medium-sized enterprises domiciled in the region where the contract is going to be performed. Also, in the case of a tie in the evaluation of offers, the second mandatory tiebreaker criterion is to prefer the offer filed by Colombian small and medium-sized enterprises; the first mandatory tiebreaker is to prefer the offer of national goods or services.

The division of a contract into lots is only allowed for the supply of goods and services of uniform technical characteristics. For other types of contract, case law has pointed out that government agencies cannot divide contracts into lots in order to skip the legal procurement procedure.

There have been major projects that have been divided into regions, to be awarded to one or more bidders.

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

Bidders may file alternative bids or technical or economic exceptions as long as: (i) the terms of reference allow such alternative bids, technical or economic exceptions (some terms of reference expressly prohibit this possibility); and (ii) it does not imply a conditioning of the offer.

Case law has differentiated alternative bids from exceptions to the terms of reference. An alternative bid is one that complies with the terms of reference, but contains other technical possibilities for the performance of the contract without affecting the purpose of the contract. On the other hand, an offer with exceptions or deviations varies non-substantial aspects of the object to be contracted, still allowing its technical execution.

Alternative bids do not replace the original or main bid. Consequently, in order for an alternative bid to be admissible, the bidder's original or main bid has to fulfil all the requirements provided

under the terms of reference and has to be deemed as the most favourable offer (ie, the winning offer).

28 Must a contracting authority take variant bids into account?

Case law has stated that alternative bids must be taken into account if: (i) the terms of reference allow bidders to file alternative bids; (ii) their main bid fulfils all the requirements set forth in the terms of reference, and is deemed as the most favourable offer; and (iii) the alternative bid does not imply conditioning the offer.

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

Bidders may not change the specifications or submit their own standard terms of business. If they do so, the governmental entity may reject the offer.

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

No subjective criteria are allowed for the award of public contracts. Contracting authorities have to set forth the objective awarding criteria in the terms of reference. Such awarding criteria must allow an objective evaluation of all the bids and as a result thereof, the most favourable bid for the contracting authority will be determined. In public biddings the contracting authority must determine the most favourable offer, taking into account the: (i) quality and price according to previously determined scores or formulas; or (ii) quality and price relation that entails the best cost-benefit ratio.

In the case of goods or services of uniform characteristics, price is the awarding criteria.

31 What constitutes an 'abnormally low' bid?

Public procurement legislation does not provide an explicit definition for abnormally low bids. Nonetheless, before the procurement procedure takes place, the contracting authority has the obligation to undertake an analysis of the legal, commercial and financial characteristics of the sector or industry to which the project belongs. Based on such analysis, the contracting authority may deem an offer as an abnormally (or artificially) low bid.

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

When a contracting authority deems an offer abnormally low, it has to request the bidder to provide an explanation justifying the value that was offered. If the explanations provided by the bidder show that the amount offered has an objective justification and that the bid will not put at risk the contract's performance, the contracting authority may not reject the bid and shall continue with the evaluation process.

Review proceedings

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

The award of contracts by governmental entities is not subject to any administrative review proceedings. The only available remedies for unsuccessful bidders are judicial actions filed before the judges.

The only procurement decisions that may be challenged by means of an administrative remedy are those that declare the public tender deserted (ie, when the government agency fails to award the contract, even if bids have been submitted). Bidders may challenge that decision before the governmental entity that issued it. If unsuccessful, they have the right to a judicial action.

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

There are no administrative review applications in Colombia. Only judges have the power to grant remedies.

Update and trends

The hot topics in Colombia in public procurement are corruption and bid rigging. According to the current legislation, bid rigging is both a criminal offence and an antitrust violation. The Antitrust Authority (the Superintendency of Industry and Commerce) has a special task force dedicated to investigating bid rigging in government contracts.

The existing proposals to change the current legislation intend to broaden the scope of applicability of public procurement law and to close some gaps that have been used in past years to evade the application of such legislation.

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

Up until recently, judicial proceedings could last up to 15 years. With an oral procedure in place, those proceedings are expected to last around four to eight years.

36 What are the admissibility requirements?

Unsuccessful bidders have the right to challenge the award of government contracts by means of a judicial action. They have the burden of proving that the award was unlawful and that their bid was the one that should have been successful. Judges have ruled that if these circumstances are proven, unsuccessful bidders have the right to claim and obtain lost profits from the governmental entity. The successful bidders who executed the contracts are called to become part of the judicial proceeding, but they are not responsible for the payment of damages to unsuccessful bidders.

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

The decision not to award the contract must be challenged within 10 business days of the decision being notified in a public hearing.

The award of a contract must be challenged judicially within four months of the date of the award.

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, judicial actions that challenge the award of government contracts do not have an automatic suspensive effect blocking the continuation of the procurement procedure or the execution of the contract by the successful bidder.

Nonetheless, in recent years, a privatisation procedure, under Law 226 of 1995 (see question 9), was suspended by a judge as a consequence of judicial actions filed by individuals who opposed the decision of the government to privatise a state-owned company.

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

Not applicable.

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

The award of government contracts is notified, to successful and unsuccessful bidders, in a public hearing.

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

Procurement files are public. They are published in the Electronic System for Public Procurement (SECOP).

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

Under Colombian law, there are no administrative review applications. The only remedy for unsuccessful bidders is a judicial action, which, as a general rule, does not block the continuation of the procurement procedure or the execution of the contract by the successful bidder. These judicial actions are not common, because judicial proceedings take a very long time to be decided.

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

Yes. Disadvantaged bidders can claim, in a judicial proceeding, the profits they would have obtained if the contract had been awarded to them (lost profits). They have the burden of proving that the bid was wrongfully awarded and that their offer was the one that should have been successful. Damages must be paid by the contracting authority that awarded the contract in violation of 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?

No. Once the contract is awarded, the decision is irrevocable. There is only one exception to this rule: if after the contract has been awarded, and before it is executed, it is proven that the award was obtained in an unlawful manner, the contracting authority must refrain from signing the contract. This is unusual, because contracts are usually executed a few days after the award. Therefore, it is very difficult to prove, in such a short period of time, that the contract was awarded in violation of procurement law.

Unsuccessful bidders may only claim lost profits.

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

There are judicial actions available. Interested parties may also file criminal and disciplinary complaints against the public officials who unlawfully awarded the contract.

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

The only costs for the filing of judicial actions are lawyers' fees.

大成 DENTONS CARDENAS & CARDENAS

Ximena Zuleta **ximena.zuleta@dentons.com**
Santiago Lizarralde **santiago.lizarralde@dentons.com**
Catalina Moncada **catalina.moncada@dentons.com**

Cra. 7 No. 71-52 Torre B, Piso 9
Bogota, DC
Colombia

Tel: +571 313 7800
http://dentons.cardenas-cardenas.com

Cyprus

Alexia Kountouri

Tassos Papadopoulos & Associates LLC

Legislative framework

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

Cyprus acceded to the European Union on 1 May 2004. As an EU member state, Cyprus has enacted legislation on public procurement law in order to comply with the public procurement European 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 regarding 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) 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), regulate procedural matters and provide for the establishment and the operation of the appropriate public organs for handling public tenders and set 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, the municipalities, etc).

A relatively new piece of subsidiary legislation, 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, regulates the management of the execution of public contracts, the establishment of a number of committees and the exclusion of economic operators from public contracts.

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 the 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.

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.

4 Are there proposals to change the legislation?

No, as stated herein above, legislation has been recently enacted in compliance with EU Directives.

Applicability of procurement law

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

Contracting authorities are defined to be the state, the local or rural authorities and the public law organisations. All other entities are not considered to be contracting authorities, with the exception, under certain circumstances, of entities that have been awarded concession agreements.

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

The general rule is that certain parts of Law 73(I)/2016 (Parts I–IV) apply to works contracts of a minimum of €5,225,000, services and supplies contracts of a minimum of €135,000, supplies and services contracts of a minimum of €209,000 awarded by non-central contracting authorities and services contracts of a minimum of €705,000 when contracts are in the field of social and other special services.

The threshold values are reviewed in light of any review thereof by the European Union, according to article 6 of Directive 2014/24/EU.

We have to emphasise, that even in cases where Law 73(I)/2016 does not apply, the general principles governing public procurement procedures are to be complied with.

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

Legislation (Law 138/16) provides for the establishment of special committees that examine any proposals from the contracting authority to amend the contract. 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 the principle of transparency. 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 of, there have not been any cases dealing directly with this aspect.

9 In which circumstances do privatisations require a procurement procedure?

Law 28 (I)/2014 on the Regulation of Privatisation Matters does not provide for a specific procurement procedure; it nevertheless refers to the principles of transparency, non-discrimination and equal treatment, within the frame of the existing legislation.

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, yes, a procurement procedure is required.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

There are two methods of advertising:

- electronic advertising, which is effected through the upload on an online portal, where interested economic operators have access; and
- non-electronic advertising in the Gazette and the Official Gazette of the European Union.

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 have to comply with the principles governing public procurement law, the criteria may relate only to three factors: 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 herein above. In any case, the number of bidders has to be adequate for competition reasons.

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 a new concept in our legal system, introduced by a recent law amendment. Any economic operator that is in certain exclusion situations may provide evidence to the effect that 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

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.

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 provided for in a number of pieces of legislation, including public procurement law.

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.

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.

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

The prevailing type of procurement procedure is the open 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.

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. The participation in the competitive dialogue procedure is allowed only to economic operators who 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 publicly known.

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

The framework agreements have a time limitation; 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 in no 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 without a new competitive procedure or with such a 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.

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.

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 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 small and medium-sized enterprises in the tender.

There are rules on the division of a contract into lots. The rules are provided for in law and they include provisions limiting the number of lots single bidders can be awarded; it is a prerequisite that the maximum number of lots single bidders can be awarded is explicitly provided for in the procedure documents.

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.

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 results in substantial deviation from the tender specifications, its tender will be excluded from the tender award.

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.

Update and trends

There are no emerging trends or hot topics that we are aware of, with the exception of the Committee for Exclusion of Economic Operators from Future Award Procedures under Certain Circumstances, which remains to be established after a recent law amendment.

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 has to reject the tender if the tender is abnormally low owing to non-compliance with applicable obligations in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by specific international environmental, social and labour law provisions.

Review proceedings

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

The authorities that may rule on review applications are the Tenders Review Authority established by law or the administrative court. It is possible for an economic operator to challenge the decision of the Tenders Review Authority by filing recourse before the 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 its delivery 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.

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 the Administrative Court takes much longer, namely one to two years with the exception of cases that the parties agree to expedite.

36 What are the admissibility requirements?

The economic operator has to 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 has to be filed within a timeframe of 15 calendar days (in some cases 10 days) of the day on which the economic operator gained knowledge of the decision it wants to challenge. Recourse before the administrative court has to be filed within 75 days of the day on which the economic operator gained knowledge.

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 85–90 per cent of the applications are successful. This is not the case with regard to the Supreme Court, where the percentage is very small and does not exceed 5 per cent.

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.

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.

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

Yes, it is quite customary. In 2016, 79 recourses were filed before the Tenders Review Authority, in 2015, 66 and 2014, 71. Those numbers are relatively big for a small jurisdiction like Cyprus.

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.

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 the contract non- effective.

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 the legal fees.

The costs for an application before the Supreme Court are significantly lower, at about €300. This does not include legal fees.

tassos papadopoulos & associates llc

Alexia Kountouri **akountouri@tplaw.com.cy**

10 Iasonos street
Jason Building
1082 Nicosia
Cyprus

Tel: +357 22 889999
Fax: +357 22 889988
www.tplaw.com.cy

Egypt

Sameh Kamal, Heba El Naggar and Lana Abdelrasoul
Zaki Hashem & Partners

Legislative framework

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

There is no unified legislation in Egypt governing public contracts. The Egyptian Constitution has set a general principal whereby disposing of the state's public property is prohibited, while disposing of the state's private property, the granting of natural resources exploitation rights and public utility concessions are all allowed in accordance with the laws promulgated in this regard. The main laws regulating the award of public contracts are:

- Law No. 89 of 1998 Organizing Biddings and Tenders (the Tenders Law) and its Executive Regulations. The Tenders Law is the main body of law regulating government procurement. It applies to all the administrative units of the state such as ministries, authorities and agencies with special budgets; municipalities; and general authorities (whether economic or services authorities). However, some public entities and some sectors are excluded from the application of the Tenders Law by other special laws issued in this regard. The Tenders Law governs the purchase, sale and lease of movable real property, contracting on construction works and services and licensing for exploitation and use of real property where the aforementioned public entities are party;
- Law No. 67 of 2010 on Partnership with the Private Sector in Infrastructure Projects, Services and Public Utilities (the PPP Law) and its Executive Regulations. The PPP Law applies to public-private partnerships in relation to consultation and implementation contracts concerning infrastructure projects, services and public utilities;
- Law No. 129 of 1947 regarding the Public Utilities Concessions, as amended, regulating the obligations related to the public utilities concessions; and
- The Prime Minister Decree No. 695 of 2001 Constituting a Ministerial Committee and a Working Group to Organize Local and National Projects awarded under BOT or BOOT Regimes as amended by Decree No. 512 of the year 2002.

However, please note that this chapter is based mainly upon the Tenders Law and its Executive Regulations, as it is the general Egyptian law organising public procurement.

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

Some sectors have been carved out from the general legislation governing the award of public contracts. It is not possible to include an exhaustive list of such sectors, but they include the following sectors.

Telecoms
The Egyptian Telecommunication Company was established by a special law No. 19 of 1998 and is deemed a legal person pursuant to its mandate. Furthermore, Telecommunication Regulation Law No. 10 of 2003 states that the National Telecom Regulatory Authority is competent to import, by itself or by virtue of a third party, all it needs in terms of materials, equipment, spare parts, technical tools and transportation means, etc, provided that there are no suitable national products and within the limits of its budgets. Such importation shall be in accordance with the rules and requirements of the Authority's internal regulations.

Mineral resources
Law No. 198 of 2014 stipulates that the General Egyptian Mineral Resources Authority's board of directors may issue a resolution for offering areas for mineral resources' exploitation and researches, after gaining the approval of the minister or governor concerned. The offering shall be according to specific regulations mentioning the contracting, offering and awarding methods and procedures and the criteria of choosing the best offer, without being subject to the Tenders Law. The Offering and Awarding Regulations were issued by virtue of Prime Minister Decree No. 1966 of 2015.

Electricity
The Law No. 100 of 1996 amending Law No. 12 of 1976 regarding the Establishment of the Egyptian Electricity Authority states that said Authority shall have the competence to take all the necessary actions and works for the accomplishment of its purposes. The Authority may also have the right to contract directly with persons, companies, banks and national and international entities, according to its internal regulations. In addition, it may grant the concession of public utilities for national and foreign investors, without being subject to the provisions of Law No. 129 of 1947 regarding the Public Utilities Concessions and Law No. 61 of 1958 regarding the Natural Resources Investment. The Egyptian Electricity Authority was transformed into the Egyptian Electricity Holding Company by virtue of Law 164 of 2000, and this holding company has the right to directly contract with third parties pursuant to its own procurement rules and not that of the Tenders Law.

Airports
Law No. 3 of 1997 stipulates that it is possible to grant the concession of public utilities to foreign or Egyptian investors in order to establish, prepare, operate, maintain and exploit airports, landing sites or parts thereof, without being subject to the provisions of Law No. 129 of 1947 regarding the Public Utilities Concessions and Law No. 61 of 1958 regarding the Natural Resources Investment and according to the Civil Aviation Law No. 28 of 1981 and Civil Aviation Fees Law No. 119 of 1983.

Public roads
Public Roads Law No. 229 of 1996 amending Law No. 84 of 1968 provides that public utility concessions may be granted to Egyptian and foreign investors in relation to the construction, management, exploitation and maintenance of highways and freeways, as well as the exploitation of the areas adjacent to said roads, without being subject to the provisions of Law No. 129 of 1947 regarding the Public Utilities Concessions.

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

We are not aware of the EU regulations as it is not within the scope of our work. However, Egypt is a member of the World Trade Organization (WTO). Therefore, the Egyptian laws shall be in compliance with the rules, regulations and agreements of the WTO as ratified by Egypt.

4 Are there proposals to change the legislation?

We are not aware if there are any official proposals to change the legislation to comply with EU regulations as far as public procurement is concerned.

Applicability of procurement law

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

As mentioned above, some state-owned entities and sectors are excluded from the application of the general government procurement laws by means of special laws and decrees. In addition to such entities, companies regulated by the Public Business Sector Companies Law No. 203 of 1991 are divided into holding companies that are fully owned by the state and the subsidiaries of such holding companies, which can either be fully or partially (at least 51 per cent of their share capital) owned by public entities. They are organised as joint stock companies and are deemed legal persons. These companies are free from applying the Tenders Law when contracting; however, it is worth noting that such entities usually adopt procurement rules based on the general principles and regulations provided for under the Tenders Law.

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

Exclusions from the application of the general government procurement laws are not based on value thresholds.

However, the value of the contract may have an impact on the manner of contracting under the Tenders Law. Under said law, the main method for tendering is by holding a public tender or a public practice (negotiation), but as an exception another four methods are recognised: local tenders, limited tenders or limited practices (negotiations) and direct contracting. Contracting shall be by way of a local tender for values not exceeding 400,000 Egyptian pounds. In this case, the tender shall be limited to local suppliers and contractors whose activity falls within the boundary of the governorate wherein the implementation of the contract shall take place.

In addition, the value of the contract may have an impact on the procedures taken for contracting such as the determination of the competent authority issuing the required approvals in case of direct contracting. Direct contracting may apply in urgent matters that cannot endure the lengthy procedures of a tender or a practice; however, it requires certain approvals and the level of approval is impacted by the contract value as follows:

- for purchase of moveables, services, consultations and transportation contracts with a value that does not exceed 500,000 Egyptian pounds and for construction works with a value of one million Egyptian pounds, the approval of the head of the government authority is required;
- for purchase of moveables, services, consultations and transportation contracts with a value that does not exceed five million Egyptian pounds and for construction works with a value of 10 million Egyptian pounds, the approval of the minister or governor is required; and
- for contracts with a value that exceed the above-mentioned values, the approval of the Prime Minister is required.

Finally, it is worth mentioning that one of the criteria for the application of the PPP Law in relation to projects carried out by means of a public private partnership is that the value of the contract should not be less than 100 million Egyptian pounds.

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

The Tenders Law permits the amendment of a concluded contract without a new procurement procedure in the following cases.

With respect to construction contracts, with a term that lasts for six months or more, the contracting authority shall – at the end of each three months of the contract – amend the contract value as per the decrease or increase of costs of the contract items, which arises after the date set forth for opening of the technical bids or following the contract date that is based on the direct award order, this shall be in accordance with pricing factors as allowed by the Tenders Law and as set out by the contractor in its bid and upon which the contract was concluded. Such amendment shall be binding upon both parties.

The Tenders Law also allows for variation orders whereby the administrative authorities may modify the quantities or volume of its contracts by increasing or decreasing them within the limits of 25 per cent for each item under the same conditions and prices. The contractor shall not have the right to claim any compensation in relation thereof. In case of emergency and with the approval of the contractor, the above-mentioned percentage may be increased. In all cases of contract amendment, the approval of the competent authority shall be obtained, in addition to the existence of the necessary financial appropriation. The amendment shall be issued during the term of the contract.

As for the PPP Law, the law allows for the inclusion of clauses in the contract to allow the administrative authority to amend the conditions of construction, equipment, rehabilitation and other works as well as the services availability payment agreed upon under the PPP contract and to amend the rules of operation or utilisation including the sale prices of products or services. Furthermore, it is allowed to agree in the contract to amend its clauses in case of the occurrence of unforeseen circumstances after execution of the PPP contract, including amendments to laws or regulations that were enforceable at the time of execution of the PPP.

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

The Egyptian Administrative Court has upheld the principle that the tendering authority has the right to a variation order within the limits allowed by the Tenders Law.

9 In which circumstances do privatisations require a procurement procedure?

There are several methods for the execution of privatisation; the Egyptian legislator has left the right to the companies to choose the most suitable method, depending on their financial structure and their objects. The different methods of privatisation are, for example, tender or practice (whether public or limited or any other type), sale of the shares on the Egyptian stock exchange or sale of the shares to the employees.

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

The setting up of a public-private partnership under the PPP Law requires a procurement procedure in all cases.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

With respect to the Tenders Law and its Executive Regulations, the announcement of the public tender or public practice (negotiation) shall be made in two widely read daily newspapers. In addition, the announcement may be made in other widely read media including electronic media, subject to the approval of the competent authority and pursuant to the importance and the value of the contract.

In case of external tenders (in Egypt or abroad), the announcement shall be in both Arabic and English. Foreign countries' embassies or consulates, according to each case, shall be requested to notify those operating in the relevant sector of the announcement in their respective countries.

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 the Tenders Law, there are no limitations on the ability of contracting authorities to set criteria or conditions to assess whether an interested party is qualified to participate in a tender procedure or not.

However, the contracting authority may have the right to set any criteria or conditions, provided the compliance of said criteria and conditions with the provisions of the Tenders Law and its executive regulations. The setting of the criteria and conditions depend on the subject matter and the specific circumstances of the contracting.

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

Generally contracting shall be by virtue of public tenders or public practices. However, it is permitted by the Tenders Law (exceptionally by virtue of a decree issued from the competent authority) to enter into contract by other means such as limited tender, local tender or limited practice (negotiation) or direct contracting.

Contracting by virtue of a limited tender or local tender permit limits the number of bidders participating in the tender procedure. The invitation to participate in a limited tender is addressed to the largest possible number of persons operating in the relevant sector and whose names are registered in the relevant administrative authority's register. Contracting by virtue of a local tender shall be limited to local suppliers and contractors whose activity falls within the boundary of the governorate wherein the implementation of the contract shall take place

However, generally, it is worth noting that the contracting authority shall have the right to limit the number of bidders that can participate in a tender procedure, depending on the conditions and requirement of the tender and the authority needs.

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?

Pursuant to the Tenders Law, the General Authority for Governmental Services shall hold a register for the registration of the names of persons who are prohibited from dealing with any public authority, whether the prohibition is stipulated by law or administrative decrees.

However, a bidder that was excluded from a tender procedure because of past irregularities may request to be re-registered in the importers or contractors' registers, in case that the reason of the prohibition has been negated by virtue of public prosecutor's decision stating that there are no grounds for filing a criminal case against him or her, or by means of administratively archiving it or by rendering a final judgment acquitting him or her of the acquisition attributed thereto. The decision of re-registration shall be presented before the abovementioned Authority for its publication.

The procurement procedures

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

Both the Tenders Law and the PPP Law state that the tender procedures are subject to the fundamental principles of equal treatment, transparency and competition.

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

The Tenders Law deals with conflict of interest by prohibiting employees working in the contracting authority from submitting – in person or by proxy – tenders or offers to those entities. It is also impermissible to purchase items from them or to assign them any tasks.

Furthermore, it is impermissible to combine the chairmanship of the different committees participating in the tender procedures and tender decision.

17 How are conflicts of interest dealt with?

See question 16.

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

The Tenders Law does not contemplate the involvement of bidders in the preparation of the tender documents, but that of government employees who are prohibited from participating in tenders carried out by the contracting authority for which they are employed. As for the PPP Law, the involvement of expert advisors to the PPP unit in the preparation of the tender documents is regulated by the PPP Law and its executive regulations, but it envisages that the advisor to the PPP unit will be an advisor to the PPP unit throughout the whole tendering process and not only in the preparation of the tender document. Furthermore, the conflict of interest related to some such advisors is dealt with in the legislation governing their professional field, as is the case with legal advisors.

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

According to the Tenders Law, there are different types of procurement procedures such as public tender/practice (negotiation), local tender, limited tender/practice (negotiation) and direct contracting; each type has its own criteria and conditions. Therefore, it is not possible to mention the prevailing type of procurement as it depends on the conditions, requirements and needs of the relevant administrative authority and the value of the transaction.

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

The PPP Law does not allow the submission of separate bids by the same bidder and provides that in the case of a bid by a consortium, a consortium member may not submit another bid directly or indirectly, individually or through another consortium, or through a company in which it owns the majority of its equity, or has control over its management, or if such member's ownership or management is controlled by one of these companies, unless otherwise stipulated in the tender document.

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

According to the Tenders Law, the procurement procedures may be by virtue of a public or limited practice (negotiation). The negotiation is undertaken by a committee constituted by virtue of a decree issued from the competent authority and is composed of technical, financial and legal elements according to the importance and nature of the contact.

Under the PPP Law, qualified investors may be invited to meetings to discuss their inquiries on the project documents. In addition to answering inquiries, a bid under the PPP Law may involve a competitive dialogue. In case of a competitive dialogue, the authority may decide to tender the project in two phases, and conduct, as phase one, a competitive dialogue with the purpose of obtaining the necessary clarifications on the elements of technical and financial offers in this phase. In phase two, final bids are to be submitted. In the cases where the decision is made to tender the project in two phases, the committee in charge of preparing the project tender document shall prepare the tender document in phase one, which has to include:

- general information on the project and its specifications;
- specifications of the final product, service level and performance indicators;
- the heads of terms of the PPP contract;
- the technical and financial evaluation system in general;
- the requirements, forms and documents requested in each of the nonbinding technical and financial offers that give a general outline of both offers;
- the means of submission of the nonbinding technical and financial offers; and
- the tender procedures of both phases, dates of submission of inquiries and its replies thereto, final deadline for submission of the non-binding technical and financial offers, initial dates for holding the competitive dialogue with bidders and issuance of final tender document.

Having secured the unit's approval on the tender document in phase one, the administrative authority must issue this document and make it available to bidders on the project's website. The administrative authority shall notify bidders by acknowledged receipt-registered mail and by email with the date of uploading this document to the website, allocating to each bidder a password to allow access to the project website and review of the tender document content. The administrative authority shall receive and respond to the queries sent by bidders via email on the date specified for this purpose. The bidders shall then submit non-binding bids. Each party that submitted a non-binding bid shall then be notified with the date, venue and duration of the competitive dialogue session. Competitive dialogue meetings shall be held separately with non-binding bidders and such discussions shall be deemed confidential.

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 choice of the practices (negotiations) type (whether public or limited) depends on the subject matter of the procurement, as the Tenders Law specifies some cases that shall be effected by virtue of a limited practice (negotiation). Therefore, we cannot determine which practice (negotiation) is used more regularly.

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

In case of the conclusion of a framework agreement, said agreement shall be in compliance with the provisions of the Tenders Law. In addition, it shall be included in the bid requirements.

24 May a framework agreement with several suppliers be concluded?

In general, the public procurement procedures shall be in compliance with the fundamental principles of equal treatment, publicity and fair competition. So, a framework agreement that generally complies with such principles and is in accordance with the Tenders Law should be possible.

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

The Tenders Law states that any bid or any amendments received after the deadline of submission shall be disregarded. So it is not possible to amend or change any conditions or any part of a bid after its submission within the deadline.

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?

Generally, the relevant administrative authority is entitled to set the criteria and conditions of any tender according to its needs and requirements. Generally, the bids that are submitted by small and micro companies are preferred, as long as they confirm to the terms and conditions of the tender and are equal to the amount of the lowest bids.

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

Variant bids seem not to be allowed to be submitted by the same bidder; only one bid may be submitted in the same tender procedures.

28 Must a contracting authority take variant bids into account?

The contracting authority may not take variant bids into account. In case of submission of variant bids, the contracting authority is entitled to take into consideration one of submitted bids and disregard the other or others.

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

Bids that are not in compliance with the tender terms and conditions may be excluded by the relevant administrative authority.

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

The award of tender shall be made for the bid of the best conditions and specifications and with the lowest price after unifying the basis of comparison from technical and financial aspects.

The deciding committee shall make a comparison between the different offers after unifying the basis of comparison from technical and financial aspects. Said committee shall also take into consideration the conditions of providing the necessary guarantees, maintenance, spare parts, operations necessities, payment and delivery conditions in addition to any other matters that may affect the determination of the comparison value of the offers, according to the conditions and the nature of the contract.

31 What constitutes an 'abnormally low' bid?

There are no rules regulating an 'abnormally low' bid. However, it could be considered as a bid with a price that is abnormally lower than the market price.

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

In case of an abnormally low bid, the contracting authority may disregard such bid as it may suggest that the contract might be ill performed in breach of the tender terms and conditions.

Review proceedings

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

According to Egyptian laws, there are several authorities that may rule on review applications.

The administrative authority that issued the tender decision is competent to review applications or complaint submitted by any complaining bidder.

Further, any complaint may be filed at the relevant department at the Ministry of Finance, claiming it is in violation of the provisions of the Tenders Law.

According to the State Council Law, the Administrative Judiciary Courts are competent to rule on any dispute related to any type of administrative contract (ie, obligation, general works and supply, etc) and administrative disputes. Such judgments are appealable before the Supreme Administrative Court under certain conditions.

It is worth noting that the first two procedures are subject to an appeal before the state courts.

The administrative authority may also agree to arbitration as an alternative dispute resolution mechanism. In this case, the competent minister must approve the arbitration or clause to become valid and enforceable.

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

This case does not seem to be applicable as usually one administrative entity is entitled to take the lead on the tender from all its respects.

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

The timeframe depends on a case-by-case basis.

36 What are the admissibility requirements?

With respect to the admissibility requirements before the State Council courts, there are some requirements related to the form of the case and others related to the substance of the case. Regarding the form-related requirements, the claimant shall: have locus standi capacity and personal interest in filing the lawsuit; file the case during the time limits allowed under the law; and issue any summons required by the law before filing the case.

Regarding the requirements related to the substance, the lawsuit must be of an administrative nature where the administrative entity seeks to fulfil a public utility through public law means.

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

Generally, a lawsuit for review before the State Council courts shall be filed within 60 days starting from the date of publishing the administrative decree or decision subject of the review in official journals or the notification of the claimant of such administrative decree or decision.

Regarding the challenges filed before the Supreme Administrative Court against the judgment issued by the State Council court, the time limit shall be 60 days starting from the day of issuance of the appealable judgment.

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 does not have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract.

The State Council court may order the suspension of the execution of the decree or decision subject of the review, if the claimant has requested in the lawsuit and if the result of the execution could be impossible to rectify.

Generally there are two conditions that must be fulfilled for the suspension of the administrative decree or decision subject of the review as follows:

- urgency of the matter, as for example if the result of the continuation of the procurement procedure or the conclusion of the contract could be impossible to rectify; and
- in case it appears from the initial review of the submitted documents that the administrative decree or decision will probably be annulled.

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

This information may not be verified as such applications are not publicly accessible.

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

As soon as the tender decisions are issued, a notification with acknowledgment of receipt shall be sent to the unsuccessful bidders and to the successful bidder.

In addition, the reasons of the success or exclusion of each bid shall be published on a board reserved for such purpose in a visible place, for a period of one week.

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

Yes, an applicant may have access to its procurement file.

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

Generally, it is not customary for disadvantaged bidders to file review applications.

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

Disadvantaged bidders may claim damages against the tendering authority if the violation of the Tenders Law is established. However, in order for the damages claim to be successful the claimant must establish to the satisfaction of the court:

- a violation committed by the tendering authority;
- a harm inflicted as a result of such violation; and
- a causal relationship between the violation and harm inflicted.

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?

Generally, the State Council court or the reviewing authority would not cancel or terminate a concluded contract. But the court may order compensation be paid to the unsuccessful bidder, if the procurement procedures that led to the administrative authority's decision or the conclusion of a contract with the successful bidder have violated the Tenders Law.

The court may also cancel or terminate a concluded contract based on said violation. However, the cancellation or termination of the concluded contract is circumstantial and depends on a case-by-case basis.

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

The legal protection available for an aggrieved party in respect of a decision issued by an administrative authority against the rules of the applicable laws is judicial review of such decision. Such judicial review, as explained earlier, shall be triggered at the State Council court and is challengeable as a final resort at the Highest Administrative Court. However, Law 32 was passed in order to regulate the appeals procedure and prohibits third party interference in contracts between Egypt and its investors (subject to certain exceptions).

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

The cost is determined on a case-by-case basis.

ZAKI HASHEM & PARTNERS
ATTORNEYS AT LAW

Sameh Kamal **sameh.kamal@hashemlaw.com**
Heba El Naggar **heba.elnaggar@hashemlaw.com**
Lana Abdelrasoul **lana.abdelrasoul@hashemlaw.com**

23 Kasr El Nil Street
Cairo 11211
Egypt

Tel: +20 2 2399 9999
Fax: +20 2 2393 3585
www.hashemlaw.com

European Union

Totis Kotsonis
Eversheds Sutherland

Legislative framework

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 award 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 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 European Union (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 as follows:

- Regulation (EU, Euratom) 966/2012 of the European Parliament and the European Council of 25 October 2012; and
- The Commission Delegated Regulation (EU) 1268/2012 of 29 October 2012.

Unless otherwise specified, the responses to the questions below relate to the application of the Public Sector Directive.

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

Yes, see question 1.

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 single market. As a result, the EU procurement rules are much more detailed than the GPA requirements.

4 Are there proposals to change the legislation?

No. The most recent legislative change has been the introduction of the 2014 Directives.

Applicability of procurement law

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 European Commission has already granted a number of exemptions pursuant to this type of procedure.

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 next review will take place on 1 January 2018.

The Public Sector Directive applies when the estimated value of a works contract meets or exceeds €5,225,000. The value threshold for supplies and most services contracts is significantly lower at €209,000 (or €135,000 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 €5,225,000 or €418,000 for supplies and most services contracts. The value threshold for services contracts for social and certain other types of services stands at €1,000,000.

The Concession Contracts Directive applies when the estimated value of a works or services contract meets or exceeds €5,255,000. 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 €418,000.

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 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.

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 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 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 (the 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 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.

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 to 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 and 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.

Separately, irrespective of whether or not a privatisation might constitute a type of contract that is subject to EU procurement regulation, EU state aid considerations will often require that a sufficiently well-publicised and fair competitive tender process, with the winner determined on the basis of highest price, is carried out. This is so as to avoid the risk of selling a state enterprise, for example, below market value as this could lead to concerns under the 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.

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

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.

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 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 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 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 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.

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 members 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

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

The 2014 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 by favouring or disadvantaging certain economic operators, for example.

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.

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.

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.

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.

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

The 2014 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 their case, there is no real risk of practices capable of jeopardising transparency and distorting competition between tenderers, occurring.

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

Under the Public Sector Directives 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.

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.

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 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 amongst 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.
- 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.

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

The 2014 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 court 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.

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.

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.

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.

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.

31 What constitutes an 'abnormally low' bid?

The 2014 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 (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

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 Directive permits member states to confer the power to grant (different) remedies on different bodies responsible for different aspects of the review procedures.

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 timeframes for carrying out such reviews vary (sometimes considerably) between member states. As regards European Commission infringement proceedings against member states for breaches of EU procurement law obligations, these 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.

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 European Commission or infringement proceedings by the European 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 will vary for each member state.

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.

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

There are no express provision 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.

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

The practice varies between member states.

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.

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).

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.

EVERSHEDS SUTHERLAND

Totis Kotsonis **totiskotsonis@eversheds-sutherland.com**

1 Wood Street
London
EC2V 7WS
United Kingdom

Tel: +44 20 7919 4500
Fax: +44 20 7919 4919
www.eversheds-sutherland.com

Finland

Kristiina Hirva and Tuija Kaijalainen
Asianajotoimisto DLA Piper Finland Oy

Legislative framework

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, inter alia, public procurement cases in the first instance. A petition can be submitted to the Market Court by whomever the case concerns and in particular cases by certain authorities. Typically a petition is submitted by an unsuccessful bidder or a potential bidder. 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 the 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.

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 Public Transportation (869/2009), 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.

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.

4 Are there proposals to change the legislation?

No. The Public Procurement Act and the Public Procurement Act for Special Sectors entered into force of 1 January 2017, implementing the EC 2014 Directives.

Applicability of procurement law

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 addition, a foundation established for civil aviation and operating an aviation centre and providing, for example, training was not considered as 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 who own real estate with a permanent right to use that private road and enterprises that have a right to utilise that private road, was not considered as a contracting entity as such.

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 production and sales of electricity.

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 2017):

- €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 2017):

- €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 and 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.

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 M&A 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 and does not circumvent 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, 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 issued at least a few relevant decisions – C-496/99 *P. Succhi di Frutta*, C-454/06 *Pressetext* and C-91/08 *Wall*, C-549/14 *Finn Frogne A/S* – before specific rules were included in the Directives.

9 In which circumstances do privatisations require a procurement procedure?

Procurement law does not include a definition of privatisation, nor is privatisation directly regulated by procurement law. Here, mixed or partnership contracts that procurement legislation does not separately define may be relevant. Such arrangement 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.

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

Each arrangement (setting up of 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

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 at www.hankintailmoitukset.fi (the HILMA system). As regards procurements below the national threshold the contracting authority may at its own discretion decide to publish the notice on the HILMA system. As regards procurements exceeding the EU threshold, the contract notice shall be made publicly available in the Tenders Electronic Daily (TED), which is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement, and on the HILMA system.

After the contact 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.

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 has to be stated in the contract notice. In the restricted procedure the minimum number to be accepted is five and in the competitive procedure with negotiation, the competitive dialogue and the new innovative partnership procedure, three, unless there are fewer bidders meeting the criteria. The selection of bidders shall be made based on the minimum suitability requirement and selection criteria set for the bidders in the contract notice. The procurement procedure related to procurements below the 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.

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 presenting that is has compensated or committed to compensate all the damages resulting from punishable deed, fault or neglect, in active cooperation with the investigating authority and has executed concrete technical, organisational and personnel-related actions which are able to prevent new punishable actions, defaults and neglects. If such evidence and reliability are considered as sufficient, the bidder concerned shall not be excluded from the procurement procedure.

The procurement procedures

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).

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 also question 15.

17 How are conflicts of interest dealt with?

Questions regarding potential conflicts of interest are generally governed by Finnish administrative law as regards 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 to the option of raising claims against the contracting authority for non-compliance with the obligations relating to equal treatment of bidders. As regards 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.

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.

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.

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 European Court of Justice 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.

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 may be applied:

- 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.

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 which 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 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.

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.

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 (consortia) 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, for several or for 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.

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 provided this has been indicated in the request for tender.

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 has to 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 a 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.

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, for instance: quality, price, social, environmental or social aspects or innovative characteristics. Quality may include technical merit, aesthetic and functional characteristics, accessibility, operating costs, cost-effectiveness, after-sales service and technical support, maintenance and delivery date and other delivery terms and applicability and experience of personnel if there is a notable effect in the performance.

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 the 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

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 procedure is called the correction procedure. It is not possible to appeal against the review decision of the contracting authority.

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-award 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.

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 6.3 months, while in the Supreme Administrative Court they last on average about 15 months.

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.

An appeal may be submitted to the Market Court by a party concerned, typically a bidder or a potential bidder. 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 as regards 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 correction procedure may be initiated by the contracting authority 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 as regards 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 needs to 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 Market Court granting permission to appeal except if an indemnity payment to the state has been ordered in which case no permit is needed.

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 a 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 as regards applications for the lifting of an automatic suspension.

Update and trends

Currently outsourcing of social and health services is executed and planned in several municipalities, and joint enterprises have been established between contracting authorities and private companies. This is related to the hottest topic as regards the social and health sector: the government proposal on the establishment of counties on 1 July 2017 and the transfer of responsibility for the organisation of social and health care services from apprimately 200 municipalities to 18 counties as of 1 January 2019. The government proposal for the health, social services and regional government reform was submitted to Parliament on 2 March 2017.

A special Act to restrict extensive and long-lasting outsourcing of and investment related to social and health services of municipalities to the private sector until 31 December 2019 came into force on 1 July 2017 to ensure the reform is in accordance with the targets set by the government. The Act sets certain limits on outsourcing possibilities.

As a result of the reform, the social and healthcare services currently provided by municipal organisations will be taken over by counties to be established. Counties will be public law bodies that enjoy regional autonomy. The counties will serve as public authorities with a wide range of duties to be defined in the County Act. According to the proposal, the counties will be required to make administrative arrangements to segregate the organisation and provision of social and healthcare services in the context of their own activities. For the provision of services, counties will establish county-owned undertakings capable of producing the services independently. At the same time, they will be able to complement the range of in-house services by purchasing ancillary services from private providers.

On 21 December, the government published a draft of the legislation detailing how customers will be able to select from among the health and social services that are within the scope of freedom of choice. The consultation of the draft lasted until 28 March 2017, and over 600 statements were received. The scope, the costs and timetable of freedom of choice are under intensive discussion.

In addition, private-public partnerships are being discussed with the aim of ensuring better quality in constructing of public premises (eg, schools and day-care centres for children).

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). As regards 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 as regards 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.

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 total 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 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.

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 2016, 426 public procurement cases were submitted to the Market Court (compared with 542 in 2015).

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 a compensation payment 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.

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, in the procurements made under article 346(1)(b) TFEU, the only remedy is a compensation payment.

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 has to 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.

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 €2,000. However, in cases where the value of the procurement contract exceeds €1 million, the fee is €4,000 and if the value exceeds €10 million, the fee is €6,000. Natural persons are liable to pay a processing fee of €500, 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.

Kristiina Hirva **kristiina.hirva@dlapiper.com**
Tuija Kaijalainen **tuija.kaijalainen@dlapiper.com**

Fabianinkatu 23
00130 Helsinki
Finland

Tel: +358 9 4176 030
Fax: +358 9 4176 0417
www.dlapiper.com

France

Boris Martor, Bruno Richard and François Lichère

Eversheds Sutherland LLP

Legislative framework

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

The current legislation is enacted in one statute and two decrees: 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.

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

The utility procurement rules are enshrined in the above statute and decrees. The work or service concessions award rules are dealt with by the Ordinance of 29 January 2016 and its Decree of 1 February 2016. They are due to be integrated in a single code with the public procurement contracts rules by December 2018 at the latest.

There is no real specific-sector legislation.

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

There are quite a number of supplementing rules with regard to EU procurement directives. For instance, the Decree of 25 March 2016 bans the change in the composition of the consortium during the award process with a few exceptions (see below). 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 (see below). Morevover, for certain contracting authorities, there is a duty to separate the functions of designing and supervising the construction and of building 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 only imposed for 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 to a situation 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).

4 Are there proposals to change the legislation?

There is no current proposal to change the legislation. However, as France will adopt a new code by December 2018 to consolidate the rules, the government is not allowed to change substantive rules but is asked by the French parliament to ensure that the 'hierarchy of norms' is fully respected. It is, therefore, expected that when codifying the future ordinance and decrees that will create this code it will take this opportunity to redress the potential wrongful transposition of Directives 2014/24 and 2014/25 (and 2014/23 for the concessions).

Applicability of procurement law

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

There is no case law of this kind.

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 whose estimated value is below €25,000 (VAT excluded) are considered public procurement subject to a negotiated procedure without prior publication. However, even then, the Decree states that the contracting authority shall not contract systematically with the same economic operator (article 30.I.8° of the Decree).

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 lots 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, namely, not above 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.

9 In which circumstances do privatisations require a procurement procedure?

There is no requirement of this kind for privatisations of public entities or functions since the conditions of privatisation are controlled by an independent administrative commission whose rules are currently set by the Ordinance of 20 August 2014.

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

11 In which publications must regulated procurement contracts be advertised?

The requirements regarding publications vary from one contracting authority to another (article 33, 34 and 35 of the Decree of 25 March 2016).

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 European Union (OJEU) and in the national official journal for public procurement contracts (BOAMP). For contracts below the EU thresholds but above €90,000 (VAT excluded), 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. The 'freedom' is nonetheless relative since the courts may check if the advertising was sufficient and, if not, they may annul the award process (see Conseil d'Etat, 7 October 2005, Région Nord pas de Calais, www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008237426).

For the other contracting authorities and their contracts above the EU thresholds, publication must only be in the OJEU. For their contracts below the EU thresholds, they may choose freely which publications are applicable to the nature and to the estimated value of the future contract.

However, there are exceptions with regard to 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.

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 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 provides 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.

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 26 February 2014 Directives. However, the possibility of self-cleaning only exists in four 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; 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

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.

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, Conseil d'Etat, 24 June 2011, Ministre de l'écologie, www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000024329261&fastPos=1).

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).

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, www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008010310).

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.

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

Yes, 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.

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 as 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 as 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.

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

The requirements are identical to those set 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.

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 forbids, in principle, the change of consortium in the course of a procurement procedure with a few exceptions: restructuring 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.

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 SMEs. For instance, a governmental guideline asked to favour SMEs by drawing lots adapted to SMEs (*circulaire* 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 www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018006943&fastReqId=86172240&fastPos=1).

Nowadays, small and medium-sized enterprises can see their participation level up by 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.

Prior to the 2014 Directives, the case law already illustrated the possibility of limiting the number of lots 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 (see article: '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*)', www.concurrences.com/en/bulletin/news-issues/march-2012/The-French-Supreme-Administrative).

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 that 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).

28 Must a contracting authority take variant bids into account?

Once the variant is admitted, a contracting authority must take it into account.

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 that 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 application 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, www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000029559800&fastReqId=33141432&fastPos=1).

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-discriminating 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.

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.

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

The process is identical to the one set out in article 69 of Directive 2014/24.

Review proceedings

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 Conseil d'Etat 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.

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. 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 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, www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000019590160).

This new requirement has been extended to a new remedy created by the Conseil d'Etat 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 Conseil d'Etat 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.

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 or 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.

Update and trends

The current hot topic is the extent of applicability of public procurement logic – rather than rules – to other contracts. The Ordinance of 19 April 2017 states that when the occupation of public land is made for commercial purposes, then the award of the authorisation (whether contractual or unilateral) is done through a transparent procedure whose characteristics are determined by the delivering authority. The Ordinance sets out exceptions whose interpretation may be difficult in the coming years.

Another ordinance is expected regarding the generalisation of transparency for the sale of land owned by a public body. The current state of law has only imposed such transparent procedure upon the state.

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

Not applicable.

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.

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 independent administrative authority (CADA) to obtain the relevant document.

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

It is quite frequent 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.

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 occured, they may 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.

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.

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. However, there is no requirement to hire a lawyer to introduce a claim.

EVERSHEDS SUTHERLAND

Boris Martor **borismartor@eversheds-sutherland.com**
Bruno Richard **brunorichard@eversheds-sutherland.com**
François Lichère **francoislichere@eversheds-sutherland.com**

8 Place d'Iéna
75116 Paris
France

Tel: +33 1 55 73 40 00
Fax: +33 1 55 73 40 11
www.eversheds-sutherland.com

Germany

Carsten Eichler and Annekathrin Hoffmann
Eversheds Sutherland (Germany) LLP

Legislative framework

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); and
- the Procurement Regulation on Concessions (KonzVgV).

In general German procurement law transposes the 2014 EU Procurement Directives (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 GWB sets out general regulations in regard to all kind of bidding procedures and the enforcement of the legislation. The VgV regulates the procurement of all kinds of services but construction works while the SektVO regulates the procurement by utility providers, the VSVgV regulates the 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 contracts with a lower value are set out in the first part of the VOB/A and in the Regulations on the Award of Public Service Contracts (VOL/A) and in addition in federal budgetary laws. 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, for example, payment of minimum wages, compliance with collective labour agreements or creating a blacklist of corrupt bidders.

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

Sector-specific legislation has been implemented with the SektVO for utility providers, the VSVgV for defence and security contracts (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 passenger transport services on rail 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. The procurement of passenger transport services by bus and tram is furthermore supplemented by the German Passenger Transport Act (PBefG).

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) have to be observed in addition to the GWB.

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 GPA in a more detailed way.

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, that governs 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 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) that is oriented on the structure of the VgV. The regulation will come into force with an Application Command by the federal republic and every federal state. For the federal republic the Command is expected in the first half of 2017 and for most of the federal states for the second half of 2017.

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

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 that were established for 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 contracting authorities pursuant to section 99 GWB.

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 the bidders are not allowed to file review applications with the competent procurement review chamber.

The current EU thresholds are as follows:

- public work contracts: €5.225 million;
- public supply or service contracts: €209,000;
- public supply or service contracts of the highest or higher federal authorities: €135,000;
- public supply or service contracts in the sectors of transport, water and energy (utilities) and in the fields of defence and security: €418,000;
- work or service concessions: €5.225 million; and
- social and other special service contracts (eg, healthcare, education): €750,000 for public contracts and €1 million for utilities 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 regarding to conditions, which the contracting entity could not have foreseen;
- the new contractor replaces the previous contractor owing to circumstances like takeover, insolvency, merger; and
- the total character of the procurement contract is not changed and the value of the change does not exceed the respective threshold value of the EU and within public supply and service contracts the amendment is not more than 10 per cent and with work contracts not more than 15 per cent compared to the original value of the contract.

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

As section 132 GWB has not been in force before 18 April 2016, at the moment, there is no clarifying jurisdiction in place. Nevertheless, as section 132 GWB implemented established case law (eg, CJEU case C-454/06) already existing case law could be referred to with regard to a clarification of the legislation.

9 In which circumstances do privatisations require a procurement procedure?

German public procurement law does not provide any specific regulations. 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, ban on discrimination) have to 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. The main examples are: if a private party acquires access to a public contract as a result of a privatisation, the law may require a formal procurement procedure; and if the privatisation is used to bypass the rules on public procurement law.

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

For setting up a public-private-partnership (PPP) the German public procurement law does not provide any rules or regulations. As confirmed by German courts and procurement review chambers in most of the cases the contract will be governed by the terms of the public procurement law, because the public-private partnership 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

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised within the publication office of the European Union (the Official Journal of the European Union (OJEU)) (Section 40 VgV) and in the EU public procurement database (TED).

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 a certain amount of discretion in assessing the actual qualification of bidders for a specific tender. The use of this discretion is only subject 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 Procurement 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, who must be invited to participate is three, and, in case of a restricted procedure, five.

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 upheld the possibility for 'self-cleaning' procedures for a company (section 125 GWB). The company need to fulfil a 'self-cleaning' process. In order to do that the company needs to prove one of the following measures:

- payment of the damage or an obligation to pay the damage for each crime or misconduct;
- full clarifications of all crimes and misconducts and thus resultant damages in collaboration with the public contractor and the investigating authorities; or

- implementation of specific technical, personnel, and organisational measures that are suitable to avoid further crimes or other misconduct.

In any case a bidder can be excluded for not more than three (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

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.

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 and this is literally stated in section 97 paragraph 2 GWB, section 6 paragraph 1 VgV and section 2 paragraph 5 EU VOB/A.

17 How are conflicts of interest dealt with?

Entities how are deemed to be biased due to their dual function 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, section 7 KonzVgV). For example, a person is deemed to be 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.

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 a distortion is avoided (section 7 paragraph 1 VgV, section 6 paragraph 3 No. 4 EU VOB/A). Such measures in general are the information about this involvement and the exchanged information on behalf of the other bidders.

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

The prevailing type of procurement procedure used by the contracting authorities is the open procedure (with the price as 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 the contracting authorities are allowed to freely choose between open and 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 this procedure allows them to limit the number of bidders after the call for competition to a minimum of five.

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.

In case of a bidder participating alone and in addition as subcontractor of another bidder in general such action would not be prohibited unless a flow of relevant information between the bidders is traceable.

If two bidders are linked by being controlled by the same mother company or by controlling each other the bidders will have to prove absence of knowledge (eg, by verifying a Chinese wall between the bidders) or the court will presume anticompetitive behaviour.

In case of a bidder participating alone and a part of a consortium the courts will, in almost all cases, presume anticompetitive behaviour.

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 negotiate elements of public procurement contract with one or more bidders and is only permitted as an exception from the open or restricted procedure.

Under the circumstances of section 14 paragraph 3 VgV and section 3a paragraph 2 EG VOB/A (eg, 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 (eg, 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.

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 the framework agreement for a given period of time. According to that procurement legislation 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 agreements 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 clear 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 further procurement procedure. If the framework agreement is sufficiently detailed only in part then the individual contract will be awarded by a mix of direct award and a simplified award procedure. If the framework agreement is not sufficiently detailed then the entity has to conduct a simplified award procedure among the party's within the framework agreement. The individual contract will be

awarded based on the offers submitted and the award criteria stated in the framework agreement.

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.

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 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 ruled 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 if to create lots, and therefore this decision is only subject to 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 small and medium-sized enterprises 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 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, section 25, paragraph 3 KonzVgV).

With regard to the number of lots, single bidders can be awarded in general, 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.

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

Contracting entities can allow alternative bits in the tender procedure. However, this has to 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 in 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 the 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 where expressly permitted and stated minimum requirements are fulfilled.

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

In general the bidders are not permitted to change the tender documents and the contracting conditions so the offers will be exclude from the procedure. This rule does not apply, if the tender documentation allows changes, for example, in a negotiation procedure, the competitive dialogue or in 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.

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

The most economical 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, the 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 peragraph 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).

31 What constitutes an 'abnormally low' bid?

Pursuant to German law an 'abnormally low' bid can be considered if the bid is between 10 to 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 case of an abnormally low bid, pursuant to section 60 VgV and section 54 SektVO the contracting authority has to check if the bid is abnormally low at first glance and then in a more precise way. If this appears to be the case, the contracting authority has to 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, for example, being able to save costs because of another project conducted simultaneously, special manufacturing processes, or financially favourable conditions (eg, 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 that the bid is abnormally low because it doesn't comply with the obligations pursuant to section 128, paragraph 1 GWB.

Review proceedings

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 by federal authorities. 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 has to submit the case to the Federal Supreme Court if it wants to deviate from a decision by another court of appeal or the Federal Supreme Court.

Update and trends

Competition Registry
Public procurement legislation allows contracting authorities to exclude bidders from the procedure if they have conducted economic crimes or other relevant material crimes. The proper informing of contracting authorities about such circumstances became a focal point for the Federal Ministry of Economics and Energy over past years and led to the enactment of a statute to introduce a competition registry on 29 March 2017. The registry will be kept by the Federal Cartel Office and all law enforcement authorities are obliged to report economic crimes electronically to the registry. Contracting authorities are obliged to check any preferred bidder with the registry if the procured contract sum is €30,000 or more. Nevertheless, if a preferred bidder is registered, the contracting authority is not obliged to exclude him or her from the procedure but must take the registration into account within its discretion. Registered companies will be deleted from the registry after three or five years (and earlier, if they are able to show that they have conducted a proper 'self-cleaning' pursuant to section 125 GWVB).

eProcurement
Since 18 April 2017 central purchasing bodies are obliged to conduct procurement procedures above the EU thresholds in digital form only. Participation applications and offers must only be accepted in digital form and the communication with the bidders should also be done in digital form. All other contracting authorities will be obliged to do so from 18 October 2018. In practice, a lot of bidders are already using digital procedures, but as the obligation for digital procurement procedures is regulated differently for procedures under the EU threshold (in general digital offers have to be accepted from 1 January 2019 and are mandatory from 1 January 2020; but on the other hand, for construction contracts, there is no obligation for digital procedures at all) it seems to be hard for contractors and bidders to fully accept eProcurement even though digital forms seem to be beneficial for all involved parties.

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.

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 has to decide the review within five weeks of receipt of the review. In exceptional cases the tribunal is entitled to extend the time limit, but 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:

- 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 has to claim that its rights were violated by non-compliance with public procurement provisions – a possible infringement is enough;
- the applicant has to 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 also inadmissible if the violation of procurement provisions governing that become apparent from the tender notice is not notified to the contracting entity by the end of the period specified in the notice for the submission of a bid or application;
- pursuant to section 160 paragraph 3 No. 3 GWB, the application is inadmissible if the violation of provisions governing the awarding of public contracts that only become apparent from the award documents is not notified to the contracting entity by the end of the period specified in the notice for the submission of a bid or application; and
- 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 complaint of the applicant. 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 the contract. Nevertheless, for a review application to be admissible section 160 GWB requires that it to be made no more than 15 calendar days since 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. Such a claim has to 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 Official Journal of the EU, 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.

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 has to 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 of Germany about 15 per cent of applications for the lifting of an automatic suspension are successful (data from 2011 to 2015).

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 has to provide the unsuccessful bidders with an advance notification of the intended award (see question 36). This notification has to 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 over the tender procedure or over the conclusion of a framework agreement, if the disclosure impedes the law enforcement, is contrary to the public interest, especially the interest in defence and security issues, if entitled economic interests of a company are damaged, or if the competition between the companies is affected.

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, in respect to business and trade secrets or confidential secrets, necessary.

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

Keeping the high number of procurement procedures in mind it is not very customary for bidders to file review applications. In 2015, a pretty common amount of 864 bidders filed a review application. A total of 117 decisions have been appealed at the Higher Regional Court, which is low compared to earlier years.

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, for example, if the claiming bidder failed to initiate review proceedings or judicial proceedings.

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) or awarded the contract to a company without giving other companies the chance to participate (an illegal direct award or de facto award) unless the de facto award is permitted by law and such violation has been established in a review procedure, therefore 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.

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 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.

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 all but few 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 has to pay the full costs, so the lawyer costs for the other side would also have to be borne.

EVERSHEDS SUTHERLAND

Carsten Eichler **carsteneichler@eversheds-sutherland.de**
Annekathrin Hoffmann **annekathrinhoffmann@eversheds-sutherland.de**

Brienner Straße 12
80333 Munich
Germany

Tel: +49 89 54565264
Fax: +49 89 54565330
www.eversheds-sutherland.com

Ghana

David Ofosu-Dorte, Ferdinand Adadzi and Isabel Boaten
AB & David

Legislative framework

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. Additionally, all government agencies, institutions and establishments in which the government has a majority interest are mandated to comply with the Act.

The application of the Act is, however, subject to two key exceptions. The first exception is the power vested in the Minister of Finance to direct the use of a different procurement procedure where the Minister determines that it is in the 'national interest to do so'. Where the Minister makes such a determination, the procurement method shall be published in the Gazette. The second exception is in respect of the procurement of goods, works and services financed by loans taken or guaranteed by the state, or aid granted under an international agreement that prescribes the procurement procedures to be employed.

The Public Procurement Authority (the Authority) is mandated to ensure that public procurement is carried out in a fair, transparent and non-discriminatory manner. The Authority is vested with administrative powers to ensure that procuring entities comply with the Act. The Authority is also mandated to monitor the processes employed by procuring entities, to review procurement decisions made by procuring entities, to investigate procurement malpractices, and to 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.

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

There is no sector-specific procurement legislation to supplement the Act. Note, however, that under the Act the Minister of Finance is vested with the power to employ a different procurement procedure other than those prescribed under the Act where it is in the national interest (ie, a scenario where the nation attaches high value, returns, benefit and consideration to the matter in question). The Minister of Finance is also required to define and publish in the Gazette the method of procurement to be used. 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.

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

Ghana is not a member of the EU or a signatory to the 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 UNCITRAL Model Law on procurement.

4 Are there proposals to change the legislation?

There is no existing proposal to amend the Act as amended by the Amendment Act. The recent Amendment Act is to address 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. If approved, entity tender committees (ETCs) and entity heads, for example, could purchase twice as much or more than currently 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:
  - recategorisation, 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 (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 discretion of the Minister 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.

Applicability of procurement law

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;
- subverted 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.

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 entity tender committees.

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, changes, such as an increase in the value of the contract, will require 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 which 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 which clarifies how amendments to concluded contracts are to be carried out.

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.

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 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

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 website of the Authority. 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.

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 criterion 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 the 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 and 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;
- 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 only from one source;
- there is an urgent need for the goods, works or services;
- there is an urgent need due to a catastrophic event; or
- the procurement entity requires continuity or additional supply of the goods, or the performance of the works or service.

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.

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

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, inter alia, public procurement is carried out in a fair, transparent and non-discriminatory manner.

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.

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 conflicts, or is likely to conflict, with the performance of the functions of their office.

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.

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.

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 firms that constitute the consortium (not the lead firm in the consortium) can associate with other bidders in the same procurement procedure (as long as the firm is not the lead firm in any of the bids) and 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.

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

There is no provision in the Act for the 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 question 21.

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 question 23. The Amendment Act allows a framework agreement with several suppliers to be concluded.

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.

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 SMEs 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.

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.

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 non-responsive and shall be rejected. Generally, a tender may be declared non-responsive

Update and trends

The most discussed topic currently in relation to procurement regulation in Ghana is the use of sole source procurement. The perception is that it is now very prevalent in comparison with the competitive procurement process, even though it does not ensure value for money. The new government has the office of the Minister of State in charge of Public Procurement, with responsibility for ensuring that the government employs appropriate procurement methods and does not abuse the sole source procurement method. In addition, since the PPP bill has not yet been passed into law, there is a debate as to whether procurement of a private partner should be undertaken under the Public Procurement Act. These are topical issues and have not yet resulted in any legislative changes.

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.

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.

31 What constitutes an 'abnormally low' bid?

There is currently no provision on 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

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 21 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 Government Act 1993 (Act 462) 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 seeks to remove 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. Such decisions are subject to challenge 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.

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 question 33.

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 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 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.

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 of 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.

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.

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 include a high-profile case that has been successfully litigated before the courts against a decision of a procuring entity and the 'approval' of the Authority. This is sure to embolden more bidders to seek review in procurement processes.

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.

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.

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.

AB & David
AFRICA

David Ofosu-Dorte **david@abdavid.com**
Ferdinand Adadzi **ferdinand@abdavid.com**
Isabel Boaten **isabel@abdavid.com**

8 Dr Isert Road, Accra
North Ridge
PO Box TF330
Accra
Ghana

Tel: +233 30 225 3073 / 701 2129
Fax: +233 30 225 3075
www.abdavid.com

Greece

Alexandros A Kortesis, Athanasios S Taliadouros and Vasiliki Karamani
PotamitisVekris

Legislative framework

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

On 1 August 2016 Law No. 4412 on Public Procurement entered into force, introducing a centralised, comprehensive procurement procedure framework for all national tenders. The above Law implements the EU Procurement Directives, namely Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors) in one single legislative act. In particular, Book I of Law No. 4412/2016 (articles 3–221) contains provisions that are applicable to procurement procedures with respect to public contracts of works, supplies or services as well as design contests; whereas Book II (articles 222 – 338) contains provisions that are applicable to procurement procedures in relation to public contracts of works, supplies or services by entities operating in the water, energy, transport and postal services sectors.

Law No. 4412/2016 applies to all national procurement procedures, irrespective of whether they meet or not the relevant European thresholds. More specifically:

- Procurement procedures in relation to public contracts of works, supplies or services (Book 1 of Law No. 4412/2016 – articles 3 – 221):
  - articles 25 – 115: General provisions that are applicable to all procurement procedures that meet the EU thresholds; and
  - articles 116 – 128: Apply only to procurement procedures that fall under the EU thresholds.
- Procurement procedures in relation to public contracts of works, supplies or services by entities operating in the water, energy, transport and postal services sectors (Book 2 of Law No. 4412/2016 – articles 222 – 338):
  - article 263 – 317: General provisions that are applicable to all procurement procedures that meet the EU thresholds; and
  - articles 326 - 333: Apply only to procurement procedures that fall under the EU thresholds.

As far as the review proceedings are concerned, Law No. 3886/2010 currently applies. However, the dispute settlement procedure referred to in articles 345 – 373 of Law No. 4412/2016 (Book IV) shall be applicable to disputes arising from 1 June 2017.

In addition, the stipulations of Directive 2014/23/EU on the award of concession contracts have been transposed into national legislation via Law No. 4413/2016.

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

The Greek legislature has transposed Directive 2009/81/EC into national law by Law No. 3978/2011 (fields of defense and security). Moreover, Greece has established a detailed legal framework regarding the selection of private investors in public-private partnerships (PPPs). Public procurement relating to PPP contracts is regulated by Law 3389/2005.

A separate legal framework concerning 'fast-track' works, namely the acceleration and transparency mechanism for procedures relating to the implementation of strategic investments in Greece, whether these consist of private-private ventures (a private investment in a private asset, such as a hotel or tourist development, an industry, etc) or PPPs (a private investment in a state asset or property, such as the development of the old Athens airport site, the development of Greek state-owned tourism real estate etc), is governed by Law No. 3894/2010, as amended by Laws No. 4072/2012 and 4242/2014. The principal aim of the Fast Track Law is to accelerate the licensing procedures for investment deemed strategic for the Greek economy.

Finally, as already mentioned above, Law No. 4413/2016, which entered into force as of August 2016, regulates public work concession contracts.

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

Greece has ratified the WTO Government Procurement Agreement with Law No. 2513/1997. Notice that according to article 28(1) of the Constitution, international conventions – as of the time they are ratified by statute and become operative according to their respective conditions – form an integral part of domestic law and prevail over any contrary provision.

4 Are there proposals to change the legislation?

No. See question 1.

Applicability of procurement law

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

Pursuant to article 2(1) of Law No. 4412/2016, contracting authorities shall mean the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

Examples of public and private public bodies, currently considered not to constitute contracting authorities include, inter alia:

- Hellenic Telecommunications Organisation SA;
- churches constituting sui generis public law entities;
- chambers of industry and commerce; and
- certain public entities incorporated under private law whose stocks are listed on the Athens Stock Exchange.

Further, note that the status of private legal entities not belonging to the stricto sensu public sector, albeit vested with administrative and financial autonomy, might be disputed.

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

No. Notwithstanding their respective value, all tendering procedures are governed by new Law No. 4412/2016. However, as far as contracts falling short of the new Directives' thresholds are concerned notice that the Greek legislature has exercised its residual competence on certain aspects of the procurement procedure (eg, judicial protection, choice of procurement procedures, etc).

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

Pursuant to article 132 of Law No. 4412/2016, a modification of an existing contract does not require a new procurement procedure only in 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. No modifications or options that would alter the overall nature of the contract or the framework agreement are allowed.
- 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.

However, it should be underlined that any increase in price shall not exceed 50 per cent of the value of the original contract.

- Where several successive modifications are made, the aggregate value of these modifications shall not exceed 50 per cent of the value of the original contract or framework agreement:
  - where all of the following conditions are fulfilled:
    - the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee;
    - the modification does not alter the overall nature of the contract; and
    - any increase in price is not higher than 50 per cent of the value of the original contract or framework agreement.
- 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;
  - universal or partial succession into the position of the initial contractor, following corporate restructuring 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;
  - in the event that contracting authority itself assumes the main contractor's obligations towards its subcontractors.
- Where the modifications, irrespective of their value, are not substantial. Note that a modification is considered to be substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded.

Similar provisions on the modification of public contracts are included in article 156 (in relation to public contracts of works) and article 186 (in relation to design contests) of the aforementioned law.

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

Greek Courts have addressed the subject matter issue in an exhaustive matter. In particular, it has been held that an amendment is allowed, as long as the following conditions are fulfilled:

- objectively justified circumstances;
- agreement among contracting parties;
- such possibility of modification needs to be provided for by a contracting authority in the respective tender documentation; and
- previous legal opinion of the competent authority.

Notwithstanding the above, the amendment of contracts and framework agreements without a new procurement procedure is expressly provided for in the newly enacted legislation, subject to the analysis in question 7. However, since the above provisions have just entered into force, there is no case law to-date clarifying said provisions.

9 In which circumstances do privatisations require a procurement procedure?

The Hellenic Republic Asset Development Fund was established in July 2011 (Law No. 3986/2011), under the medium-term fiscal strategy. The law aims to restrict governmental intervention in the privatisation process.

The Fund is a societe anonyme, of which the Hellenic Republic is the sole shareholder with a share capital of €30 million. The Fund is not a public entity and is governed by private law. The assets transferred to it by the state do not form part of its share capital. Most of the assets contained in the medium-term plan have been transferred to the Fund, while other assets, which the Hellenic Republic has decided to develop or sell, will also be transferred. Any asset transferred to the Fund is to be sold, developed or liquidated; the return of any asset back to the state is not allowed.

The Fund's board of directors approves key points of the tender process, pre-selection, principal terms of the contract and selection of the final investor. An independent evaluator intervenes at the end of the process, whose opinion is also taken into account by the board in its deliberations. Upon the adoption of a decision, the contract is submitted to the Audit Office for a pre-contract audit.

Further, according to article 5 of Law No. 3986/2011, the Fund decides upon the specific form pertaining to the process of counterparties' finding, taking into account, inter alia, international practice in analogous transactions; the specificities of each asset; the existence and characteristics of investment interest, with a view of optimally utilising the Fund's assets.

The Fund shall respect EU law legislation regarding the conclusion of contracts not covered by public procurement law, as such rules are elaborated upon in ECJ jurisprudence and the relevant Communication of the European Commission (2006/C 179/02).

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

Public procurement relating to the selection of private investors in PPPs is regulated by Law No. 3389/2005. Article 1(2) defines PPPs as written commercial cooperation agreements ('partnership agreements') for the performance of construction work or services, or both, between public entities and entities governed by private law.

Moreover, the requirements set out in Law No. 3389/2005 are the following:

- a private partner operator should be a special-purpose ('vehicle') company vested in the form of a societe anonyme;
- the partnership agreements' object is the execution of works or the provision of services in an area that is part of the public entity's responsibility, as defined by law or by agreement, or in its memorandum of association;
- the financial contribution of the private partner operator in return can be sought – either in whole or in part – by the final users of the works or services, or alternatively by the public entity, usually assured through the public investments budget funding the public investment programme;
- private entities are to finance, either in whole or partly, the execution of the work of services; and
- the partnership agreements' object is the execution of works or the provision of services up to €500 million (excluding VAT).

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

With regard to public contracts that meet the EU thresholds, contract notices and prior information notices shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in full in the official language(s) of the institutions of the EU chosen by the contracting authority (article 65 of Law No. 4412/2016). Subsequently, such notices and the information contained therein shall be published at national level on the centralised electronic register of public contracts according to article 66 of the above-mentioned Law.

It should be mentioned that notices published at national level shall not contain information other than that contained in the notices dispatched to the Publications Office of the European Union or published on a buyer profile, but shall indicate the date of dispatch of the

notice to the Publications Office of the European Union or its publication on the buyer profile.

With respect to public contracts that fall under the EU thresholds, contract notices and relevant information notices are only published on the centralised electronic register of public contracts.

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 58 of Law No. 4412/2016, contracting authorities may only impose criteria relating to suitability to pursue the professional activity; economic and financial standing; and technical and professional ability as requirements for participation. In this context, contracting authorities shall limit any requirements to those that are appropriate in order to ensure that a candidate or tenderer has the legal and financial capacity as well as the technical and professional ability to perform the contract to be awarded. Note that all requirements shall be related and proportionate to the subject matter of the contract.

In relation to the award criteria in case of concession contracts, these shall be objective in the sense that they ensure that tenderers are assessed in conditions of effective competition. Thus, according to article 45 of Law No. 4413/2016, the award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority. Note that environmental, social or innovation-related criteria may also be included.

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

Pursuant to article 65 of Law No. 4412/2016, in restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender, provided that a minimum number of qualified candidates is available. Note that contracting authorities shall indicate, in the contract notice or in the relevant invitation to the selected candidates, the objective and non-discriminatory criteria that they intend to apply, the minimum number and, where appropriate, the maximum number of candidates.

In short, as far as restricted procedures are concerned the minimum number of candidates shall be five. In the competitive procedure with negotiation, competitive dialogue and innovation partnership the minimum number of candidates shall be three. Nonetheless, in any event the number of candidates invited shall suffice so as to ensure effective competition.

Last, where the number of candidates meeting the selection criteria, as described in article 75(5) of Law No. 4412/2016, is below the minimum number, the authority may continue the procedure by inviting only such number of candidates with the required capabilities.

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 73 of the new Law No. 4412/2016 introduces for the first time into Greek procurement law the concept of 'self cleaning'. Consequently, Greek law now explicitly recognises that it is disproportionate and thus unjustified to exclude and debar a currently unreliable bidder from public contracts for an indefinite period of time.

Said mechanism allows for economic operators to regain suitability and reliability through 'self-cleaning' by providing evidence that they have taken measures which are sufficient to demonstrate their reliability despite the existence of a relevant ground for exclusion (both mandatory and discretionary exclusion of a bidder). Such measures include paying or undertaking to pay compensation in respect of any damage caused by the misconduct; clarifying the facts and circumstances by actively collaborating with the investigating authorities; and taking concrete technical, organisational and personnel measures that are appropriate to prevent further misconduct. In case the competent authority considers on an ad-hoc basis said measures to be insufficient, the unreliable bidder shall be informed.

Having said that, note that as long as 'self-cleaning' constitutes a novel concept for Greek procurement law its practical implications are yet to be tested.

Lastly, Law No. 4412/2016 introduces time limits for exclusions; so that an economic operator subject to a mandatory exclusion will be excluded for a maximum of five years from the date of the relevant conviction, and an economic operator subject to a discretionary exclusion will be excluded for a maximum of three years from the date of the relevant event.

The procurement procedures

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

Yes, pertinent legislation states the fundamental principles pertaining to procurement procedures. In more detail, according to article 18 of Law No. 4412/2016, contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. Regard shall be had to issues pertaining to mutual recognition, protection of public interest, protection of civil rights, environmental law, sustainable development and unfettered competition. Further, the design of the procurement shall not be made with the intention of excluding it from the scope of Law No. 4412/2016 or artificially narrowing competition. The aforementioned core principles are further strengthened by the administration's obligation to state reasons to enforce the principles of legal certainty and reasonable expectations, sound administration, and privacy of offers, enshrined both in the respective statutes and applicable case-law.

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

Please see question 15. In addition, notice that the principles of objectivity and impartiality of the administration constitute a direct manifestation of the rule of law, as enshrined under article 25 of the Constitution.

17 How are conflicts of interest dealt with?

Until now such conflicts were resolved pursuant to the general principles applicable to public procurement procedures, namely transparency, impartiality and equality of treatment. The notion 'conflicts of interest' was dealt with in a piecemeal manner via fragmentary references in several public law instruments. However, the new Law No. 4412/2016 attempts to comprehensively address the subject matter and contains an explicit provision in article 24 under the heading 'Conflicts of Interest'. Said provision's aims are to identify and remedy – in a timely and effective manner – any conflicts of interest arising during procurement procedures and to ensure the equality of treatment among bidders.

'Conflict of interest' is defined as a situation where certain persons (eg, employees, managers, etc, of the contracting authority, as well as relatives thereof) have a direct or indirect 'private' (ie, pecuniary or personal, or both) interest in the conclusion of a procurement procedure that might be interpreted as impeding their objectivity and impartiality. Moreover, the article contains detailed notification obligations concerning both contracting authorities and bidders.

In short, contracting authorities must immediately contact the Hellenic Single Public Procurement Authority (HSPPA), an independent administrative body, and take any reasonable action with a view to remedying the conflict. As long as less restrictive means are not available, the contested bidder is disqualified from the procedure. Additionally, contracting authorities are responsible for the avoidance of conflicts when electing personnel responsible for a specific procurement procedure. Finally, the successful bidder upon completion of the procurement procedure signs a relevant contractual clause ('impartiality clause') stipulating that throughout the procurement process and until completion of the work or service no illicit, abusive or unfair actions were undertaken on his or her behalf. Breach of the aforementioned stipulations results ipso facto in revocation of the tenderer's contract.

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

Previous participation of a bidder in the preparatory work of a tender procedure that bestows him or her with a privileged position vis-à-vis other bidders might raise serious implications pertaining to the application of the principle of equal treatment.

That being said, pursuant to the *Fabricom* judgment (Case C-21/03) such prior involvement may lead to the exclusion of the bidder, as long as the information gained is liable to hinder competition. Thus, in order to ensure equality of treatment, procedures must be in place through which – and in accordance with the principle of proportionality – an ad hoc evaluation is undertaken pertaining to assessing potential distortions of competition. In this vein, contracting authorities must assess the facts of the case at hand in order to ensure transparency in the award procedures and the unbiased and objective evaluation of tenders. In addition, the bidder must be given the opportunity to rebut any presumptions relating to unjustified advantages.

Note that the subject matter is now explicitly addressed in article 48 of the new Law No. 4412/2016, stating that where 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. Such measures shall include the communication to the other candidates of relevant information exchanged in the context of, or resulting from the involvement of, the tenderer in the preparation of the procurement procedure. The candidate or tenderer concerned shall be excluded from the procedure only where there are no other less restrictive means to ensure compliance with the principle of equal treatment. As long as all competitive disadvantages have been compensated, an exclusion is deemed illegal and in violence of the proportionality principle. Lastly, the Greek Competition Commission shall be informed accordingly.

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

According to national administrative case law, open or restricted procedures constitute the norm; whereas procurement procedures among a limited number of participants are only exceptionally allowed. Suffice it to say, open procedures are used in most standard tender processes.

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

As mentioned above, procurement procedures should be governed, amongst others, by the principles of effective competition and privacy of offers. In this vein, the principle of privacy ensures the uniqueness of each offer and the prevention of possible collusion and unfair practices among tenderers. Thus, in principle, related bidders should not be allowed to submit separate bids in the same procedure.

However, related companies may legally submit different offers in a procurement procedure only when such companies have commercial and financial autonomy and act independently during the submission of offers. Said criteria can be summarised as follows:

- autonomy of each company: this concerns the establishment of marketing strategy, pricing policy and consequently respective bid (offer independence); and
- performance independence: respective offers shall be prepared and submitted after the quest to attain the best cost-efficiency relationship regarding the offered products.

Finally, regard should be had to core principles deriving from ECJ case-law, namely the rulings in *Assitur* (Case C-358/07) and *Serratoni* (Case C-376/08) pursuant to which the approach envisaged by the Court is to allow related bidders to participate as long as they can demonstrate that, in their case, there is no risk of collusion. It should be noted that the aforementioned risk of collusion is mitigated in cases where related companies submit separate bids that – nonetheless – concern different product categories or services. In such cases the respective economic offers are in essence not comparable and consequently the fundamental principle of privacy of offers is deemed to be complied with.

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

Competitive Dialogue:

It should be stressed at the outset that the new regime envisaged by Law No. 4412/2016 provides greater flexibility during both the selection and the award phase. Contracting authorities may limit the number suitable candidates they will invite to conduct a dialogue, provided a sufficient number (a minimum of three) of suitable candidates is available. The procedure itself can consist of several phases of negotiations before the dialogue is completed and candidates are called to submit their final offer on the basis of the negotiations. The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio as envisaged in article 86(2) of Law No. 4412/2016.

According to article 26 of the aforementioned Law contracting authorities may apply a competitive dialogue in the following situations:

- with regard to works, supplies or services where one or more of the following criteria are met:
  - the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - they 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 makeup or because of the risks attaching to them; and
  - the technical specifications cannot be established with sufficient precision by the contracting authority; and
- with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

Competitive Procedure with Negotiations:

In addition to the above, the new Law (articles 29 and 32) envisages that negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances (eg, where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract). Thus, only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself. Authorities relying on this exception should provide adequate reasons. Suffice it to say that during negotiations, contracting authorities shall ensure the equal treatment of all tenderers and they may provide for the procedure to take place in successive stages with a view of reducing the number of tenders to be negotiated by applying the award criteria in the notice or specifications. Lastly, note that the minimum requirements and the award criteria shall not be subject to 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?

In light of the recent and significant amendments introduced via Law No. 4412/2016, the practical implications thereof are yet to be tested.

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

A framework agreement is defined as an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regards to price and, where applicable, the quantity envisaged. Contracting authorities may not use framework agreements improperly or in an abusive manner that results in hindrances to effective competition. Note that pursuant to article 39 of Law No. 4412/2016 the general provisions of Greek procurement law apply also to the award of framework agreements.

In principle, the term of a framework agreement may not exceed four years (and eight years respectively with regards to Utilities – article 273 of Law No. 4412/2016). Where such an agreement is concluded with a single economic operator, pertinent contracts shall be

awarded within the limits of the terms laid down in the framework agreement. It goes without saying that contracting parties may under no circumstances make substantial amendments to the terms stipulated in the framework agreement.

Lastly, note that all framework agreements and pertinent contracts undergo ex-ante control by the Greek Court of Audit; whereas according to well established case-law, any omission to precisely describe the maximum purchase volume, in the context of tendering procedures pertaining to the conclusion of framework agreements, constitutes a material breach of public law.

24 May a framework agreement with several suppliers be concluded?

Yes, framework agreements can be concluded with several suppliers for the same goods, works or services. Pursuant to article 39 of Law No. 4412/2016, where a framework agreement is concluded with more than one economic operator, such agreement shall be performed in one of the following ways:

- where the framework agreements sets out all pertinent terms, the agreement shall follow the terms and conditions of the framework agreement, without reopening competition;
- where not all terms governing the provision of the works, services and supplies are laid down in the framework agreement, a simplified competitive procedure shall precede the award of the contract; and
- as long as it is explicitly stipulated in the framework agreement, contracting authorities may use both procedures (ie, no reopening of competition for those works, services and supplies whose terms are elaborated upon in the framework agreement and simplified competitive procedure for the rest).

In addition, note that the competitions referred to above shall be based on the same terms as those applied for the award of the framework agreement and, where necessary, more precisely formulated or other terms in accordance with the provisions of article 39 of Law No. 4412/2016.

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

Law No. 4412/2016 provides, under certain conditions, for the substitution of the representative of the consortium for a specific public contract of work or its alternate. Such substitution, which is always subject to the approval of the awarding authority, is allowed only at the stage when the works are being carried out, that is to say the phase which follows the signature of the contract between the contractor and the awarding authority and not at a stage prior to award of the contract. Also, note that in the event the substitution of the representative or its alternate is requested by any member of the consortium, the consent of all members of the consortium is required.

Further, contracting authorities may law down specific rules regarding the change of consortia members in the tender documents. The general view seems to be that, as long as the changed consortium can fulfill the contract requirements; meet any pre-qualification criteria; and no distortion of competition has occurred as a result; members of consortia may change.

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 new legislative framework provides for a variety of measures in relation to the participation of small and medium-sized enterprises (SMEs). In particular:

- the possibility of separating contracts into lots: 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 may, even where tenders may be submitted for several or all lots, limit the number of lots to be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest;
- in addition, national legislation provides for special methods pertaining the calculation of a public contract's value. Said provisions are set out in article 6 and article 236 of Law No. 4412/2016 as well as article 8 of Law No. 4413/2016;
- the prohibition of selection criteria that require bidders to have an annual turnover greater than two times the estimated contract value;
- the introduction of the European single procurement document: This document aims to reduce the hurdles SMEs encounter when attempting to participate in procurement procedures by not asking for detailed evidence of their compliance with certain requirements; and
- rules on the use of subcontractors, for instance, allowing direct payment to subcontractors in certain circumstances.

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

In principle, currently contract notices indicate that tenderers are not allowed to submit variant bids. Therefore, only where it is explicitly stated in contract notices are variant bids admissible.

In more detail, pursuant to article 57 of Law No. 4412/2016, contracting authorities may authorise or require tenderers to submit variants. In such case, they shall indicate in the procurement documents to confirm interest whether or not they authorise or require variant bids.

In addition, contracting authorities authorising or requiring variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

28 Must a contracting authority take variant bids into account?

If the contracting authority has explicitly indicated in the contract notice that it will consider variant bids, then it is under an obligation to do so. However, only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration as elaborated upon in question 27.

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

Bidders should not change the tender specifications or submit their own standard terms of business. Should they do so, the contracting authority is obliged to exclude them from the procurement procedure. This is without prejudice to tender documents that explicitly make allowances for changes according to the tender's notice.

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

According to article 86 of Law No. 4412/2016, contracting authorities shall base the award of public contracts on the most 'economically advantageous tender'. The latter shall be identified either on the basis of the lowest price or on the basis of the price or cost, using a cost-effectiveness approach, as elaborated upon in article 87, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental or social aspects, linked to the subject matter of the pertinent contract (eg, quality, technical merit, organisation, qualification and experience of staff assigned to performing the contract, technical assistance etc). However, the cost element may also take the form of a fixed price on the basis of which tenderers will compete on quality criteria only.

Implementing pertinent European case-law, the new regime provides that award criteria shall be considered to be linked to the subject matter of the contract where they relate to the works, supplies or services to be provided under that contract and shall not have the effect of conferring an unrestricted freedom of choice on the authority. Importantly, authorities shall specify in the documentation the relative weighting given to each of the criteria in order to determine the most economically advantageous tender.

From a practical perspective, however, it should be stressed that to-date the vast majority of contracts are awarded pursuant to a lowest price criterion. Hence it remains to be seen whether Greek contracting authorities shall make usage of the more flexible rules envisaged by the new regime, as well as how such criteria will be dealt with by the judiciary.

31 What constitutes an 'abnormally low' bid?

In line with the previous regime, the notion constitutes a vague legal concept and is not defined exhaustively under Law No. 4412/2016. That being said, Greek administrative courts have held that in principle the respective bids of competitors should be examined, inter alia, in terms of the administrative costs inherent in each work or service, which should include the general operating expenses of the undertaking, as well as other costs arising from the notice, consumables' costs etc. In addition, it should be examined whether the contested bid allows for a certain profit margin; nonetheless, the exact margin is to be decided by the competent court or authority on ad hoc basis and on the facts of the case at hand.

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

Pursuant to article 88 of Law No. 4412/2016, where tenders appear to be abnormally low in relation to the works, supplies or services, contracting authorities shall require economic operators to explain the price or costs proposed in the tender, within 10 days following the pertinent request.

Said clarifications may relate in particular to:

- costs of the manufacturing process, of the services to be provided and the of the chosen construction method;
- technical solutions chosen and any exceptionally favourable conditions available to the tenderer for the supply of goods or services, or for the execution of the work;
- originality of the supplies, services or work proposed by the tenderer; and
- compliance with employment obligations, health and safety regulations.

Further, the contracting authority may request clarifications regarding the possibility of the tenderer having obtained state aid. All in all, the contracting authority shall assess the information provided and it may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price. Nonetheless, contracting authorities shall reject the tender, where it is established that said tender is abnormally low due to its non compliance with the obligations postulated in article 18(2) of Law No. 4412/2016 (non compliance with applicable obligations in the fields of environmental, social and labour law established by union law, national law, collective agreements or by the international environmental, social and labour law provisions).

Review proceedings

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

Pursuant to the new dispute settlement mechanism provisions envisaged in Law No. 4412/2016 a new review procedure for complaints against violations of the procurement rules is established. As per the previous similar provisions of Law No. 3886/2010, the new law grants candidates the right to complain against infringements of the procurement rules during an award procedure. However, to date the new dispute mechanism settlement has not yet entered into force with regards to those public contracts whose estimated value exceeds €60,000. After several postponements, said mechanism shall be applicable for procurement decisions, acts or omissions having occurred as of 1 June 2017 onwards according to article 50 of Law No. 4446/2016. Having said that, the possibility of an additional postponement regarding the implementation of the aforementioned mechanism cannot be excluded. Thus for present purposes we hereby present both the dispute settlement mechanism scheduled to enter into force as of 1 June 2017, as well as the current applicable mechanism for public contracts the estimated value of which exceeds €60,000. In particular:

New dispute settlement mechanism (not yet in force)

With regards to public contracts the estimated value of which exceeds €60,000, pursuant to the provisions of Book IV of Law No. 4412/2016 (articles 345 – 373), which according to the above are likely to enter into force as of 1 June 2017, candidates have the right to challenge procurement decisions, acts or omissions of the contracting authority by filing a review application before the competent newly set authority for the hearing of review applications. Note that an application for review results in an automatic suspensive effect on the conclusion of the contract.

If the review application is accepted, the contracting authority is obliged to comply with such decision, as per article 367 of Law No. 4412/2016. On the contrary, if the review application is rejected, candidates have the right to seek judicial protection before the competent Administrative Court of Appeal (or the Council of State in case of public contracts the estimated value of which is above €15 million or in case of public concession contracts) in accordance with article 372. In more detail, candidates are entitled to file a petition for annulment of the decision of the reviewing authority and of any other illegal act or omission of the contracting authority and a petition requesting the suspension of the enforcement of the above decision or acts or omissions. That being said, note that candidates are entitled to file only the aforementioned suspension request, that is, without first filing the above petition for annulment, within 10 days of the issuance of the reviewing authority's decision. If the suspension request is successful candidates must file said petition for annulment within 10 days of the notification of the suspension award. Regarding the automatic suspensive effect, please see question 38.

Importantly, neither the time limit for the filing of the suspension request nor the suspension request, as such, do automatically suspend the execution of the contract to be awarded. For this purpose, candidates must submit a specific request for the issuance of an injunction relief award before the court suspending the execution of the contract or the progress of the procurement procedures.

The currently applicable dispute settlement mechanism

Until entrance into force of the above provisions and for the time being, Law No. 3886/2010 is applicable, stipulating similar provisions as the dispute settlement mechanism described above. In particular, candidates have the right to challenge illegal acts (or omissions) of the contracting authority and are vested with the right to file a review application before the latter within 10 days of the time they became aware of its illegal acts (or omissions) in accordance with article 4 of Law No. 3886/2010. In such case, the contracting authority should respond within 15 days of the date of the submission of the pre-judicial objection. An application for review has an automatic suspensive effect on the conclusion of the contract.

If the review application is rejected or if the contracting authority does not respond within the 15-day period (in which case the review application is deemed as tacitly rejected), candidates are entitled to submit within 10 days commencing either from the notification date of the rejection decision of the contracting authority, or from the date on which the above 15-day period lapses, an interim measures petition before the competent Administrative Court of Appeal (or the Council of State in cases where the estimated value of the public contract is above €15 million or in case of a public concession contract) for the suspension of the enforcement of the rejection of their review application and any challenged act or omission of the contracting authority under such review application (article 5 of Law No. 3886/2010). Importantly, candidates are not obliged to file a petition for the annulment of such actions or omissions before filing a petition for interim measures. However, please note that in case candidates successfully obtain interim measures, they are obliged to file a petition for annulment of the challenged acts or omissions within 30 days of the issuance of the interim measures award.

All in all, the most significant difference between the two mechanisms can be summarised as follows: Until now, the automatic suspensive effect of the execution of the tender contract would last until the issuance of the interim measures award by the competent court. Under the new regime such suspensive effect shall last until the issuance of the decision of the Authority for the Hearing of Review Applications (administrative authority), as elaborated upon above. Consequently, under the new mechanism candidates should seek an injunction relief by the competent court, in order to retain such suspensive effect until the issuance of the award upon their suspension request against the decision of the above authority on the respective review application.

Public contracts equal or below €60,000

With regard, now, to public contracts the estimated value of which is equal to – or less than €60,000 – candidates have the right to file an objection before the contracting authority within five days of the time

they became aware of its illegal act (or omission). In case their review application is rejected according to the general provisions of Greek Administrative Procedural Law, candidates have also the right to file a petition for the suspension of the enforcement of the act (or omission) of the contracting authority, as well as a petition for the annulment of such act (or omission) before the competent court.

Importantly, neither the time limit for the filing of the suspension request, nor the suspension request as such, automatically suspend the execution of the contract to be awarded; candidates must submit a specific request for the issuance of an injunction relief award before the court suspending the execution of the contract or the progress of the procurement procedures.

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

Subject to the preamble of our analysis in question 33, regarding disputes arising as from 1 June 2017, the sole administrative authority that may rule on a review application shall be the Authority for the Hearing of Review Applications; whereas, currently, the contracting authority performing the tender is the only administrative authority competent to rule on the review application of the candidates.

However, in case the review application is rejected, candidates may seek judicial remedies before the competent Administrative Court of Appeal (or where applicable, the Council of State), as per our above analysis under question 33.

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

Under the current legal regime, the administrative and judicial proceedings for the review of any procurement decision could last up to three to four months. Regarding solely the administrative proceedings, the review could last up to 25 days.

As already mentioned, the new legal regime for review applications is likely to be implemented as of 1 June 2017. Concerning the latter, we are not yet in a position to estimate the length of such administrative and judicial proceedings given that under the upcoming regime there is no statutory explicit time-limit for the issuance of the decision of the administrative authority. Further note that under the new regime, the administrative authority deemed competent to review said applications shall be obliged to issue a written decision. Contrariwise - as the law now stands - in case the contracting authority does not issue a decision within a 15 day period, the review application is deemed to be tacitly rejected and the 10 day time limit for the filing of a petition for interim awards against such tacit rejection starts.

36 What are the admissibility requirements?

The requirements can be summarised as follows:

- the candidate must have an interest in the awarded contract, which is generally proven by the submission of an offer;
- the candidate must prove that the contracting authority has acted or neglected to act in breach of EU and national provisions; and
- the candidate has to demonstrate that it has suffered a loss, or might be about to suffer a loss, as a consequence of the alleged violation of procurement provisions.

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

When the estimated value of the public contract exceeds €60,000, the following shall apply: as per our above analysis in question 33, and until 31 May 2017 Law No. 3886/2010 provides a time limit of 10 days from the candidate's knowledge for the issuance of the procurement decision for the filing of a review application.

Following the entrance into force of the new regime (expected 1 June 2017), different time limits shall apply. In particular:

- review application against a procurement decision: The filing of a review application against an act of the contracting authority, pursuant to article 361 of Law No. 4412/2016, shall take place within 10 days of the time the illegal decision of the contracting authority was notified to candidates by electronic means; within 15 days from the time the illegal decision of the contracting authority was notified to candidates by any other means of communication; or within 10 days of the time candidates become fully aware of the illegal decision of the contracting authority; and
- review application against an omission: The filing of a review application against an omission of the contracting authority shall take place within 15 days of the occurrence of such omission.

When the estimated value of the public contract is equal to or less than €60,000, the following shall apply: the filing of an objection before the contracting authority shall take place within five days of the time candidates become aware of its illegal acts or omissions.

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 already analysed above (see question 33), an application for review results to an automatic suspensive effect on the conclusion of the contract. Under the new legal regime to be in force pursuant to Law No. 4412/2016, such automatic suspensive effect shall last until the issuance of the decision on the review application.

In case of a negative decision upon a review application, candidates shall file petition for interim measures and a petition for injunction relief requesting the competent court the extension of such suspensive effect until the issuance of the court's ruling upon the petition of the interim measures.

Note that, as per the current regime (Law No. 3886/2010), such automatic suspensive effect lasts until: the lapse of the time limit for the filing of a review application; in case of filing a review application; until the lapse of the time limit for the filing of a petition for interim measures; and in case of filing an interim measures petition, until the award of the competent court upon such petition.

Law No. 3886/2010 enables the contracting authority to file a petition seeking the lifting of the automatic suspension granted by the court on grounds pertaining either to the inadmissibility of the interim measures petition or to the manifestly unfound nature of the latter. However, note that the new Law No. 4412/2016 does not explicitly provide for the above possibility.

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

As practice now stands, the contracting authority respects in almost all cases the automatic suspensive effect of the review application until the issuance of the award for interim measures by the competent courts. Petitions for lifting of such automatic suspension are practically rare.

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

The contract is concluded with the notification of the award decision, which is notified to all bidders who are participating until the last phase of the procurement procedures.

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

Yes. The new Law No. 4412/2016 makes specific allowances for candidates' right of access to other candidates' procurement files, in accordance with the terms and conditions envisaged in the tender invitation. This is without prejudice, however, to pertinent ECJ case-law postulating that the right of access to information relating to the award procedure has to be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. Practically speaking, given that currently most procurement procedures are taking place through electronic means, the candidates have immediate and automatic access to the files of the other candidates following the opening date of the respective offers.

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

Yes.

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

According to article 373 of Law No. 4412/2016, any candidate that was excluded from the procurement procedure or from the conclusion of the public contract, in breach of the EU or national respective legislation, shall be entitled to bring a claim for compensation before the

contracting authority in accordance with articles 197 and 198 of the Greek Civil Code. Similar provisions apply under the current regime (article 9 of Law No. 3886/2010). Further, if the interested party can demonstrate that in the absence of the aforementioned infringements, it would be awarded the contract, it may claim damages in accordance with general provisions of Greek civil law (eg loss of earnings, loss of profit and non pecuniary 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, such a possibility exists both under the current regime (Law No. 3886/2010) and the regime to be in place as of 1 June 2017 (Law No. 4412/2016). Nevertheless, such kind of review applications are not usually filed.

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

Under both legal regimes (current and expected), anyone with legal interest can seek the annulment of the contract in of an award without any procurement procedure (so-called illegal direct award or de facto award).

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

With regard to public contracts the estimated value of which exceeds €60,000, pursuant to article 363 of new Law No. 4412/2016, the most significant cost associated with an application for review is an administrative fee amounting to 0.5 per cent of the total estimated value of the contract to be awarded (excluding VAT). Note that, irrespective of the contract's value said administrative fee cannot be lower than €600; whereas it is capped at €15,000. As far as interim measures petitions are concerned, an administrative fee amounting to 0.1 per cent of the total estimated value of the contract to be awarded (including VAT) is required according to article 372 of new Law No. 4412/2016. Said fee cannot be lower than €500; whereas it is capped at €5, 000.

As per the current legal regime (Law No. 3886/2010), for the filing of an interim measures petition an administrative fee amounting to 1 per cent of the total estimated value of the contract to be awarded (including VAT) is required. Said fee is capped at €50,000.

With respect to public contracts the estimated value of which is equal to, or less than €60,000, for the filing of an objection before the contracting authority an administrative fee amounting to 1 per cent of the total estimated value of the public contract is required according to article 127 of the new Law No. 4412/2016.

POTAMITISVEKRIS

Alexandros A Kortesis **alexandros.kortesis@potamitisvekris.com**
Athanasios S Taliadouros **athanasios.taliadouros@potamitisvekris.com**
Vasiliki Karamani **vasiliki.karamani@potamitisvekris.com**

9 Neofytou Vamva street
106 74 Athens
Greece

Tel: +30 210 3380000
Fax: +30 210 3380020
www.potamitisvekris.com

India

Sumeet Kachwaha
Kachwaha & Partners

Legislative framework

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

India has a federal constitution, with the responsibility for governance divided between the central and state governments. 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. But the subject can be said to be covered indirectly under the State List heading 'Trade and Commerce', thereby enabling states to legislate on the subject. 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. The subject is primarily covered by the General Financial Rules (GFR) 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 GFR 2017 was issued by the Ministry of Finance on 11 February, 2017 and came into force on 8 March, 2017. (See 'Update and trends' for more on the GFR 2017.)

Further, the Directorate General of Supplies and Disposals (DGS&D) Manual on Procurement and the Central Vigilance Commission (CVC) Guidelines prescribe the procurement procedure to be followed by all central ministries. In furtherance to 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. They are very detailed in nature.

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.

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

There is no legislation for procurement, as stated in question 1. However, there exist some sector-specific guidelines and regulations.

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 Defence Procurement Manual 2016 was issued by the Ministry of Defence on 4 November, 2016.

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 in 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 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.

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

India has not acceded to the GPA.

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 approved the Draft Public Procurement Bill 2012. This Bill had lapsed but has now been revived. The Bill seeks to incorporate best practice into law. It encompasses the various categories (ie, goods, services, works and PPPs). It also provides a grievance redress system and a code of integrity. Last, it provides for offences and specifies penalties for violation, which include imprisonment. Presently, the Bill is pending introduction in Parliament.

Applicability of procurement law

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 control of the government are not bound by the procurement procedures described in question 1.

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).

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

After award 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'.

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 2011, the Department of Economic Affairs formulated an extensive policy for PPP projects including rules for regulating expenditure, appropriation of revenue, contingent liabilities, etc. However, this is still at the consultation stage within the government and has not yet been finalised.

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.

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

See question 9.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

See question 19.

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 Central Vigilance Commission 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.

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 is subject to judicial review (inter alia, 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

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

Yes.

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

Yes.

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, inter alia, 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, inter alia, 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 GFR 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.

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.

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 GFR 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:

- where the competent authority in the concerned 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.

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.

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 (Central Vigilance Commission Guideline dated 3 March 2007). Even post-tender negotiations with the lowest bidder (L1) are not permitted except for reasons to be recorded in writing.

The GFR 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.

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.

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 same may be permitted by the authority 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.

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 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.

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.

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.

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 situation there can be a retender. Otherwise, the tender will be awarded to L1 without negotiation.

31 What constitutes an 'abnormally low' bid?

'Abnormally low' bids are those that vary from the estimated rates by more than 25 per cent even after updating the scheduled rates to match the prevailing cost index.

Update and trends

The General Financial Rules (GFR) of 2017 were issued by the Ministry of Finance on 11 February, 2017 and came into force on 8 March, 2017 (a Notification was issued by the Ministry of Finance). The government's focus in the GFR is to boost e-procurement through e-commerce portals, including online purchase of goods and services by various central government ministries and departments. The intent is to migrate to an internet-based platform. The GFR 2017 has introduced the concept of a government e-marketplace (GeM). The Directorate General of Supplies and Disposal or any competent agency will host an online portal for common use goods and services utilised by government buyers for direct online purchases. The procurement of goods and services by ministries or departments will be mandatory for goods or services available on GeM.

It is now also mandatory for all procuring entities to publish their tender enquiries and receive all bids through e-procurement portals. Exemption is granted in cases where confidentiality is required or for reasons of national security with the approval of the competent authority.

Presently, the proposed Public Procurement Bill has failed to gain any momentum. The focus now is on legislation that enhances the ease of doing business. At the UN Global Compact India Conference held in June 2016, a few suggestions were made by various stakeholders. First, there should be no monetary threshold except for emergency procurement and procurement for national security. Second, where the procuring entity may not know in advance the technical, financial or legal means to identify its procurement needs it can enter into a dialogue with qualified bidders to set these specifications and select options with the best price-quality ratio, while maintaining neutrality in the sense that none of the dialogue partners has access to more information than any of the others. Third, there should be a system to question the genuineness of abnormally low-priced tender offers. Fourth, there should be some system to check abuse of monopoly powers in single-source procurement. Another suggestion was that 'sustainable public procurement' norms should be incorporated.

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

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 has to 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 monitor 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 in 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.

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 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.

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 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.

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. Suspension can only be ordered by the court by 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.

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

No. The GFR 2017 only make it mandatory for the procuring entity to publish details of the bid award on a central public procurement portal.

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

The procurement file is treated as confidential and is not liable to 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.

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.

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 the process adopted or decision made by the authority is:

- mala fide 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?

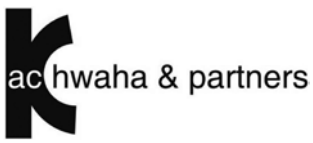
This would depend upon the facts of the case and discretion of the court. Sometimes, where third-party interests have crystallised and public interest is involved, the court may not cancel the contract. See also question 36. However, there are cases to the contrary (see, for instance, *Dr Subramanian Swamy v Union of India*, 2012 (3) SCC 1).

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.

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 is 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, and nor is a litigant seeking interlocutory relief subjected to conditions.



Sumeet Kachwaha **skachwaha@kaplegal.com**

1/6, Shanti Niketan
New Delhi – 110021
India

Tel: +91 11 4166 1333
Fax: +91 11 2411 0763
www.kaplegal.com

Ireland

Peter Curran and Áine Smith
Eversheds Sutherland

Legislative framework

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 EU 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 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. 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.

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).

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 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 due to be transposed into Irish law by 18 April 2016, however, this has not yet been implemented. On 8 December 2016, the European Commission sent a reasoned opinion to Ireland requesting it to fully transpose the Directive into national law. It is expected that transposition will occur by mid-2017.

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).

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 and the Utilities Regulations do not include any significant additional obligations beyond those laid down in Directive 2014/24/EU or Directive 2014/25/EU (which are based on the GPA).

4 Are there proposals to change the legislation?

In May 2016, the Public Sector Regulations and the Utilities Regulations were published. At the time of writing, we are not aware of any proposals to change or amend this legislation. It is expected that the transposition of the Concessions Directive will occur in 2017, although no draft legislation has yet been published.

Applicability of procurement law

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.

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 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.

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:

- €5,225,000 for works contracts;
- €135,000 for supply contracts and services contracts awarded by central government authorities and design contests organised by central government authorities;
- €209,000 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:

- €5,225,000 for works contracts;
- €418,000 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').

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.

The Concessions Directive applies to concessions with a value equal to or greater than €5,186,000.

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

The Public Sector Regulations (Regulation 72) and the Utilities Regulations (Regulation 97) 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 there are limits on the increase in price that such a modification may entail, and in both the Public Sector Regulations and the Utilities Regulations the modification must be publicised in the Official Journal;
- 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, as above, there are limits on the increase in contract price permitted, and in both the Public Sector Regulations and the Utilities Regulations the modification must be publicised;
- where there is a change to the contractor as a result either of an unequivocal review clause or a corporate restructuring; and
- where the value of the modification is de minimis (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 de minimis modifications are not aligned with the Directives they purport to transpose. The 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, the national legislation requires the value of the change to be below one or other (and not both) of these values. This inconsistency will need to be corrected to bring the national legislation into line with the 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 new legislation relating to amendments to concluded contracts.

9 In which circumstances do privatisations require a procurement procedure?

There is no specific guidance in the Public Sector Regulations or the Utilities Regulations 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 effected 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.

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 Directive 2014/23/EU, and has a value equal to or greater than €5,186,000, then it should be procured in accordance with the rules laid down in that Directive.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the Official Journal of the European Union. 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 Public Sector Regulations and the Utilities Regulations.

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 (www.etenders.gov.ie). 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 SME access to government contracts.

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.

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 is 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.

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. Both the Public Sector Regulations and the Utilities 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

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 and the Utilities Regulations both reiterate the general principles of equal treatment, non-discrimination, transparency and proportionality.

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. See also question 17.

17 How are conflicts of interest dealt with?

The Public Sector Regulations and the Utilities 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.

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.

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 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.

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

There are no national 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. The procuring body will generally specify in its published procurement documentation whether it is permitting more than one tender from an individual bidder or related bidders. Variant bids are also permitted under the Public Sector Regulations and the Utilities Regulations as noted in question 27.

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:

(i) the authority's needs cannot be met by adapting readily available solutions;
(ii) the requirements include design or innovative solutions;
(iii) 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;
(iv) 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
(v) 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.

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. The negotiated procedure without publication tends to be used rarely by authorities in Ireland, who 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.

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 have to 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 reopening of competition. In general the terms of any call off contract and the procedures for procuring 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: (i) 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; (ii) 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 (iii) by re-opening competition among framework suppliers where not all of the contract terms are laid out in the framework agreement.

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 recently 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.

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/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.

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.

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 Directive, 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.

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 is likely to 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.

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

The legislation requires contracts to be awarded on the basis of the most economically advantageous tender. 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 an unfettered discretion when it comes to devising award criteria. Award criteria always have to be related to the subject matter of the contract in question. The Public Sector Regulations and the Utilities Regulations suggest that award criteria may comprise (amongst 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.

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 require any economic operator 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.

Update and trends

Since the law changed in 2015, it has become possible for contracting authorities to apply to the Courts to have the automatic suspension lifted, and this is now a consideration that will arise in most cases. The Courts have tended to permit the suspension to be lifted in the cases heard to date.

Debriefing obligations have also come to the fore in recent times, following the High Court decision in *RPS Consulting Engineers Limited v Kildare County Council* ([2016] IEHC 113).

There have been other significant recent decisions on late tenders and framework agreements.

Contracting authorities continue to grapple with the practical implications of implementing the 2016 legislation. Standard contract and tender documentation has had to be modified to bring it into line with the new regime.

The European Single Procurement Document has been adopted for many procurement exercises; this presents particular new challenges for contracting authorities and bidders alike.

Review proceedings

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

In Ireland, review applications are dealt with by the Courts. 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.

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 (for example, 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 public contract and who alleges harm, or the risk of harm, as a result of an infringement, in relation to that reviewable public 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 (for example, 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 the 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 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 Official Journal. 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 Court does 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).

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), 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.

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

There is a requirement under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (and the equivalent legislation applicable to utility undertakings) 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 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. A recent High Court decision in *RPS Consulting Engineers Limited v Kildare County Council* ([2016] IEHC 113) clarified the debriefing obligations of contracting authorities under Irish Law.

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 the Utilities Regulations. However, there is no automatic right for a tenderer to have access to any such file or records.

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.

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'.

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.

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.

EVERSHEDS SUTHERLAND

Peter Curran **petercurran@eversheds-sutherland.ie**
Áine Smith **ainesmith@eversheds-sutherland.ie**

One Earlsfort Centre
Earlsfort Terrace
Dublin 2
Ireland

Tel: +353 1 6644200
Fax: +353 1 6644300
www.eversheds-sutherland.ie

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 circumstances, as described in question 45.

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), the Court must impose 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.

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 €100,000 to €200,000 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.

Italy

Filippo Satta and Anna Romano
Studio Legale Satta Romano & Associati

Legislative framework

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

The provisions of law governing the award of public works are contained in Legislative Decree No. 50 of 18 April 2016 (the new Code). It is divided into 220 articles and 22 annexes, and requires, to become fully effective, the adoption of guidelines issued by the Ministry of Infrastructure and Transport and the National Anti-Corruption Authority (ANAC) and of approximately 50 ministerial decrees as implementing acts.

Legislative Decree No. 50/2016 and the relevant implementation measures replace the previous Code (Legislative Decree No. 163/2006 and Presidential Decree No. 207/2010), as well as other regulatory acts for specific sectors.

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

The legislation governing specifically the award of public works in the sectors of defence and security is contained in Legislative Decree No. 208/2011, in compliance with Directive 2009/81/EU. The new Code also contains specific provisions for the defence and security sector (articles 159 to 163).

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 new Code makes reference to the obligation of the awarding administrations to reserve to suppliers based in states that are signatories of the agreements to which the EU is bound – which include the GPA – a treatment that is not less favourable than the one reserved to operators based in EU countries (article 49 of the new Code).

4 Are there proposals to change the legislation?

A decree amending the new Code (deadline of April 2017) is being approved. In fact, Law No. 11/2016 authorised the government to adopt supplementing and corrective provisions within a year after the publication of Legislative Decree No. 50 of 18 April 2016.

Applicability of procurement law

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

In principle, only private entities are not contracting authorities. Some public entities are, however, excluded when operating in competition with other operators. This is the case of Poste Italiane, which is not considered a contracting authority for its payment services and for the transfer of money. Other public companies derived from previously public entities, which operate in special sectors, are not considered contracting authorities (ENI SpA, Ferrovie dello Stato SpA, etc).

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

As provided by article 35 of the new Code, the latter does not apply to public contracts whose amount, before value added tax, is lower than the following thresholds:

- €5,225,000 for contracts relating to public works and for concessions;
- €135,000 for public contracts relating to supplies of goods, services and for public tenders relating to projects awarded by administrations that are central governmental authorities (listed in Annex III);
- €209,000 for public contracts relating to supplies of goods or services and for public tenders relating to projects awarded by sub-central awarding administrations; and
- €750,000 for contracts relating to social services and other specific services listed in Annex IX.

As far as the special sectors are concerned, the thresholds determining the application of the new Code are the following:

- €5,225,000 for work contracts;
- €418,000 for contracts relating to the supply of goods or services and for public design tenders; and
- €1 million for service contracts, for contracts relating to social services and other services specifically listed in Annex IX.

The thresholds have been established independently by the national legislature for various purposes: for example, in order to define complex works (article 3, letter oo), to fix the limit to direct awards (articles 31 and 36), to establish when no qualification is necessary for the contracting authorities to award services or supplies (article 37), for the purpose of simplified award procedures of the works (article 36), and for very urgent awards of works (article 163).

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

Contracts may be amended without a new award procedure only in the circumstances provided by article 106, sections 1 and 2 of the new Code, which are:

- if the amendments have been provided in the initial tender documents through unequivocal clauses, and do not make any amendments altering the general nature of the contract;
- for necessary supplemental activities, in the event that the change of the contracting party appears to be unfeasible due to economic or technical reasons;
- in the event of unpredicted or unpredictable circumstances for the awarding administration or the awarding entity (so-called change orders during works in progress), for example, issue of new provisions of law or regulations; and
- in the event of replacement of the original contractor in the cases provided by article 106, section 1, letter (d); or
- because of design errors or omissions negatively affecting the realisation of the works or the relevant use, if the value of the change is below the values provided by section 2 of article 106.

Any substantial amendments are also prohibited (ie, any amendments that considerably alter the originally agreed-upon essential elements of the contract (article 106, section 1, letter (e) and section 4 of the new 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 *Succhi di Frutta* Court of Justice, 29 April 2004, case C-496/99 P), has clarified that the discrimen

between admissible and non-admissible amendments lies in the substantial nature of the amendment (ie, in its suitability to alter the originally agreed-upon elements of the contract). The Italian Council of State has ultimately clarified that change orders issued while the works are in progress result in changes to the project from typological, structural and functional standpoints. For such changes to be accepted it is necessary that the call for tender provides therefor, identifying the minimum requirements highlighting the limits within which the work proposed by the bidder represents an alternative compared to that anticipated by the public administration (Council of State, Div V, sentence No. 42 of 10 January 2017).

9 In which circumstances do privatisations require a procurement procedure?

Privatisations are always realised through a public procedure, above all when public powers or public functions are transferred to the private sector (services, works).

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

Part IV, Title I of the new Code lays down detailed rules and regulations governing PPPs. By way of example, and not limited to these, the concession of services, project financing contracts and joint ventures are PPPs. In all of these contracts, the choice of the private partner takes place through a public procedure.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

Articles 72 and 73 of the new Code provide that all announcements and calls for tender relating to contracts in both ordinary and special sectors are to be 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:

- online, on the website of the contracting authority and on ANAC's digital platform displaying calls for tender. Such advertisements have legal effect from the date of publication;
- on the ICT service platform of the Italian Ministry of Infrastructure and Transport; and
- through an abstract published in at least one of the principal national and local daily newspapers.

Up to the date of operation of the ANAC platform, the legal effects start running from the publication in the Official Bulletin of the Republic of Italy and from the publication in the municipal notice board (Albo Pretorio) for those works involving an amount of money lower than €500,000.

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 new Code.

The general requirements provided by article 80 are mandatory and the contracting authorities are not allowed to require general requirements other than those provided by the applicable legislation.

The requirements provided by article 83 are of a special nature. In this case, the contracting authorities have the discretionary power to apply additional requirements both for ensuring the technical and financial reliability of the participants and in order to anchor the evaluation of a company's reliability not only to the elements defined by the general provisions of law, but also to criteria that are more 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, section 2 of the new Code, the contracting authorities may limit the number of bidders in the following events:

- 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 fewer than the minimum number, the contracting authority may continue the procedure, inviting the candidates in possession of the required skills and abilities.

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, section 6 of the new Code permits a bidder responsible for the irregularities provided by article 80, section 1 of the new Code to obtain again the status of suitable and reliable bidder through 'self-cleaning' measures. Such measures consist of the supplier's obligation to prove that:

- it has indemnified or has undertaken to indemnify any damages caused by its irregularities; and
- it has adopted measures of a technical organisational nature and relating to personnel, which are suitable to prevent the perpetration of additional crimes or offences.

The 'self-cleaning' measures cannot be used for all the exclusion events governed by article 80, section 1 of the new Code, but only for those events in which the final sentence includes imprisonment for a period not exceeding 18 months or has recognised the mitigating factor of the collaboration as identified for each individual crime. Moreover, the adoption of the self-cleaning measures must have taken place within the time limit fixed for the submission of the bids and must be indicated also in the DGUE (Documento di Gara Unico Europeo – European Single Procurement Document).

Finally, it is the administration's responsibility to evaluate whether such measures are sufficient to avoid the exclusion of the bidder from the procedure.

The procurement procedures

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

Article 30 of the new Code lays down the general principles inspiring the entire legislation governing public contracts. Such principles are free competition, non-discrimination, transparency and publicity. In addition to the latter principles expressly mentioned by the Code, the general principles provided by Law No. 241/1990 for all activities carried out by the public administration must also be applied for tender procedures.

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

The new Code, both at the level of statement of general principles (article 30) and at the level of specific rules and regulations, states that the contracting authority must be impartial (ie, equidistant from the bidders involved in the selection procedure). For this reason the Code prohibits, for example, the adoption of discriminatory conditions for accessing the tenders, requires the uniform application of the rules to all bidders and prescribes the identification of the contractor on the basis of objective and predefined parameters. The contracting authority, conversely, does not need to be 'independent': it is an administration and not a judge.

17 How are conflicts of interest dealt with?

Article 42 of the new Code provides a precise definition of conflict of interest, specifying that there is a conflict of interest when the personnel of a contracting authority participating in the performance of the award procedure is able to influence in any manner whatsoever the relevant result or has, directly or indirectly, a financial, economic or other personal interest that can be perceived as a threat to its impartiality and independence. In particular, those situations, which determine an obligation to abstain from participation as provided by article 7 of Presidential Decree No. 62 of 16 April 2013, give rise to a conflict of interest situation. Persons to which the above definition may apply are

required to notify the contracting authority thereof and to abstain from participating in the award procedure.

Except for events of administrative and criminal liability, such failure to abstain will entail a disciplinary procedure against the public employee.

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

In the Italian system an entity is prohibited from participating in a tender procedure if it has been involved in the preparation of that procedure. In the event that such involvement represents one of the events 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 events expressly governed by provisions of law, it is necessary to strictly ascertain whether the event is in fact an event of exploitation (*approfittamento*) and, therefore, represents a wrongful competitive advantage in the framework of the tender, whose function is that of ensuring equality of conditions and opportunities to all the participants (Regional Administrative Court, Rome, decision No. 4315/2007; Council of State, decision No. 7130/2003).

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

Article 59 of the new Code offers different procedural options to the contractor: open, restricted, negotiated, competitive dialogue and partnership, subject to the prior publication of a call for tender or notice of a call for tender. In open procedures the suppliers submit their bids in compliance with the procedures and terms provided in the call for tender.

Restricted procedures are characterised by a two-phase 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, subject to an evaluation of the information provided, only the suppliers invited by the awarding administration may submit a bid.

Negotiated procedures, competitive dialogues and partnerships have an exceptional residual import, since it is possible to adopt such procedures only in the presence of certain conditions peremptorily established by law (see questions 21 and 22).

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

Article 80, section 5, letter (m) of the new Code excludes from participation in a procurement procedure those bidders which are in a position of control over another participant in the same procedure, pursuant to section 2359 of the Italian Civil Code. The article further applies to any relationship between the bidders, including in point of fact, if the relationship means that the bids are imputable to one single decisional centre. Section 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 available a sufficient number of votes to exercise a dominant influence in a shareholders' meeting; or
- which 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.

Case law has, however, laid down that it is not possible to penalise such relationships between companies by automatically excluding them from the selection procedure, since it is necessary to assess whether such connections have, in fact, affected their respective conduct in the framework of the tender.

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

The procedures based on negotiations with bidders are: the negotiated procedure with or without publication of the call for tender, the competitive dialogue, and the partnership for innovation. Articles 59, 63 and 65 of the new Code lay down in a mandatory manner the cases in which the above-mentioned procedures may be used.

The competitive procedure with negotiation and the competitive dialogue are employed when:

- in the open tender or in the restricted procedure only irregular or inadmissible bids have been submitted;
- the interest of the administration cannot be satisfied other than through immediate solutions;
- innovative solutions are necessary;
- the supply, due to its special nature, cannot be awarded without prior negotiations; or
- technical specifications cannot be exactly defined in advance by the contracting authority.

Only the operators 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 evidence showing that they are economically and financially qualified to tender and that they are technically and professionally capable, in compliance with the principles of transparency, competition and alternation.

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 considered not appropriate; or
- when the works, the supplies or the services can be supplied exclusively by a certain supplier, in the events specifically provided by the law (article 63, section 2, letter (b)).

In the event of public contracts for supplies, this 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 complementary 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 a supplier that is winding up or from a liquidator.

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, section 1.

Contracting authorities may avail themselves of the partnership for innovation (see question 46).

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 can be used exclusively in the cases provided for under the law.

Italian law provides for more than one procedure permitting negotiations with bidders, each one subject to particular conditions (see question 21). Of these, the most frequently used is the competitive procedure with negotiation, since the preconditions for its application are less rigid.

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

A framework agreement is a fixed-term agreement concluded between one or more contracting authorities and one or more suppliers to establish the clauses relating to the contracts to be awarded, in particular as far as prices and, where applicable, envisaged quantities are concerned.

Framework agreements may be used for works, services and supplies. For the purpose of their conclusion, the contracting authorities are required to follow one of the procedures stipulated by the new Code. Except in exceptional duly motivated cases, framework agreements cannot exceed four years for ordinary sectors and eight years for so-called 'special sectors'.

In any event, public contracts awarded on the basis of a framework agreement may permit 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 new Code, framework agreements may be concluded with one or more suppliers. Contracts based on framework agreements concluded with several suppliers may be awarded following different procedures; for example, if the framework agreement:

(i) contains all the terms governing the provision of works, services and supplies and lays down the order of priority for the choice of the supplier to which the contract is to be awarded, no new competitive procedure among the suppliers takes place;
(ii) does not contain all the terms and conditions governing the supply, the awarding administration is bound to reopen the competitive procedure among the suppliers that are parties to the agreement; or
(iii) contains all the terms and conditions governing the supply, in part without reopening the competitive procedure in compliance with (i) above and, in part, reopening the competitive procedure among those suppliers which are parties to the agreement in compliance with (ii) above, provided, however, that such possibility was established by the awarding administration in the tender documents for the framework agreement.

The competitive procedures, if provided, are based on the same conditions applied to the award of the framework agreement, if expressly laid down, or on other conditions, if indicated in advance. In particular, the contracting authority must consult the suppliers that are able to carry out the contract in writing, fixing a reasonable deadline for the submission of the bids, which must remain secret up to the submission deadline. The contracting authorities award the contract to the bidder that submitted the best bid on the basis of the awarding criterion set out in the specifications of the framework agreement.

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

Article 48, section 9 of the new Code prohibits any changes in the composition of bidders (joint ventures and ordinary consortia) from the composition that existed when the bid was submitted. A breach of such prohibition will result in the annulment of the award or the nullity of the contract, as well as the exclusion of the bidders. The applicable provisions of law provide only for a few exceptions (section 17, 18 and 19), which concern changes that take place during the performance of the contract, for example:

- in the event of insolvency of the agent, death, interdiction, disqualification or insolvency of the individual contractor-agent or in the cases provided by the provisions of law and regulations against organised crime, the contracting authority may continue the relationship with another supplier, which has appointed a new agent, provided that the supplier has adequate capacity for completing the supplies or services that are still to be executed;
- in the event of insolvency of one of the principals or in the event of death, interdiction, disqualification or insolvency of the individual contractor-principal, or in the cases provided by the provisions of law and regulations against organised crime, the agent, if it has designated no other successor supplier, is bound to execute the works, supply or the provision of services directly or through other principals, provided that the supplier meets adequate requirements for completing the works, supplies or services that are still to be executed; and
- in the event of withdrawal of a supplier from the consortium or joint venture due to organisational needs and provided, however, that the remaining companies are adequately qualified to execute the outstanding works or services or supplies. In any event, the latter subjective change is not accepted if the purpose is to avoid the lack of capacity for participation in the tender.

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, one of the principal mechanisms to further the participation of small and medium-sized enterprises is the division of a contract into lots. Should this be the case, the contracting authorities must indicate in the call for tender, or in the letter of invitation to submit 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 there is a limit to the number of lots that may be awarded to one single bidder.

For the purpose of furthering the use of this instrument, article 51 of the new Code obliges administrations to justify, in the call for tender or in the letter of invitation and in the single report, why the tender has not been divided into lots.

However, contracting authorities are prohibited from dividing into lots simply to avoid the application of the provisions of the Code, as well as to award through an artificial aggregation of contracts.

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

Bidders may submit variant bids only when this is expressly provided for by the contracting authorities in the tender specifications.

As provided by article 95, section 14 of the new Code, the contracting authority authorising or requesting variant bids must mention, in the tender specifications, the minimum requirements that variant bids must meet, as well as the specific submission procedures.

28 Must a contracting authority take variant bids into account?

Yes, as provided by article 95, section 14 of the new Code, contracting authorities must take into account variant bids, if these are expressly requested and if they meet the minimum requirements established by the tender documents.

The contracting authorities that authorised or requested the variant bids are not allowed to exclude a variant bid based solely on the fact that, if the variant bid is accepted, it would represent a contract for the provision of services rather than a contract for the supply of goods or vice versa.

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), bidders may not amend the specifications of a bid. The principle has been constantly applied by national administrative case law. If a bidder amends the specifications, its bid shall be excluded. There are, however, occasions when bidders are permitted to propose limited adjustments to the specifications (see question 27).

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

According to the provisions of article 95 of the new Code, the award may take place on the basis of two mandatory award criteria: the lowest price 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 contractor 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 gave the awarding administration the discretion to choose either criterion, the economically most advantageous bid criterion is now the default option, while the lowest price/cost criterion represents the residual alternative.

In particular, only the following works may be awarded on the basis of the lowest price criterion:

- works in an amount equal to or lower than €1 million;
- services and suppliers with standardised characteristics or whose conditions are defined by the market; and
- services and supplies in an amount lower than the Community threshold, characterised by high repetitiveness, except for services and supplies with significant technological or innovative content.

However, the new Code expressly mandates selection of the most advantageous bid for the award of contracts relating to:

- social services and hospitals, social assistance and school catering services;
- services requiring high intensity of manpower (ie, those in which the cost of manpower is equal to at least 50 per cent of the overall amount of the contract – article 50); and

- engineering and architectural consulting services, as well as other services of a technical and intellectual nature in an amount exceeding €40,000.

In any event, the contracting authority must expressly indicate in the call for tender the chosen criterion.

31 What constitutes an 'abnormally low' bid?

An abnormally low bid is a bid that cannot ensure to the bidder an adequate profit in relation to the scope of the contract. In order to identify the 'anomaly threshold', the new Code (article 97, sections 2 and 3) provides for two separate methods, depending on whether the contract is awarded according to the lowest price criterion or that of the economically most advantageous bid.

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, section 2) and chosen during the tender after the completion of a special draw. Its purpose is to prevent unlawful agreements from being reached between the bidders, thereby making it impossible for the calculation parameters of the anomaly threshold to be determined in advance.

In the case of procedures based on the economically most advantageous bid criterion, the anomaly threshold also applies to the exceeding of four-fifths of the maximum score provided by the call for tender, both for the price component and the other evaluation elements (article 97, section 3).

The new Code also continues to provide for a special discretionary power held by the contracting authority, which may also submit to the verification process those bids which, even though they remained beneath the anomaly threshold, nevertheless appear at first sight to be abnormally low, on the basis of 'specific elements' (article 97, section 6).

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

When a bid appears to be abnormally low at first sight (see question 31), the contracting authority starts an inter partes proceeding with the bidder, granting it a term of no less than 15 days for the submission in writing of explanations of the price or the costs proposed in the bid. The contracting authority excludes the bid only if the submission provided does not sufficiently justify the low amount of the proposed prices or costs, or if it 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 comply with environmental, social, labour, subcontractual and security obligations (article 97, section 5). In particular, no justifications are accepted on the cost of labour, which must comply with the minimum levels provided by the law and collective bargaining agreements, nor on the costs for security (article 97, section 6). An additional reason for exclusion is that the bidder obtained state aid, unless the bidder can prove the compatibility of such aid with the domestic market pursuant to article 107 of the Treaty on the Functioning of the European Union (article 97, section 7).

Review proceedings

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

The records relating to tender procedures, as well as related measures issued by ANAC, may be challenged exclusively by filing a complaint with the competent Regional Administrative Court (Code of Administrative Procedure, article 120, section 1). The Regional Administrative Court decides in the first instance proceedings and its decision may be challenged by filing an appeal before the Council of State. The appeal decisions of the Council of State may be challenged before the Supreme Court of Cassation only for reasons relating to the jurisdiction. Finally, additional means for challenge against the decisions of the administrative court are revocation and third-party opposition.

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 annulment of award procedures and declare the awarding of a contract invalid in the cases provided for under the law (Code of Administrative Procedure, articles 121 and 122). However, it is possible to apply to ANAC to obtain para-jurisdictional protection: in these cases ANAC has the power to express a binding pre-litigation opinion for parties that have agreed to it in advance (new Code, article 211, section 1), which may encourage the contracting authority to pre-emptively protect itself. If the contracting authority doesn't comply with ANAC's mandatory recommendation, it is punished by a financial penalty (new Code, article 211, section 2). For the purpose of reducing litigation, it is possible for the parties to ask for an arbitration proceeding (new Code, articles 209 and 210).

The decisions and the acts taken by ANAC, and the arbitration award, may be challenged before the competent Regional Administrative Court.

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 have been reduced by half (articles 119 and 120 of the Code of Administrative Procedure). Consequently, judicial proceedings, after deducting the time for the two instances before the Regional Administrative Court and the Council of State, last approximately one year.

36 What are the admissibility requirements?

Within the scope of an administrative procedure, the standing to apply for review in disputes regarding public tenders is related to a differentiated situation deserving protection. This position is identified by legal literature and case law as participation in the tender procedure under dispute. Consequently, anyone who has chosen not to participate 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.

In this respect it must be pointed out that the final exclusion or the assessment of the unlawfulness of participation in a tender would disqualify the bidder from having the standing to challenge the results of the selective procedure.

Having an interest in filing an appeal, resulting from the upholding of the application for review, must be distinguished from the standing to act. It must continue up to the time of the appeal decision and affects the exercise of the action at any time: it can be 'final' and consist, therefore, in the award of the procurement contract; or 'instrumental' and consist in the annulment of the entire tender procedure and its re-proposition.

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

For the purpose of the filing of an application for review for the annulment of the award procedure before the competent Regional Administrative Court, the Code of Administrative Procedure identified the following:

- the event relating to the failure to publish the call for tender, subject to the short term of 30 days after the publication of the notice of award; and
- the event, more serious, in which the failed publication is followed by the omission or non-compliance of the award notice: should this be the case, the company may file a complaint up to six months after the conclusion of the contract (article 120, section 2).

The new Code has introduced a special procedure for lodging a complaint against the measure determining exclusion from the tender or the admission of bidders without the necessary requirements for participation (article 120, section 2-bis). In this case the measure must be challenged within 30 days, running from the date of publication on the website of the client of the contracting authority. Failure to challenge precludes the right to challenge any consequential unlawfulness of the subsequent acts of the award procedure, including by a cross-appeal. In addition, the challenge of the award proposal and of the other preparatory acts of the proceeding lacking immediate injury is inadmissible, if proposed.

Apart from this instance, challenges to any new acts made under the same procedure must be made by filing an appeal for review due to added reasons (article 120, section 7). In addition to the principal complaint, the cross-appeal and the added reasons, including against acts other than those already challenged, must also be filed within a term of 30 days, running, for the principal complaint and that for added reasons, from the receipt of the notice of award or for the calls for tender and the

notices by which an autonomously damaging tender is organised, from the publication on the website of the client of the contracting authority or, in any other event, from the moment the plaintiff becomes aware of the Act (article 120, section 5).

The appeal to the Council of State against first instance decisions must be lodged also within 30 days after the service of the decision or within three months after the publication of the decision.

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 general, a simple application for review of the tender document has no suspensive effects and does not block the continuation of the procurement procedure or the conclusion of the contract. However, if an application for review is filed against the award with simultaneous precautionary application, the contract cannot be entered into from the time of the service of the precautionary application to the contracting authority and for the subsequent 20 days, provided that within such term at least the first instance precautionary measure is issued or the publication of the operative part of the sentence of the first instance proceeding has taken place, in case of a decision on the merits at the precautionary hearing or until the issue of said measures, whichever is earlier. The suspensive effect of the conclusion of the contract ceases when, during the review of the precautionary application, the judge declares his or her lack of jurisdiction or sets down, through an order, the date for discussion of the merits without granting precautionary measures or sends the review of the precautionary application to the proceeding on the merits, with the consent of the parties ('automatic suspensive effect', article 32, section 11, new Code). The conclusion of the contract is, however, prohibited until 35 days have elapsed from the last communication of the award measure (the 'standstill' clause, article 32, section 9, new Code).

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

In 2016 approximately 1,500 applications for suspension in the matter of contracts were filed. Of these, approximately 450 applications were upheld (approximately 30 per cent). The percentage taken into consideration refers only to the first instance proceedings.

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

Article 76 of the new 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 was 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 expiry of the deferral period for the conclusion of the contract must be notified.

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

In the field of public contracts, the rules for accessing administrative documents are precise and are laid down in article 53 of the new Code. The reasons for allowing access are balanced with the need to ensure the regular performance of the procedure. Therefore, the disclosure of information is governed by precise time limits.

Moreover, for the purpose of preventing bidders from having the opportunity of exploiting commercial information to obtain an unfair competitive advantage on the market, it is prohibited to access documentation containing data relating to the technology and to commercial secrets of suppliers.

Such a prohibition is not applicable when a bidder intends to challenge the outcome of the procedure before the court. In these cases, also in the implementation of the appeal directive (No. 2007/66/EU), the new Code provides that access to the relevant documents is always permitted to ensure the right to defence.

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

Yes, it is customary for losing bidders to file review applications. In 2016 approximately 60,000 review applications were filed before the first instance administrative court, 7,000 of which were decided by a sentence. Review applications relating to contracts represent approximately 9 per cent of the total.

Update and trends

The new Code, following Directive 2014/24/EU, assigns particular importance to innovative projects, which the administration intends to establish, and which have no equivalent in the solutions already existing in the market; therefore, they must be expressly brought into being, further to specific research and development activities.

A specific structure was, therefore, created for such purpose: the partnership for innovation.

Article 65 of the new Code provides for this instrument to be based on a procedure divided into three phases:

- concept and design;
- implementation of the product or service; and
- marketing.

The division into phases allows for administrative supervision, which allows for negotiation of the initial bids and all the subsequent bids submitted by the interested suppliers, except the final bids, to improve their contents. The criterion employed to decide the winning bid will be the best ratio between quality and price.

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

Italian law permits an unsuccessful bidder to claim damages for a failed award in the form of specific performance, through an application for award of the contract. For the application to be upheld, the bidder must prove that had the wrongful measure not been adopted, it would have been successful in the tender. A declaration of invalidity of the contract by the judge is also necessary if certain conditions stipulated by the Code of Administrative Procedure are met (articles 121 and 122; see question 44). If the judge does not declare the invalidity of the contract, he or she must rule for damages equivalent to the loss actually suffered by the bidder (Code of Administrative Procedure, article 124, section 1). In this case the bidder must prove the existence of all the general preconditions for damages to be awarded (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, but it considers that a private entity may prove the fault of the public administration simply by providing evidence of the wrongfulness of the injuring measure.

According to case law the following are recoverable items of damage:

- the actual profit that the supplier would have earned in case of award, based on the bid submitted for tender;
- the 'curricular' damage (ie, loss of the opportunity to increase its goodwill based on its activity in the market), to be settled in the manner that the court will consider equitable; and
- legal interest accrued from the date of conclusion of the contract up to the date of actual compensation of the damage.

The compensation of the costs borne for participating in the tender is, however, excluded. Finally, following case law, the damages may be decreased by the judge if the plaintiff has profitably carried out a similar activity in the period of performance of the contract or did not enforce in a timely fashion all the instruments provided under the Italian system for its protection, thereby contributing to the damage, on the basis of the general principle of fault of the creditor (Code of Administrative Procedure, article 30, section 4 and article 124, section 2; 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 cancellation of the executed contract, if applicable.

The court's decision to cancel a contract must take into account the interests of the parties, the actual possibility for the plaintiff to obtain the award in the light of the defects found, the state of progress in the performance of the contract and the possibility of success in the event that the error in awarding the contract does not result in renewal of the tender and the request to succeed in the contract has been made (article 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 cancel the contract if:

- 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 a call for tender or with the works being awarded on a time and material basis (*affidamento in economia*) 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; or
- if the contract has been concluded without meeting the deferral term provided for by article 32, section 9 of the new Code, if such violation:
  - has deprived the plaintiff of the possibility to avail him or herself of the means for filing an application for review prior to the conclusion of the contract; or
  - by exacerbating the defectiveness of the award, has affected the opportunity for the plaintiff to obtain the award.

In cases in which, notwithstanding the violations, the contract is considered effective or the invalidity is temporarily limited, the judge will apply the alternative penalties provided by the subsequent article 123 (article 121, section 4, Code of Administrative Procedure).

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

The new Code permits only in exceptional cases, expressly provided by law, the award of a contract directly without the prior publication of a call for tender. This is the case of the negotiated procedure without the prior publication of a call for tender governed by article 63 of the new Code and of the negotiated procedure without a procurement procedure for contracts in the special sectors (article 125 of the new Code). In other cases it is prohibited to proceed to any direct award. If a company becomes aware of any direct award in violation of the law, it may file a complaint with the administrative court and demand the cancellation of the contract (see question 37).

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

Pursuant to article 9, section 1 of the Consolidated Text of laws in the matter of judicial expenses (Presidential Decree No. 115/2002), in the administrative procedure the *Contributo Unificato* (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 decisions concerning tender procedures, the fee is €2,000 when the value of the dispute is equal to or lower than €200,000; for disputes relating to an amount between €200,000 and €1 million the fee is €6,000. The wording 'value of the disputes' means the amount that is placed as an auction base identified by the contracting authorities in the records of the tender (article 14, section 3-ter, TU). Such value must appear in an appropriate statement submitted by the plaintiff in the conclusions of the application for review (article 14, section 3-bis, TU). Failure to provide the statement will result in the obligatory payment of the maximum amount of the Consolidated Contribution. Furthermore, the amounts are increased by 50 per cent if the attorney for the defence does not indicate his or her certified email address and fax number, or if the party omits to include its fiscal code in the application for review (article 13, section 6-bis.1, TU). For appeals filed with the Council of State, the consolidated contribution is increased by 50 per cent, while it is doubled for proceedings before the Supreme Court of Cassation (article 13, section 1-bis, TU). Failure to pay the consolidated contribution does not determine the inadmissibility of the complaint, but it does oblige the judicial authority to proceed with the collection of the contribution, with the possible application of the monetary penalties related to the default.

SATTA ROMANO & ASSOCIATI
STUDIO LEGALE

Filippo Satta, Anna Romano **segreteria@sattaromano.it**

Foro Traiano 1/A
00187 Rome
Italy

Tel: +39 06 6990561
Fax: +39 06 69191011
www.sattaromano.it

Kenya

Jairus Mohammed Nyaoga and Anthony Guto Mogere
Mohammed Muigai Advocates

Legislative framework

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

The relevant legislation is the Public Procurement and Asset Disposal Act (No. 33 of 2015) (the PPAD Act), the Public Procurement and Disposal Regulations of 2006, the Public Procurement and Disposal for Public Private Partnerships Regulations of 2009 (the Regulations), and the Public Private Partnerships Act (No. 15 of 2013). The Public Procurement and Asset Disposal Act (No. 33 of 2015) repealed and replaced the Public Procurement and Disposal Act No. 3 of 2005, which shall be referred to as the Old Act where applicable.

Also relevant are the provisions of article 227 of the Constitution of Kenya 2010, which requires public entities to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and that also permits the use of procurement as a policy tool. The PPAD Act and the regulations made under it are enforced by the following principal institutions:

- The National Treasury on Public Procurement and Asset Disposal, created by section 7 of the PPAD Act, shall be responsible for public procurement and asset disposal policy formulation.
- The Public Procurement Regulatory Authority (PPRA), created by section 8 of the PPAD Act, is charged with the responsibility of enforcing the standards developed under the PPAD Act as well as ensuring that procurement procedures provided for under the PPAD Act are complied with, and monitoring the public procurement system and its overall functioning.
- The Public Procurement Administrative Review Board, created by section 27 of the PPAD Act, which has powers to review, give directions or substitute the decision of any procuring entity with that of its own upon a request for administrative review by any affected person.
- The High Court, provided for under section 42 of the PPAD Act for persons aggrieved by the decisions of the Review Board to seek judicial review in the High Court.

The Public Private Partnerships Act is enforced by the Petition Committee established under section 67 of the Act.

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

Yes. The Public Private Partnerships Act No. 15 of 2013. The Act provides for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the government through concession or other contractual arrangements; the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected purposes.

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

The legislation does not supplement either the EU procurement directives or the GPA, since Kenya is a non-EU country and has not adopted the GPA.

4 Are there proposals to change the legislation?

Yes. Regulations implementing the PPAD Act are yet to be formulated. The Public Procurement and Disposal Regulations of 2006 under the Old Act are still in use.

Applicability of procurement law

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

All public entities are defined in section 3(1) of the PPAD Act. There are no organisations that are exempt under the Act. In the High Court Case of *Electoral Commission of Kenya v Attorney General & 2 Others* [2007] eKLR, however, the court declared that the Act did not apply to the then Electoral Commission of Kenya. The Electoral Commission, the court held, was not subject to the jurisdiction of the Public Procurement Administrative Review Board; it was only answerable to the auditor general, parliament and the courts for breach of procurement rules. The court decision is of doubtful validity, especially because the Act expressly provides that it applies to constitutional commissions. Under section 133 of the Act, the defence and national security organs are expected to comply with the Act, save for the procurement of certain restricted items that they must declare in advance to the Public Procurement Oversight Authority (PPOA).

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

Section 102 of the PPAD Act provides for restricted tendering, and the maximum allowable value for such tendering is provided under the Regulations. Section 107 provides for low-value procurement, the maximum value of which is also contained in the Schedule to the Regulations. The First Schedule to the Public Procurement and Disposal Regulations of 2006 (formulated under the Old Act) provides for thresholds for the different forms of procurement procedure such as direct procurement, request for quotations, request for proposals and low-value procurement. The schedule does not provide for any exclusion of any value below minimum thresholds, only that low-value procurement shall not exceed 30,000 Kenyan shillings. Further detailed rules for the calculation of the value of contracts have not been formulated. The PPOA regularly publishes an average price list of items most commonly used by public entities. The main purpose of the publication is to help guide accounting officers and heads of procuring entities regarding the prevailing market prices for listed items to enable them to make informed procurement decisions.

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

Regulation 31 allows variations but only if the price variation is based on a consumer price index or monthly inflation rate issued by the central bank, the quantity variation for goods and services does not exceed 10 per cent of the original contract quantity, or 15 per cent of the original price for works and the price or quantity variation is executed within the period of the contract.

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

No.

9 In which circumstances do privatisations require a procurement procedure?

Privatisations in Kenya are governed by the Privatisation Act No. 2 of 2005, which requires that such privatisations be conducted in an open and competitive way with a view to ensuring that compensation received represents the fair value of what is privatised. The methods permitted for privatisations, such as public offering of shares, concessions, leases, management contracts and other forms of public-private partnerships, are all governed by and require a procurement procedure under the PPAD Act.

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

All PPPs require a procurement procedure. Regulation 3(2) of the Public Procurement and Disposal for Public Private Partnership Regulations 2009 states that except where otherwise expressly provided by a written law, all PPP projects shall be procured through a competitive bidding process. There is no other written law, at the time of writing, exempting any category of PPPs from the procurement procedure set out at Regulation 3(2).

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

In instances where the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for the county, national and international advertising, then a procuring entity can advertise in the dedicated government tenders' portals, on its own website or via a notice in at least two daily newspapers of nationwide circulation. In addition, procuring entities are allowed to use Kenya's dedicated tenders' portal as well as posting the advertisements in a conspicuous place in their premises.

In regard to county-specific procurements a procuring entity will advertise the notice inviting expressions of interest in the dedicated government tenders' portal, in its own website, or in at least one daily newspaper of county-wide circulation.

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 section 80 of the PPAD Act categorically limits the discretion of the contracting entity by providing that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and in the tender for professional services.

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

Section 73 of the PPAD Act provides for restricted tendering and the maximum allowable value for such tendering is provided under the regulations. Section 90 provides for low value procurement the maximum value of which is also contained in the schedule to the regulations.

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 debarred from a tender procedure can only regain the status of a suitable and reliable bidder by challenging the debarment by way of judicial review at the High Court of Kenya.

The procurement procedures

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

Section 3 of the PPAD Act provides for the values and principles upon which public procurement and asset disposal by state organs and public entities shall be guided.

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

Yes.

17 How are conflicts of interest dealt with?

The PPAD Act excludes from participation all those persons who are regarded in law as having a conflict of interest. This is dealt with at great length at section 66. It includes agents, employees, committee and board members and relatives. It also creates a criminal offence for any person who is found guilty of contravening the rules of conflict of interest.

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

Procuring entities do not, generally, permit a bidder who has participated in the preparation of tender documents to participate in the ensuing procurement. In *Alliance Technologies Solutions Ltd v the Public Procurement Oversight Authority* (Public Procurement Administrative Review Board Application No. 24 of 2010), it was alleged that the bid documents had been prepared by the Kenyan branch of a multinational consulting firm. The successful bidder, it was alleged, had some engagements with the Indian branch of the same multinational consulting firm. Though part of the same global chain, the various country branches of the multinational consulting firm were, in fact, separate legal entities owned and controlled by different persons. The Public Procurement Administrative Review Board ruled that there was no conflict of interest. The case was argued by the authors.

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

Open tendering is the prevailing type of procurement procedure.

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

No. Such a situation is not contemplated by the Kenyan Procurement Law. In practice, most procuring entities warn bidders that the submission of separate bids by related bidders will be deemed an act of collusion and lead to the rejection of both bids.

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

Under the PPAD Act, competitive negotiations are undertaken where there is a tie in the lowest evaluated price by two or more tenderers; there is a tie in the highest combined score points; the lowest evaluated price is in excess of available budget; or there is an urgent need that can be met by several known suppliers. Under the Public Private Partnership Act of 2013 its use is limited to cases of PPPs whereby a contracting party (state department, agency, state corporation or county government) seeks to have services it usually renders to be performed by a private party. The consent of the Public Private Partnership Committee is required before a contracting party undertakes any competitive dialogue. Moreover the dialogue should be held with every bidder on the basis of transparency and equality. It should be noted that the discussions held in the competitive dialogue are confidential and, thus, should not be disclosed by any of the parties involved.

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 PPAD Act allows competitive negotiations only as outlined in question 21.

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

Framework agreements have been recently introduced under the PPAD Act. The PPAD Act provides that a procuring entity may enter into a framework agreement open tender if the procurement value is within the thresholds prescribed under the Regulations, the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement, and a minimum of seven alternative vendors are included for each category.

24 May a framework agreement with several suppliers be concluded?

Yes. The procuring entity may procure through call-offs, order when necessary or invite competition among persons that have entered into the framework agreement in the respective category.

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

Section 76 of the PPAD Act provides for modification of bids. A person who submitted a tender may change or withdraw the bid in writing and the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitted tenders.

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?

Section 157(2) of the PPAD Act provides that the minister for finance shall, in consideration of economic and social development factors, prescribe preferences or reservations in public procurement and disposal that shall apply to, among others, candidates from disadvantaged groups, and micro, small and medium enterprises. Consequentially the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 were enacted – vide legal notice 58 of 2011 – to apply to procuring entities when soliciting tenders from small and micro enterprises, disadvantaged groups and other groups it sets out therein.

The High Court considered the applicability of section 39 of the Old Act, which mirrors section 157(2) PPAD and, in particular, the requirement margins of preference in Miscellaneous Civil Application No. 540 of 2008 (*Republic v The Public Procurement Administrative Review Board and The Kenya Revenue Ltd ex parte De La Rue Company and Security Print Ltd*). The court found that the failure of the Kenya Revenue Authority to properly address the relevant law on margins of preference clearly violated the twin objectives of fair treatment of bidders and the promotion of local industry and economic development as provided for in section 2 of the Act. The award was thereby quashed. Following the High Court decision, the Public Procurement Administrative Review Board in Review No. 42 of 2008 (*Ongata Works Ltd v Kenyatta University*) held that the requirement for margins of preference as provided for under section 39 of the Act is mandatory. The board held that:

> *As regards breach of section 39 of the Act and Regulation 28, the Board notes that notwithstanding the fact that the Procuring Entity in its Tender Documents clause 5.12, provided for preference for Kenyan citizens, it made no attempt to factor this provision in its evaluation. The Board also notes the recent High Court decision in which the issue has been examined in the case of Miscellaneous Civil Application No. 540 of 2008 (*Republic v The Public Procurement Administrative Review Board and The Kenya Revenue Ltd ex parte De La Rue Company and Security Print Ltd*), Justice Nyamu held that: 'the margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word 'may', in the regulation 28(2)(a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement'. As is the case in the present application, the preference is also incorporated in the tender documents in mandatory terms. Moreover, section 39(5) is quite categorical in terms of what procuring entities must do when processing procurement in respect of preferences.*

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

No specific reference is made in the legislation and the regulations for alternative bids and submission of such alternative bids would lead to the disqualification of a bidder. The standard tender documents published by the PPOA require, for the most part, that a bidder submit only one bid.

28 Must a contracting authority take variant bids into account?

There is no provision for alternative bids and it is as yet unclear what approach should be taken were a bidder to submit alternative bids. The Administrative Review Board has ruled, however, that where such alternative is given, the bidder is held to be non-responsive and would not be evaluated further (a case in point is the 2004 *Lavington Security Guards Ltd v Kenya Pipeline Company* case).

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

Bidders who do not strictly conform to tender specifications, either by changing them or by using their own standard terms and specifications, will be disqualified and deemed unresponsive under section 79 of the PPAD Act, save for minor deviations that do not go to the substance of the tender.

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

The award criteria must respect the key principles of procurement:

- to maximise economy and efficiency;
- to promote competition and ensure that competitors are treated fairly;
- to promote the integrity and fairness of those procedures;
- to increase transparency and accountability in these procedures; and
- to increase public confidence in those procedures and facilitate the promotion of local industry and economic development.

The award criteria shall be set out in each tender document but must, to the extent possible, be objective and quantifiable and expressed so that the criteria are applied in accordance with the procedures, taking into consideration price, quality and service for the purpose of the evaluation.

31 What constitutes an 'abnormally low' bid?

The legislation does not define an 'abnormally low' bid and no judicial or administrative decision has yet pronounced on the concept.

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

Not applicable in light of question 31.

Review proceedings

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

The Public Procurement Administrative Review Board has the main function of hearing and making determinations on review applications, pursuant to sections 167 to 174 of the PPAD Act.

Section 175 of the PPAD Act allows any party aggrieved by the decision of the Public Procurement Administrative Review Board to institute judicial review proceedings in the High Court against the decision. This application for judicial review will only be accepted once the aggrieved party pays a certain percentage of the contract value as security.

Further, if a party is not satisfied by the decision of the High Court of Kenya, the party can appeal to the Court of Appeal of Kenya.

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

Review applications are only considered by the Public Procurement Administrative Review Board.

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

Review proceedings before the Public Procurement Administrative Review Board must be concluded within 21 days after such request has been filed with the board pursuant to section 171(1) of the PPAD Act. With respect to judicial review proceedings against the decision of the board, section 175(1) provides that such appeal must be filed within 14 days of the decision of the board to the High Court, which shall then make its determination within 40 days. If dissatisfied with the High Court's decision, an aggrieved party can appeal to the Court of Appeal within seven days of the decision of the High Court. The Court of Appeal has to determine the matter within 40 days and such a decision shall be final.

36 What are the admissibility requirements?

Both the PPAD Act and the Regulations provide that a candidate who claims to have suffered, or is at risk of suffering, loss or damage owing to breach of a duty imposed on the procuring entity under the Act or the regulations made thereunder may seek administrative review of such act or omission.

For a review application to be accepted (ie, an applicant to have locus standi) an applicant must show that it is a candidate (ie, a tenderer) within the meaning of the Act and the Regulations to be able to properly invoke the jurisdiction of the board. Further, the jurisprudence of the board under the 2001 Regulations is clear that the board will only entertain applications where 'there is a breach of duty imposed on the Procuring Entity imposed by the Regulations'. Reference may be made to the board's decision in Application No. 15 of 2005, *Mohammed & Muigai Advocates v Nairobi Water Services*, where the board held that its mandate arises only where it is entitled to deal with complaints submitted by candidates pursuant and in accordance with the Regulations. The board stated on page 8:

> *Accordingly for a bidder to have standing before the Board and for the Board to be entitled to conduct a review of a complaint, there must be an alleged breach of duty imposed on the procuring entity by the regulations. Where no duty is imposed by the Regulations, there can neither be a proper complaint nor an entitlement to review.*

Reference may also be made to the holding in Uni-Impex (Import and Export) Ltd and the Ministry of Health (KEMSA) Application No. 5/2004, where the board stated as follows:

> *In our view, to fall within the definition of a candidate who can claim under the Regulations, a person must be invited [...] the second fundamental ingredient is in the content of the invitation. On its face, and by its general terms, an advertisement calls upon an invitee, or interested person, to react in certain ways to it. These usually include the necessary step of obtaining or purchasing the tender or bid documents or such like. It is not enough for the advertisement to be to the whole world, but that to become a candidate, he who reads it must react to it in one of the ways required by it. The third and final necessary ingredient of an invitation is in the return of the advertisers, in the required format and at specific time or place, of the tender or bid documents or such like. It is the affecting of this third step of returning tender documents that makes the invitee a candidate or in effect, an examinee. In procurement language, the invitee enters into the competition as one of the persons whose documents will be examined and evaluated for purposes of the award. [...] These are the necessary ingredients pursuant to which any person becomes transformed into a candidate under the Regulations. A person who does not satisfy all the foregoing criteria can be nothing more than a busybody without sufficient interest in the tender process in issue.*

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

An application for review must be made within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

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. Section 168 of the PPAD Act provides that where a request for review is made, the secretary to the board shall notify the procuring entity of the pending review and the suspension of the procurement proceedings in such manner as may be prescribed. A textual reading of section 175(5) of the Act suggests that there is an automatic suspension of the procurement proceedings once an appeal or judicial review application is lodged in the High Court. The issue is pending determination in the High Court (in Miscellaneous Civil Application No. 260 of 2010: *Republic v Public Procurement Administrative Review Board & Another ex parte Lucy Electric (UK) Ltd*. The authors are representing the applicant in the case). Although section 175(5) of the Act seems to provide for automatic suspension once the matter goes to the High Court, the High Court normally deals with the issue of suspension as a matter of discretion, granting suspension in some cases and declining it in other cases.

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

See above.

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

Yes. Section 87 of the PPAD Act requires that as the successful bidder is notified, the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful.

Mohammed Muigai Advocates

Jairus Mohammed Nyaoga **mnyaoga@mohammedmuigai.com**
Anthony Guto Mogere **guto@mohammedmuigai.com**

MM Chambers, 4th Floor, K-Rep Centre
Wood Avenue, off Lenana Road
Kilimani
00200 Nairobi
Kenya

Tel: +254 20 239 7401
Fax: +254 20 239 7404
www.mohammedmuigai.com

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

No. The PPAD Act prohibits the disclosure of the procurement file save for a summary of the evaluation and comparison of the tender proposals, quotations and criteria used for the purposes of filing a review.

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

Yes.

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

No. Damages are not one of the remedies the review board has jurisdiction to award. The Review Board has considered damages as losses arising from anticipated profit that a disadvantaged bidder could have been entitled to if it was awarded the tender. The board has also held in many appeals that tendering is a commercial risk and that in competitive bidding there is no guarantee that a particular tender will be accepted. (see, for example, *Munshiram International Business Machine v the Ministry of Lands*, Public Procurement Review Board Application No. 20 of 2009).

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 automatic suspension of the procurement process on filing a review avoids a situation where a contract can be concluded in violation of procurement law.

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

The legislation does not provide legal protection or remedy where an award of contract is made without any procurement procedure. A person obtains locus standi to challenge an award of contract if such a person participated in the procurement by submitting a tender.

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

The fee applicable for making an application for review is predicated on the contractual sum. The formula for calculating the applicable fee is provided under Part II of the Fourth Schedule to the Public Procurement and Disposal Regulations of 2006.

Korea

Jongseok Lee, Whee-Un You and Jaeyoung Chang

Lee & Ko

Legislative framework

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.

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.

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 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 open to international bidding.

As of March 2017, the minimum value of government procurement contracts and local government procurement contracts open to international bidding has been prescribed as 210 million won and 320 million won, respectively.

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 April 2017.

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 April 2017.

Applicability of procurement law

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 a public and private entity.

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 principal, 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.

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, the MOSF, the authority responsible for the enforcement of Public Procurement Laws, has previously issued (via the Public Contract and Procurement Policy Division of the MOSF on 22 June 2012) an official interpretation stating that in the event 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.

9 In which circumstances do privatisations require a procurement procedure?

Under the Act on the Management of Public Institutions, the Minister of the 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 principal, 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.

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 principal, 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

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 principal, to be disclosed through an electronic procurement system. However, if deemed necessary, such information may also be published in a daily newspaper.

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 principal, 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 there are less than five potential bidders for a bidding process, all of the potential bidders must be selected for the bidding.

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 principal, 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

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.

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 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.

17 How are conflicts of interest dealt with?

There are no laws or regulations in Korea as of yet 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 department responsible for conducting internal audits.

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, have failed to properly pay subcontractors or have been punished for engaging in inappropriate business practices from participating in a tender procedure, no such prohibitions apply, in principal, to bidders that have been involved in the preparation of a tender 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 a no-bid procedure. Among the foregoing procedures, open tender is the most widely utilised.

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.

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 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 the 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, and it has been described in detail in question 21.

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 the MOSF) after evaluating each bidder's financial condition and past performance record in order to select the eventual winning bidders.

In the event 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.

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 a consortium member fails to perform, or is delinquent in performing, the contract absent a justifiable reason.

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.

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 are 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.

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.

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.

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 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

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 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.

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, 7 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 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.

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 principal, 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 principal, 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.

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 online 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.

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 necessary information. In addition, bidders may monitor the progress of bidding in real time through an electronic procurement system.

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.

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

In the event 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.

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.

Jongseok Lee **jongseok.lee@leeko.com**
Whee-Un You **wheeun.you@leeko.com**
Jaeyoung Chang **jaeyoung.chang@leeko.com**

Hanjin Building, 63 Namdaemun-ro
Jung-gu
Seoul 04532
Korea

Tel: +82 2 772 4000
Fax: +82 2 772 4001
www.leeko.com

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.

Macedonia

Jasmina Ilieva Jovanovik and Dragan Dameski

Debarliev, Dameski & Kelesoska Attorneys at Law

Legislative framework

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

Public procurement in Macedonia is regulated by the Public Procurement Law (PPL) passed on 12 November 2007 (Official Gazette of RM No. 136/2007), as amended and supplemented in 2008, 2009, 2010, 2011, 2013, 2014, 2015 and 2016. The PPL as lex specialis 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 it shall apply the Law on General Administrative Procedure as a subsidiary law.

The supervision and the enforcement of the public procurement system in Macedonia is 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.

A special oversight body is the Procurement Council. In some specific cases determined in the PPL it is mandatory for contracting parties to require consent from the Council before issuing the announcement for opening the public procurement procedure and to submit an adequate justification for the legal grounds and the need for the procurement.

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

The general rules of the PPL shall not apply to procurement contracts that are classified as 'state secrets' and contracts whose enforcement requires special security measures. Also, the state defence authorities shall not apply the PPL in any case when it might cause disclosure of any classified information or endanger the primary security interests of the state, especially related to manufacturing and trade of arms, munitions and military assets.

In addition to the exemptions in the field of state defence, the PPL also shall not apply to public service contracts that:

- include acquisition or rental of land, buildings or other immoveable property or the rights thereon;
- refer to the purchase, development, production or co-production of programme material by radio or TV broadcasters and for broadcasting time of TV and radio programmes;
- refer to arbitration and conciliation services;
- refer to financial services related to the issue, trading or transfer of securities or other financial instruments, brokerage services and services rendered by the National Bank of Macedonia;
- are notary services;
- are lawyers' services;
- refer to employment contracts;
- refer to R&D services;
- are public contracts for which funds have been provided by international organisations (donors and lenders) or from third countries;
- are public contracts granted for the activities of the army of the Republic of Macedonia; and
    - public procurement contracts of goods or works which are awarded on the basis of an international agreement concluded between the Republic of Macedonia and one or more countries and which are intended for joint implementation or use of a construction by the signatory states or services intended for joint implementation or use of projects by the signatory; and
    - states, provided that the international agreement anticipates an appropriate procedure for awarding the public procurement contracts.

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 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 as one of the most powerful instruments for the improvement and development of the Macedonian market.

The European Commission has evaluated the Macedonian PPL as highly consistent with the EU Public Procurement Directives including, but not limited to, Directives 2001/78/EC, 2004/18/EC, 2004/17/EC and 2007/66/EC.

Between 2014 and 2018 Macedonia will also implement Directives 2009/33/EC and 2009/81/EC.

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 to green procurement, and their implementation in the national procurement system.

Applicability of procurement law

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; so any other entity not recognised with the definition given by the PPL shall not constitute a contracting authority.

On the other hand, the government of Macedonia has made a decision to set our an indicative list of entities that constitute contracting authorities; any entity that is not included in this list does not come under the PPL.

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 the total amount of which exceeds the equivalent of €500 in denars on a monthly basis, excluding value added tax.

As an exemption from this general threshold, the PPL shall not apply for utilities contracts (water supply, energy, transport, postal services and other covered activities) when the estimated value of the

contract is below €200,000 for public supply of works and services and €4 million for the public supply of works.

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

In cases where the existing contract is amended in a manner that will involve any supplement of the subject of the procurement, the contracting authority is obliged to conduct a new procurement procedure.

The PPL permits amendments to the contract terms, the frequency of payments and dynamics of executing the contract, by signing an annex to the contract without a new procurement procedure only in cases of decreases to the Republic of Macedonia's state budget. In these cases, the signing of an annex to the contract shall be approved by the government of the Republic of Macedonia, based on the prior opinion of the Ministry of Finance.

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 would provide a clarification of the application of the legislation in relation to amendments to concluded contracts.

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 special Law on Privatisation on State Shares in Companies and they 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.

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

PPPs are governed by a separate Law on Concessions and Other Types of PPP. The PPP contract refers to services on projecting (designing), financing, contraction 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 shall apply 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

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 an open procedure, restricted procedure, competitive dialogue, negotiated procedure without prior publication of a contract notice or contest for idea solution, on the Electronic System for Public Procurement (ESPP) and in the Official Gazette of Republic of 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.

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.

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 a negative reference owing to irregularities in public procurement procedures is excluded from all further contract award procedures for a period of one year from the day of publication of the negative reference. The period of exclusion shall be extended for one additional year for every subsequent negative reference, but will not exceed five years. After expiry of the period of exclusion the bidder shall regain the status of suitable bidder.

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

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; and
- rational and efficient utilisation of funds in public procurement.

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 the equal treatment and non-discrimination of 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, a particular process, or trademarks, patents, types or a specific origin which 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.

17 How are conflicts of interest dealt with?

The PPL contains several provisions related to preventing conflicts of interest, provided 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;
- persons who have taken part or assist in the evaluation of the bids, as well as the head person at the contracting authority, cannot act as candidates, bidders, subcontractors or members in a group of bidders in the respective contract award procedure. In this case, the request to participate in the bid shall be rejected from the contract award procedure; and
- when executing the public contract, the contractor shall not appoint persons involved in the evaluation of bids submitted in the respective contract award procedure during the period of the validity of the contract. If this occurs, the public contract shall be null and void.

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.

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.

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 is the procedure with request for collecting bids. According to the last annual report on the procurement system in Macedonia, published by the Public Procurement Bureau, most of the procurement procedures were conducted as procedures with requests for collecting bids.

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; no specific requirements are provided within the PPL.

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

The PPL recognises two types of negotiated procedures.

Negotiated procedure with prior publication of a contract notice

The contracting authority shall apply the negotiated procedure with prior publication of a contract notice in the following cases:

- in exceptional cases, when the nature of the works, products or services, or the risks attached thereto, do not allow a prior overall pricing of the contract;
- for public service contracts, where the service to be purchased is of such a nature that the technical specifications cannot be elaborated with sufficient precision to permit the awarding of the contract by applying rules governing open or restricted procedures; and
- for public works contracts, when the works that will be executed are needed exclusively for the purpose of research, testing or technological development, and only if these are not carried out in order to obtain profit and do not aim at recovering the research and development costs.

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 no bid in an open procedure or no request to participate in the first phase of a restricted procedure has been submitted;
- when due to technical or artistic reasons, or for reasons connected with protection of exclusive rights (patents, etc), the contract may be executed only by a particular economic operator;
- for reasons of extreme urgency;
- when the products involved are manufactured purely for the purpose of research, experimentation, study or development. This does not apply to goods from mass production that would make a profit or recoup costs for research and development;
- in the case of supply contracts, for additional deliveries from the original supplier which are intended either as a partial replacement or extension of existing supplies;
- for the purchase of supplies under particularly favourable terms, for example from a supplier that is winding up its business activities (liquidation or bankruptcy);
- for public service contracts, when the contract concerned follows a design contest and shall be awarded to the winning candidate or to one of the winning candidates; and
- for additional works or services not included in the original contract, but that have, through unforeseen circumstances, become necessary, provided that the award is made to the economic operator performing such works or services when:
  - such additional works or services cannot be technically or economically separated from the original contract without causing major problems to the contracting body; or
  - such additional works or services, although they can be separated from the execution of the original contract, are crucial for its completion.

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 2015 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.

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

The framework agreement shall be concluded by the contracting authority by carrying out an open or restricted procedure. The contracting authority may conclude a framework agreement with duration appropriate to the nature of the subject matter of the contract, but it shall not exceed a period of two years, except with the purchase of tests that include control, calibration and supplies for laboratory medical work, in which case the framework agreement may be concluded for a period of up to three years.

Public contracts awarded on the basis of a framework agreement shall be concluded between the contracting authority and the economic operator that is party to the respective framework agreement.

The contracting authority shall stipulate the minimum selection criteria for the candidates or the bidders according to the estimated value of the largest public contract to be awarded on the basis of the respective framework agreement.

24 May a framework agreement with several suppliers be concluded?

The contracting authority may conclude framework agreements with several economic operators, but no fewer than seven. The contracting authority may conclude a framework agreement with fewer than seven economic operators, but only with prior consent of the Council.

The contracting authority shall award public contracts on the basis of a framework agreement concluded with more than one economic operator:

- without reopening the competition; or
- by reopening the competition between all economic operators party to the framework agreement.

When the contracting authority awards public contracts by reopening a competition between all economic operators, the tender shall be reopened according to the following procedure:

- for every contract to be awarded, the contracting authorities shall submit a written request to all economic operators party to the framework agreement;
- the contracting authority shall set a sufficient time limit to enable the submission of bids for each contract to be awarded;
- the bids shall be submitted in writing and the contracting authority shall open them within the set time limit; and
- the contracting authority shall award each contract to the economic operator who has submitted the winning bid on the basis of the award criteria set out in the framework agreement.

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 that has already submitted its bid may be changed only before the time limit for the submission of bids expires. Any further changes to bids after the time limit for the submission of bids expires, including changes in the members of the consortium, are not allowed.

If the procurement contract is awarded to a consortium, the option of replacing the awarded consortium with another entity is possible only if the contracting authority provided within the tender documentation that the awarded consortium shall establish a new legal entity which shall enter into the procurement contract with the contracting authority.

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.

There are no special rules on the manner of the division of the contract into lots; the contracting authority may not specify the separate lots in a manner that will limit the competition or favour only one economic operator.

Each economic operator may submit bids for each and all lots and there is no limitation on the number of lots that can be awarded to one economic operator.

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

The contracting authority may allow the bidders to submit variant bids only when the contract award criterion is the most economically advantageous bid.

The contract notice must contain an indication whether variant bids are allowed. If such an indication is missing, variant bids shall not be considered.

If variant bids are allowed the contracting authority shall specify the minimum mandatory requirements in the technical specifications that shall be met by these bidders, as well as all other specific requirements for their submission.

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.

The contracting authority shall not reject a variant bid which is economically the most advantageous, even if the variant bid will cause the public supply contract that was to be awarded to be transformed into a public service contract, or vice versa.

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.

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 is the lowest price. Only in special cases, where the subject of the procurement is intellectual or consultancy services, may the contract award criterion be the economically most advantageous bid.

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 request the economic operator, in writing and before taking a decision regarding the rejection of the bid, to provide details of the bid which it considers relevant, and it shall check the evidence supplied in order to justify the price in the bid.

The contracting authority shall take into account the evidence the economic operator has submitted, especially that referring to:

- the economic basis of the price-setting reflecting the production process or the provided services;
- the technical solutions chosen or any other exceptionally favourable conditions available to the economic operator when executing the works, delivering the supplies or providing the services;
- the originality of the supplies, services or works bid for;
- the compliance with the regulations regarding safety at work and the working conditions applicable for the execution of works, the provision of services or the delivery of supplies; and
- the possibility for the economic operator to avail itself of state aid.

Review proceedings

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.

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

The Appeals Commission is obliged to give its decision on the appeal within 15 days of receiving the whole body of documentation related to the public procurement procedure against which the appeal is submitted. The documentation for the public procurement procedure shall be delivered to the commission by the contracting authority within five days of submission of the appeal. In practice the decision-making process usually is 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 has to 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;

Update and trends

As part of the process towards EU integration, Macedonia continues to modernise and harmonise its legislation on public procurement with the EU legislation. With regard to the most recent changes to the PPL and the applicability of the law, Macedonia's legal framework has not been deployed on a range of matters, but has just been dedicated to the improvement of the electronic system of public procurement. On this subject, as set out in the Public Procurement Bureau's strategic plan for the development of Macedonia's procurement system over the next few years (2014–2018), the main targets of the development and improvement of the Macedonian public procurement system are cited as the following, among others:

- encouraging the development of the electronic system of public procurement;
- professionalisation and training of participants in the public procurement process (both economic operators and contracting authorities);
- cultivating broader competition;
- specifying certain measures that would be at the disposal of the parties, provided by the Appeals Commission and the administrative court when reviewing procurement procedures; and
- setting up improved anti-corruption measures.

- 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?

The appeal against the decisions, actions and failures to undertake actions by the contracting authority during the public procurement procedure shall be submitted within eight days, or three days in simplified competitive procedures, as of the day of:

- announcement of the contract notice, with respect to the infringements regarding the information, actions or failures under the contract notice;
- opening of bids, with respect to the infringements regarding the actions or failures related to the tender documentation and the public opening of tenders;
- receipt of the formal decision with respect to the infringements regarding the evaluation of bids; or
- acknowledging illegal implementation of the contract award procedure, within one year after the day of completing the contract award procedure.

An appeal shall be also filed within three days of the receipt of the notification of a concluded contract based on a framework agreement.

An appellant who is not satisfied with the decision of the Appeals Commission may challenge it by initiating a judicial procedure before the Administrative Court (administrative court dispute) within 30 days of receipt of the commission's decision.

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 2015 a total of 12 applications for lifting the automatic suspension were submitted. Seven out of the 12 were rejected, five were dismissed and therefore none of them were granted.

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 about the selected bidder to whom the public contract is awarded. The notice shall be sent within three days from the day the respective decision was made, and a copy of the decision shall 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.

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 the law.

The PPL explicitly provides only that an applicant who has submitted an appeal against the contracting authority's decision for awarding the public contract shall have the right to review all the documents in the appeals procedure, except those sections of the tender and the documents containing confidential information stipulated by law.

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

Generally, it can be stated that remedial actions are frequently taken by disadvantaged bidders in public procurement procedures in Macedonia.

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 and in 2015 with 626 review applications.

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 usually are 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 the 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.

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 shall 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.

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:

- less than €20,000, a fee equivalent to €100 in denars;
- €20,000–€100,000, a fee of €200;
- €100,000–€200,000, a fee of €300; or
- greater than €200,000, a fee of €400.

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.

DEBARLIEV DAMESKI KELESOSKA
ATTORNEYS AT LAW

Jasmina Ilieva Jovanovik **ilieva@ddklaw.com.mk**
Dragan Dameski **dameski@ddklaw.com.mk**

Mirche Acev 2/3rd floor
1000, Skopje
Macedonia

Tel: +389 2 3215 471
Fax: +389 2 3215 470
ddklaw.com.mk

Malta

Antoine Cremona and Clement Mifsud-Bonnici

Ganado Advocates

Legislative framework

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

The European Union has established a complex body of laws that regulates the acquisition of all necessary goods, works, and services by contracting authorities in member states, including primary legislation, namely the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and, in specific cases, secondary legislation, namely a number of directives.

The EU procurement acquis has been transposed into Maltese law. This consists mainly of four key directives: 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) and the Utilities Remedies Directive (Directive 1992/13 as amended).

The national legal framework relating to public procurement is enacted under the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta) as the principal piece of legislation. The framework was revamped in 28 October 2016 to transpose the new 2014 EU Directives on public procurement. The key applicable Regulations are the following:

- the Public Procurement Regulations of 2016 (Subsidiary Legislation 174.04) (Public Sector Regulations);
- the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations of 2016 (Subsidiary Legislation 174.06) (Utilities Regulations);
- the Concession Contracts Regulations of 2016 (Subsidiary Legislation 174.10) (Concessions Regulations); and
- the Emergency Procurement Regulations of 2016 (Subsidiary Legislation 174.09) (Emergency Regulations) (collectively the Malta Regulations).

The Director of Contracts has also issued rules entitled the General Rules Governing Tendering. These are, most of the time, part and parcel of the procurement documents published by the contracting authority and the bidders must abide by these rules. These rules are periodically amended and the latest version (2.0) was last amended in November 2016.

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), which, to our knowledge, 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 applied to any works or services concessions issued by the Maltese government or any contracting authority on an opt-in basis.

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 its scope, whether by way of subject-matter or value threshold—even if the contract is not of a certain cross-border interest.

However, there are instances where a public contract, in particular, one for the purchase of works, services and supplies, which does not fall within the scope of either of the Malta Regulations, may still attract cross-border interest from economic operators based outside Malta, and therefore, the provisions of the TEU and TFEU, as interpreted by the Courts of Justice of the European Union, will apply. This means that a procurement process is required that observes the general principles of EU public procurement law.

4 Are there proposals to change the legislation?

The national legislative framework was overhauled on 28 October 2016 with the introduction of the Malta Regulation to transpose the new 2014 EU Directives. We are not aware of any further proposals for amendment.

Applicability of procurement law

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

As far as we are aware, there is no jurisprudence on this point. 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.

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.

Public Sector Regulations

A public contract with an estimated value up to €135,000 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 and calls for quotes to 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 €135,000, then the procurement process is generally managed by the Director of Contracts and must be in any of the forms identified by the Public Sector Regulations, the preferred option being, the open or restricted

procedure. Naturally, there are exceptions. Specific contracting authorities identified by the Public Sector Regulations are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

If the estimated value of the public contract exceeds €5.225 million in case of works, €135,00 in case of supplies and services and €750,000 in 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

A public contract with an estimated value up to €418,000 is specifically regulated by a relatively light-touch regime loosely referred to as 'departmental tender procedures', which varies from open/restricted calls for tenders, calls for quotes to 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 €418,000, then the procurement process is managed by the Director of Contracts and must be in any of the forms identified by the Public Utilities Regulations, the preferred option being the open/restricted procedure. Naturally, there are exceptions. Specific contracting authorities identified by the Utilities Regulations are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

If the estimated value of the public contract exceeds €5.225 million in case of works, €418,00 in 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 €5.225 million a number of procedural guarantees apply, mainly, prior information concession notices and contract award notices.

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

Contractual modifications to public contracts are allowed, naturally, 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 €135,000, 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, 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 OJEU:
  - 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; or
  - would cause significant inconvenience or substantial duplication of costs for the contracting authority;
- where all of the following conditions are fulfilled, provided that notice of such modification must be published in the OJEU:
  - 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; and
  - any increase in price is not higher than 50 per cent of the value of the original public contract;
- 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 bullet point in this question;
  - universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, 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 which is less than 10 per cent (service/supply contract) or 15 per cent (works contract), as applicable, of the initial contract value is not substantial, and therefore, the public contract may be modified without the Director of Contracts' 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 establishes a specific procedure regulating the Director of Contracts' evaluation of requests for modification by contracting authorities.

Any contractual modification that is consented to without the prior approval of the Director of Contracts or in spite of the Director of Contracts' refusal is illegal and any compensation paid to the economic operator may be clawed back. Such illegal contractual modifications (and even 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.

Any public contract awarded through the Emergency Regulations cannot be modified, and if, the contract cannot be executed without modification, then the public contract shall be cancelled and a new award procedure is 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 modification of public contracts. Based on our experience, economic operators do not usually have appetite to spend time, energy and cost to challenge such changes. There have been a number of notable judgments delivered by the CJEU on modification of contracts, and it is clear that the new 2014 EU Directives have amended the provisions on modification of contracts to align the law closer to those judgments.

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.

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. As of 2013, Projects Malta Ltd, a specific private limited liability company fully owned by the government of Malta has been set up specifically to coordinate and facilitate PPPs.

Advertisement and selection

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 €135,000 (in the case of the Public Sector Regulations) and €418,000 (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 procure, must be published within 30 days of 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 €135,000 shall be published through e-Tenders (www.etenders.gov.mt), 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 TED (http://simap.ted.europa.eu/).

Utilities Regulations

Public contracts with an estimated value exceeding €418,000 shall be published through e-Tenders (www.etenders.gov.mt), government of Malta's e-procurement platform. If the estimated value of the public contract exceeds the utilities value thresholds, then the notices are to be submitted to the Publications Office of the EU for publication on TED (http://simap.ted.europa.eu/).

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 relating to the suitability 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 and money laundering. The contracting authority is also obliged to exclude an economic operator who is subject to a blacklisting decision issued by the Director of Contracts. An economic operator who is subject to a mandatory ground of exclusion or a blacklisting decision may undergo a self-cleaning process 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?

Yes. The number of potential economic operators invited to participate in a procurement process can be limited only in the cases of a restricted procedure, competitive procedure with negotiation, innovation partnership and the competitive dialogue. This limitation remains 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 €135,000, 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 not an absolute rule, in fact, the contracting authority may proceed with the procurement process even if the number of qualified candidates 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. Again, the principle of promoting genuine competition is the guiding principle.

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 what is known as a 'self-cleaning' process to remove of the effects of a mandatory 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) has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
(ii) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
(iii) 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 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.

This 'self-cleaning' procedure applies to the mandatory grounds of exclusion, but it may also be used as a defence before the Commercial Sanctions Tribunal if an economic operator appeals from a blacklisting decision of the Director of Contracts.

The procurement procedures

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.

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 acts independently and impartially during the pre-procurement stage, throughout that procurement process up to the award and performance of the public contract.

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 include 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 have 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'.

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'.

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

This varies from sector to sector and according to the value of the contract, but open procedures appear to be preferred.

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.

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 negotiations with bidders, among others, the competitive dialogue and the competitive procedure with negotiation.

The use of any of these procedures requires the prior 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 adaptation of readily available solutions;
- the works, services or supplies require 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 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 quite flexible, the Malta Regulations require that the contracting authority establishes, at the very outset, a minimum framework that is known to all participating bidders and procedure to guarantee equal treatment throughout the procurement procedure. There may be subsequent stages where bidders are disqualified and negotiations or dialogue with the remaining bidders are intensified, 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?

Based on a random sample taken from the e-Tenders platform, the competitive procedure with negotiation appears to be regularly used, in particular, in the utilities sector.

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

A framework agreement may be concluded either with one or several economic operators that have naturally 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 framework 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.

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, the same members are to perform the public contract. The General Rules require this since the members of the joint venture or consortium 'as a whole' must satisfy the selection criteria indicated in the procurement documents.

Update and trends

The industry is currently digesting the legislative overhaul introduced in October 2016 and economic operators and their legal advisors are starting to grapple with new right, obligations and remedies which have been introduced.

In recent years, there has been a significant drive by the government of Malta to promote concessions and public private partnership.

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 of mechanisms that enable SMEs to participate in procurement processes more effectively, whether intentionally so or by effect. These mechanisms range from the flexible selection criteria, performance-oriented and functionally equivalent technical specifications to prohibition of abnormally low tenders.

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. This option is frequently pursued by contracting authorities.

Contracting authorities are now required to indicate in the procurement documents the main reasons for their decision not to subdivide into lots, when the estimated value of the public contract exceeds €135,000 in the case of the Public Sector Regulations and €418,000 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.

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 €135,000 and in the Utilities Regulations the estimated contract value exceeds €418,000.

The contracting authority must clearly state in the procurement documents the minimum requirement to be met by the variants and any specific requirement 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 from the procurement procedure if variant bids were submitted even though they were not allowed.

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 who puts forward an offer that is not compliant with the tender specifications or otherwise insists that their own standard terms of business are adopted, should be disqualified in the interests of equal treatment.

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

A contracting authority possesses a considerable margin of discretion at 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 on the test of most economically advantageous tender (MEAT). In practice, this means that award criteria may take into account either just the cheapest offer or the price or cost along with clearly indicated quality criteria, the 'best-price-quality-ratio'. The 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, including 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; or
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

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 €135,000 and in the Utilities Regulations where the estimated value of the public contract exceeds €418,000.

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.

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

See question 31. The contracting authority must demand an explanation if it 'appears' that an 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

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.

Firstly, 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 or any ambiguities in the procurement documents or clarifications or generally any illegal decisions taken by the contracting authorities.

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 within 10 days, in particular, rejection or award decisions.

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.

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 appeal applications in connection with a procurement process.

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

The appeal hearing is scheduled within approximately one month of 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. A hearing will be scheduled within a span of two months from the date of filing of the

appeal, in which oral legal submissions (and usually no further evidence) are made. It is the policy of the PCRB that only one hearing will be held. 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 an 'interested person'. 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 has 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.

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. An application for a new trial (retrial) of a judgement delivered by the Courts of Appeal may also be filed, but this is an extraordinary and extreme remedy that can only succeed on very limited grounds (fraud, manifest error of law, breach of due process and so on). Such an application for a new trial will only trigger standstill if the party specifically demands for it. This application for a new trial cannot be exercised if the public contract has already been executed.

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

This is not applicable.

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. Unless the bidders are not notified, then the standstill period does not start running and the public contract cannot be concluded.

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

No, such requests are generally turned down by contracting authorities due to issues relating to confidentiality, trade secrets, sensitive commercial information and bid-rigging risks. To our knowledge, no application to obtain such information under the Freedom of Information Act (Chapter 496 of the Laws of Malta) has been successful to date.

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 164 decisions in 2014, 159 decision in 2015 and 129 decisions in 2016. Some of these decisions were, in turn, challenged before the Courts of Appeal.

We have not observed a similar culture or appetite in procurement processes in connection with concessions, privatisations and public private partnerships.

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 offer submitted and for judicial costs incurred for lodging the appeal.

Following this case, the General Rules Governing Tenders (and procurement documents generally) introduced a specific clause that excludes liability of the contracting authority, but it is yet to be seen whether this exclusion of liability will be upheld by the Maltese courts.

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 the contracting authority:

GANADO
ADVOCATES

Antoine Cremona **agcremona@ganadoadvocates.com**
Clement Mifsud-Bonnici **cmifsudb@ganadoadvocates.com**

59 Strait Street
Valletta VLT1434
Malta

Tel: +356 21 23 54 06
Fax: +356 21 22 59 08
www.ganadoadvocates.com

- is awarded 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 the standstill obligation.

This demand may be accompanied by a claim for compensation of damages suffered by the aggrieved party.

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

See question 44.

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 will be without charge. Any appeal lodged before the PCRB and after the submission of tenders has closed will be subject to the payment of a deposit depending on the value of the public contract. This is calculated on the basis of 0.5 per cent of the estimated value of the contract, but in any case shall not be less than €400 and not more than €50,000. This deposit may be refundable at the discretion of the PCRB. This excludes any professional legal fees which are not recoverable in case of a successful challenge.

Any appeal lodged before the Court of Appeal will be subject to approximately €500 in court registry fees and judicial costs. This amount excludes any professional legal fees that are only in part recoverable in case of a successful challenge.

Mexico

Roberto Hernández García, Adrián Roberto Villagómez Alemán and Cynthia Irene Osio Sanchez

COMAD SC

Legislative framework

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

Mexico is a federation. Therefore, there are 33 federal and state procurement regimes: one for each of the 32 federative entities and one applicable to the federal public administration. There are also procurement guidelines for the federal legislature and judiciary, as well as an independent procurement regime that regulates the activities of Petróleos Mexicanos (Pemex) and Comisión Federal de Electricidad (CFE) respectively, which are the productive companies of the state (state-owned companies), and major players in the Mexican economy. There is also the Law on Public-Private Partnerships (and its regulations). For reasons of space, this chapter addresses and explains only the rules applicable to the federal public administration. However, some minor details of the Pemex and CFE Law and the PPP regimes may be explained. The relevant federal procurement legislation in Mexico is as follows.

Article 134 of the Mexican Constitution

This provision establishes the obligation of any contracting authority or entity in Mexico (as a country) to carry out any buying of goods, leasing, provision of services, contracting of public works and services related to public works through public bids in public events, so that the state can guarantee such contracting under the best conditions on price, quality, financing, opportunity, efficiency, equal treatment and opportunity, among other issues. This article also foresees that the special laws that regulate procurement may establish ways of procurement other than public bids (restrictive bids, direct awards, etc) when the public bid is not the most efficient procurement procedure, and foresees the correct application of public financial resources. This article is the constitutional ground for all public procurement in Mexico, and any law or action that contradicts this article is considered null and void.

Free-trade agreements

Mexico has signed several free-trade agreements and economic association agreements with different countries and regions. Most of these agreements include international public procurement chapters. In accordance with article 133 of the Mexican Constitution and the Mexican Supreme Court interpretation, international treaties are the supreme law of the nation if they are in accordance with the Mexican Constitution. Free-trade agreements that include procurement chapters are, among others: NAFTA, executed between Mexico, the US and Canada; EUFTA, executed between Mexico and the European Union; and the Economic Cooperation agreement executed between Mexico and Japan, etc. Provisions of procurement chapters in free-trade agreements apply whenever different issues considered in the same agreements are covered and satisfied (lists of buying entities; amount thresholds; lists of goods, services and construction activities).

The Procurement Laws

The Public Works and Related Services Law (PWRS) and the Buying of Goods, Leasing and Rendering of Services of the Public Sector Law (BGLRS) (the Procurement Laws) are the two main laws that will apply in most federal government procurement procedures, except in those issued by the judiciary and legislative branches, and also those that regulate the activities of Pemex and CFE and the public-private partnership (PPP) projects. These laws were issued by the Mexican Congress and are enforced, depending on the matter, by the Ministry of Public Function, the Ministry of Economy and the Ministry of Finance or the corresponding contracting entities in the case of Pemex, CFE or PPPs. In the event of a violation of legal provisions, the executive power, through regulated bid protests procedures has the obligation to investigate and enforce them. As a further resource, federal courts may be competent to solve disputes and matters that arise from the application of these laws.

Administrative regulations of the PWRS and the BGLRS

The PWRS and BGLRS regulations are issued by the Ministry of Public Function and are intended to provide further details and interpretation for the application of the Procurement Laws at the administrative level. As a general and non-waivable principle, administrative regulations must not establish any provisions that contradict, violate, or exceed the rights and obligations defined by the law that they are regulating. In the case of the Regulations of the Procurement Laws, these regulations may be enforced by the Ministry of Public Function, the Ministry of Economy and the Ministry of Finance in relation to administrative matters, and in accordance with their own powers. In the case of a violation of these regulations, diverse procedures before these authorities can be initiated and as a further resource, different federal courts, such as the Administrative and Fiscal Federal Justice Tribunal and the Federal Judicial Power will enforce them.

Pemex and CFE regimes

As a consequence of the relatively recent modification of the energy sector in Mexico, the nature of Pemex and CFE were changed, and now they are called 'productive companies of the state'. Thus, their public procurement procedures are established in special laws, such as the Hydrocarbons Law, Pemex Law, CFE Law, Law of the Industry of Electricity, etc, and their respective regulations. Therefore, any public procurement procedure regarding these two companies, or the energy sector, will follow a different and independent regime. The government authorities in charge of the regulation and enforcement of the laws of the energy sector are the Ministry of Energy, Ministry of Finance, the Commission Regulatory of Energy and the National Commission of Hydrocarbons.

Jurisprudence

This is the interpretation that federal courts give to the provisions of procurement rules as a result of litigation (case law). It is important to be aware of the jurisprudence since it gives the official interpretation of a law or declares a law unconstitutional. The federal courts are increasingly issuing different decisions regarding procurement regimes, which means that bidders, suppliers and contractors have faith in the judicial system, and that many issues that might not be clear at the administrative level may be clarified and corrected in this instance.

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

As mentioned above, Pemex and CFE have a totally independent public procurement regime, following the specific rules for the energy sector. In addition, we can emphasise that the Mexican army and the Mexican

navy, as military authorities, must comply with the Procurement Laws. Nevertheless, these authorities have the power to apply articles 41 and 42 of PWRS, as well as articles 41 and 42 of BGLRS, to award directly (without a bidding process) any construction of public works, services related to public works, purchase of goods and leasing and provision of services if the goods and services are for military purposes. In addition to these laws, the military authorities have their own internal rules, according to their structure, organisation and objectives. All these rules can be found at the relevant website (army or navy) or may be requested in accordance with the transparency principles that apply to all public administration, unless this information jeopardises national security.

Also, the works or services concessions are regulated by different laws (depending on the work and service).

Moreover, the Public-Private Partnerships are also regulated by a specific piece of legislation.

Finally, it is important to mention that the judicial and legislative branches follow their own public procurement rules.

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

Mexico is neither a part of the European Union nor a part of the GPA. Nevertheless, considering that Mexico has signed a free-trade agreement with the European Union and with other countries that are subscribers to the GPA, it is important to be aware of the rules that are related to international procurement with the corresponding regions when participating in a procedure in the countries that are part of such integrated regions.

4 Are there proposals to change the legislation?

There have been several proposals to modify the legislation. One of them is an initiative that was drafted and supported by the National Chamber of the Construction Industry some years ago, in order to submit to Congress and to improve the PWRS provisions that affect productivity and competitiveness. This initiative was discussed in Congress but it was not approved by the Chamber of the Senate. During February 2017, the Chamber of Senate issued an initiative to enact a new PWRS and to abrogate the current law. The first initiative and the second initiative seem to have common items, but this is a new and independent initiative. The main objectives of the initiative are to prevent corruption during the procurement procedures, to have more transparent procedures, and to have more effective and efficient procurement procedures. Such initiative is still being discussed in Congress.

There are also some attempts to modify the BLGRS, but at the time of writing this chapter, they were still being discussed internally.

There is also a possibility of renegotiation of NAFTA, which could affect Chapter Ten concerning Government Procurement. Furthermore, there are ongoing negotiations to modernise the European Union–Mexico FTA, which could have an impact on the public procurement procedures.

Applicability of procurement law

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

The PWRS and the BGLRS define the entities and authorities that must apply the procurement legislation. These are:

- the Office of the President;
- all the ministries of state, administrative departments and the legal office of the president;
- the attorney general's office;
- all government entities with their own personality and patrimony;
- all entities with major public participation as well as public trusts; and
- states of Mexico that use the federal budget for buying goods or the development of projects, even if they are destined for state purposes.

Public entities with autonomy given by the Constitution, such as the Central Bank or the Human Rights Commission, must only apply criteria and procedures under these laws when the latter do not contradict their own internal regulations. In other words, these authorities are not subject to the law, but their regulations must be guided by the principles of the law.

Any entity or authority that is not considered in the list established in any of the Procurement Laws is not obliged to apply these laws, nevertheless all of them must comply with the principles established in article 134 of the Mexican Constitution.

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

According to both the PWRSL and the BGLRS, contracting entities can make exceptions to public bids (restricted tendering and direct award), attending criteria such as urgency, public security and specialisation, among others, but not depending on the value of the goods, leases, services, etc, and only when the amount of each operation does not exceed the maximum amounts established in the Budget Programme of the Federation and the total amount of contracts awarded under these exception procedures does not exceed 30 per cent of the annual budget authorised for the contracting entity.

These thresholds are independent of those established for public procurement procedures issued under free trade agreements.

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

BGLRS expressly states that contract amendments are permitted if the following conditions pertain: the amendment is made during the contract term, the amount to be extended does not exceed globally 20 per cent of the amount or quantities of the concepts and volumes that were established originally and that the price of the goods, leasing or services is not modified. PWRS establishes that the contracts may be modified, as long as the amendments do not exceed 25 per cent of the amount and term originally agreed. Both PWRS and BGLRS, through the Federal Civil Code (supplementary to these laws), refer that the amendment of a contract has to take place within the contract term or during the validity of such contract. In other words, if the term of the contract has expired, the contract no longer exists and no amendments can be made. If the term 'concluded contract' refers to the services or works object of the contract being terminated, such contract could be modified as long as the term of the contract is still valid, and according to the conditions referred in this paragraph. Otherwise, a new procurement procedure would be required.

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 regarding this matter since the 'concluded contract', understood as when the term is no longer valid or when the services or works object of the contract are terminated, is regulated clearly by the Federal Civil Code; no case law is necessary.

9 In which circumstances do privatisations require a procurement procedure?

The privatisation in Mexico requires two steps: first, the government has to pass a political procedure in order to modify the Federal Constitution to allow private entities to exploit certain industries, sectors or services that the constitution referred to as reserved for the state; then the modified text will regulate the implementing of such modifications and the new procedures and laws to be enacted, including the procurement procedures. However, when the service or function is transferred to a private entity, procurement procedure has to be followed according to the Federal Constitution.

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

In general, any PPP project must be carried out through a procurement process applying the Law on Public-Private Partnerships and its regulations. Procurement procedures for this kind of project include a public tender, an invitation to at least three persons or a direct award. Such provisions establish the general principles and details for a procurement procedure of these particular contracts. Even if there is a non-solicited proposal, a public procurement procedure must be carried out in order to award a PPP project. It must be said that PPPs have not been widely used in Mexico at a federal government level. The majority of PPP Projects have been performed by the states of Mexico.

In any case, transparency, efficiency, effectiveness and rule of law are the principles that shall be considered.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

The Public Electronic Information System (CompraNet) is a system controlled and administrated by the federal public administration, through the Ministry of Public Function, in which all stages of the federal procurement procedures are published, from the public call to the award of the contract. Such system guarantees the transparency of the procedures.

Furthermore, the annual programmes of public works and related services of the agencies and entities, must be available through the entity's website and CompraNet no later than 31 January of each year.

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 the Procurement Laws:

- any bid that complies with the tender documents from a technical and economic point of view must qualify;
- a contracting authority must not ask for requirements or disqualify the bidders for requirements that do not affect the technical or economic solvency of the proposals;
- any unjustified assessment of the bids that may result in a disqualification is subject to an objection or a challenge under the Procurement Laws; and
- any unjustified qualification or disqualification of a proposal may even be a matter of administrative, civil and criminal liability of the public officials, depending on the nature of their unlawful actions.

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

It is not possible to limit the number of bidders in a bidding procedure, but, as mentioned before, there is a possibility to have a restricted tendering (one of the exceptions to public bids), in which at least three bidders must be invited to participate in the procedure.

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?

According to the Procurement Laws, a bidder can be excluded from a tender procedure only when it falls into the categories established by law (conflict of interest, breaching of contract, etc), or whenever such bidder has been debarred after a successful debarment procedure.

In the first case, as a general principle, the bidder is excluded on a case-by-case basis, so the status of suitable and reliable bidder depends on not falling into the respective categories.

In the second case, the debarment means that such bidder shall not participate in any bid of the federal government until the penalty imposed by the Ministry of Public Function has elapsed. According to the Procurement Laws, the period for which a person or company can be debarred shall not be less than three months and not more than five years. A fine shall also be imposed, and until such fine is paid, even if the time of debarment has passed, debarment shall not finish.

The concept of 'self-cleaning' is not expressly established but it is implicit in the law; a bidder that has been debarred, and has completed the imposed penalty, can participate again in public procurement procedures.

The procurement procedures

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

Yes. Article 134 of the Federal Constitution establishes the obligation of public entities to consider price, quality, financing, opportunity, economy, efficiency, equal treatment and competition in the procurement process. There are special provisions and mechanisms in all the processes of the state to guarantee transparency, so these fundamental principles expressly apply to the procurement system and can be requested and actions contrary to them challenged. In addition, the judiciary has confirmed the existence and significance of these principles through its jurisprudence. Article 134 is invoked and used as the basis for all public bids and awarding procedures.

Finally, it is important to mention that due to the National Anticorruption System, which was issued on June 2016, several laws and offices were created in order to impose more penalties to those involved in anti-corruption acts during procurement procedures, and to have more transparency on such procedures.

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

Yes. All the legal structures tend to formally enforce this situation. In addition, there are certain rules to avoid any problems occurring in practice: any supplier, provider or contractor that has a direct relationship or interest with any person from the contracting authority or entity is considered 'not able' or 'not capable' of signing a contract with the contracting entity. The Federal Criminal Code and the new General Law of Administrative Responsibilities establish the penalties and liabilities of contractors and public officers, respectively, if their actions throughout public procurement procedures are not according to the law. See question 17 for conflicts of interest matters.

Also, as mentioned before, the National Anticorruption System, which was issued on June 2016, includes new several laws and offices that were created in order to impose more penalties to those involved in anti-corruption acts during procurement procedures, and to have more transparency on such procedures. Such new laws and procedures come force into force in June 2017.

17 How are conflicts of interest dealt with?

There are specific provisions dealing with a situation where officials of a contracting entity have a direct or indirect interest in the procurement process or connection with the contractors and suppliers interested in the procurement processes. In this case, the Procurement Laws prohibit the contracting entity from receiving any bids from the contractors and suppliers in which officers are related, involved or have an interest.

The new General Law of Administrative Responsibilities, which was created due to the issuance of the new National Anticorruption System, establishes the liabilities and penalties for public officers and private entities involved in procedures in which there are conflicts of interest.

It is important to say that in autumn 2015, the Ministry of Public Function issued the rules for the issuing of codes of conduct by contracting entities of the federal public administration, as well as the format to disclose conflicts of interest. The same ministry created a special office whose powers are to keep control over, and issue, guidelines on ethics in the federal public administration, as well as matters of conflict of interest.

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 is expressly forbidden by the Procurement Laws and the General Law of Administrative Responsibilities, and such conduct can lead to debarment and economic sanctions.

There is a mechanism in the Procurement Laws called 'project of invitation to bid', which is issued by the contracting entity and allows interested participants to give their opinions and comments in order to feed the invitation to bid with such input. This figure was widely used some years ago, but it has not been used in recent times since the objectiveness of such inputs was of great concern.

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

As established by article 134 of the Federal Constitution, public open tendering is the prevailing type of procurement procedure. Other methods of procurement (eg, invitation to at least three persons or direct award) can be used in the case of justified exceptions such as: emergencies, force majeure, acts of God, public health and national security reasons, among others.

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

The law uses the terms 'associated partner' or 'common associate' in order to explain that they are not allowed to participate in the same public procurement procedure. In this sense, an associated partner or common associate is a person that has an equity participation in more than one company, and has powers of direction and representation on those companies.

This conduct can lead to disqualification or debarment and penalties to the companies that breach this principle.

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

Mexican legislation (the PWRS, BGLRS and the new General Law of Administrative Responsibilities) strictly forbids any negotiation between a contractor or supplier and the contracting entity during a procurement procedure, before the award of a public contract and during the execution of the contract. It is even forbidden for a bidder to communicate with the entity during the procurement procedure, if such communication is intended to influence the contracting entity's decision on the award of the contract. Breach of this obligation will mean that the procedure is null and void, and the private entity or the public officer may incur penalties.

In the case of the new Pemex and CFE Laws, it is established that these contracting entities can have limited negotiations during the procurement procedure, as well as the negotiation of contracts below certain limits.

Finally, regarding PPPs, although it is not strictly a negotiated procedure, the PPP Law allows the parties to redefine some aspects that modify the balance of the contract as it was signed, in order to avoid causing harm to the interests of the parties.

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?

Competitive dialogue, as understood under the EU directives and US regulations, is not considered, applied or accepted in the Procurement Laws. Therefore, it is forbidden in Mexico.

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

Framework agreements are relatively new in public procurement in Mexico. There are certain rules for implementing and executing a framework agreement under the BGLRS and its regulations. Basically, the promoter of the framework agreement is the Ministry of Public Function, and several industries and providers of services and goods are invited to submit general conditions for the goods to be sold. Once the scope and price of such services and goods is determined, the companies subscribe to such framework agreement, which allows goods and services to be bought through a direct award. Public information has shown the benefits of this procedure, but the public sector cannot yet ascertain its absolute benefit or the conflicts that may arise.

24 May a framework agreement with several suppliers be concluded?

A framework agreement with several suppliers can be concluded. The award of a contract under the framework agreement requires a new procedure equivalent to the one that was initiated to obtain the first one.

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

The Procurement Laws do not foresee that a consortium member can leave the group in the course of a procurement procedure once the bid has been presented to the contracting entity (if the bid has not been presented, the members can be substituted, or the consortium could leave the procedure). This prohibition applies as well during the performance of the contract. However, in practice, and in justified cases, some contracting entities have allowed such changes, to try to avoid putting the contract at risk and to comply with the law at the same time.

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 Procurement Laws establish specific provisions that promote the participation of micro, small and medium-sized companies. Also, the laws establish that if two bidders comply with the requirement and bid a similar price, the micro, small and medium-sized companies will have preference.

There are provisions on the division of contract into lots. The general rule is that lots shall not be established in order to limit the participation of the bidders in the public procurement procedure. When micro, small and medium companies participate, they may have certain preferences.

There is no restriction on the number of lots single bidders can be awarded.

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

Variant bids may only be considered if the contracting authority has requested them. Nevertheless, the laws do not consider this possibility, and, therefore, it is never used at a federal level, since they have an implied risk related to the evaluation of the bids.

28 Must a contracting authority take variant bids into account?

If such variant bids were not requested on the bidding instructions, there is no obligation, and the bidder can be disqualified for not respecting the bidding rules, so this action is not suggested in any case.

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

If a bidder changes or amends the tender specifications established by the contracting authorities in the tender documents or submits its own standard terms of business, contrary to the specifications requested by the contracting authorities, the bidder would be disqualified (unless the contracting authority establishes in the tender documents that the bidder has the liberty to offer any specifications that it considers appropriate – in practice, this is not seen in bid documents).

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

The Procurement Laws consider three main evaluation methods:

- binary: subject to compliance with the requirements of the bid documents. In this case, the lowest bid in price shall prevail;
- points and percentages: the contracting entity will establish certain requirements, and will grant points and assign percentages to such complied requirements, and the bid with the best evaluation based on points and percentages shall be awarded; and
- cost-benefit procedure.

31 What constitutes an 'abnormally low' bid?

There is no express concept or definition of an 'abnormally low' bid in the Mexican procurement system. There is a concept of 'not acceptable price', which is defined as: 'such price that is a consequence of the market research that has been done, and is 10 per cent lower than the one that has been offered with regard to the middle-known prices of the bids that have been submitted in a procurement procedure'. Rules define that the contracting authorities must verify that the offered resources and prices are in accordance with market costs, and other related matters. In the procurement chapters of the free-trade agreements, there is a provision that states that if a contracting entity or authority has a suspicion that the offered price is not adequate for the contract to be carried out, it may contact the bidder to be sure that such price is adequate.

It can be said also, that an abnormally low bid, according to the Mexican procurement system and practice, is the one that is under the authorised budget for the intended construction project or purchase of goods. This can be a problematic situation, since during the bidding process the contracting entities and authorities have no obligation to say what the budget limit is.

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

In general terms, the contracting entity prepares market research that will serve as a basis for reference related to the acceptable price. Once the bids are presented, besides all technical, administrative and economic requirements, the contracting entity must compare the price vis-à-vis the budget and the market research in order to determine if the price is acceptable. If the price is not acceptable, the proposal shall be rejected.

Review proceedings

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

The authority that rules on a bid objection or an award challenge is the Ministry of Public Function, through special offices within the contracting entities or authorities called 'internal comptroller bodies'. The Ministry of Public Function also has a special department called the 'bid objections general office', which rules on the most important bid objections or bid objections by certain entities whose internal comptroller bodies do not have the power to resolve bid objections or if the bid objection raises a matter of importance.

Both reviewing bodies have the same competence and apply the same laws, but may have different criteria for the cases, which is a problem that suppliers, contractors and litigators face on a daily basis.

There is a procedure called 'revision', in which the private entity challenging the decision asks the same Ministry of Public Function to review the decision issued.

If such procedures are not favourable to the private entity, it may still challenge the resolution of the Ministry of Public Function (internal comptroller bodies) before the Federal Tribunal of Administrative Justice (TFJA). The final judgement of such tribunal may be challenged before the Federal Judicial Branch.

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

The only remedy that may be obtained either from the Ministry of Public Function, from the TFJA or the Federal Judicial Branch is the annulment of the award of the contract, and the replacement of the procurement procedure. The contracting authority will issue a new award of contract.

The private entity may also initiate administrative procedures in order to investigate liabilities of public officers, or could sue the contracting entity if there is an irregular activity by such entity and the private entity was damaged.

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

The period that an affected party has to file a bid objection is six days in national bids and international bids, and 10 days in international bids under free trade agreements. The authority has 15 business days after the closure of instruction stage to issue a resolution (the closure of instruction stage could be issued a long time after the procedure was initiated). Nevertheless, currently the authorities take a long time to resolve matters (approximately four months), a situation that affects bidders and users.

The Ministry of Public Function issued a 2014–2015 report in which it was established that the approximate time to issue a final decision is 93.8 business days. The 2016–2017 report has not been released.

In the case of a judicial proceeding, it is impossible to determine the minimum or maximum time that the process would take, considering its nature and complexity, but a reasonable standard time would be two years.

36 What are the admissibility requirements?

According to the PWRS and the BGLRS a review proceeding (bid objection or award challenge) can be filed against:

- the invitation to bid, whenever such invitation is not in accordance with the Procurement Laws and regulations (or the invitation to at least three persons);
- the answers in the clarification meetings, whenever such answers are not in accordance with the Procurement Laws and regulations;
- the final award;
- the cancellation of the procurement procedure; and
- the lack of signature on the contract by the contracting entity or authority, whenever the contracting entity or authority does not sign the contract during the time established in the law or the bid documents.

The timeframe to file the bid or award objection is six days after the issuance of the act to be challenged, and 10 days if it is a procurement procedure based on free trade agreements.

Having complied with the above, the document in which proceedings are filed must comply with the requirements that are requested by the Administrative Procedures Law, which are to be in writing and to include:

- the name of authority;
- the name of person that requests the proposal;
- the address to be notified;
- the basis of the case; and
- the evidence.

In sum, for the bid objection to be admitted, the affected party must file it on time and the complaint or application must meet the requirements. The Procurement Laws refer that the bid objection would not be admitted if: it is not related to one of the acts mentioned above; if the affected party consented such acts; if the act being challenged or the object of the public procurement no longer exists; and if the bid was presented by a consortium and the appeal or review was filed individually. Finally, the law refers that if the bidder did not present a 'statement of interest to participate', or a tender, during the procedure, it may not file a bid objection.

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

The deadline to file a bid objection is six days in the case of a national public bid and 10 days in the case of an international public bid after:

- the last clarification round, where the interested person has requested an objection related to the invitation to bid, the tender documents, or the clarification rounds;
- the presentation of bids or the contract award; or
- any acts or omissions of the contracting entity or authority that impede the conclusion of the contract in the terms of the tender documents or the law.

The deadline to file an administrative appeal of 'revision' in order to review the decision of the bid objection is 15 working days after the review decision has been notified to the interested party, and 45 business days for a judicial appeal before the Federal Tribunal of Administrative Justice.

Update and trends

In recent years, many public procurement procedures have been significantly affected by lack of transparency and corruption scandals. Cases include pharmaceutical products, construction projects and others. This is of great concern for companies that intend to participate in public procurement.

In July 2016, Congress issued the National Anti-corruption System, consisting of the issuance of several laws, the modification of others and the creation of different governmental offices, in order to have more transparent procurement procedures, and more penalties for those who violate the procurement laws. Such system must be in force by July 2017.

Also, the Senate published the initiative of a new Public Works and Related Services Law, which is designed to promote transparency, anticorruption and more competitiveness in the construction sector. However, such initiative is still being discussed in Congress.

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 a bid objection does not have an automatic suspensive effect, nor does it block the continuation of the procurement procedure, unless such suspension is declared by the authority because of a request by the affected party, in which the authority will consider the convenience to suspend the procurement procedure for public interest reasons, requesting a guarantee to the filing party for possible damages caused to the party who was awarded the contract and if the review procedure was initiated for the purpose of hindering the procurement process. (Nevertheless, it must be said that in many cases the authorities do not require the guarantee.) The party who was awarded the contract may present another guarantee in order to continue with the execution of the contract.

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

See question 38. There is no public record, but it is more common not to grant the suspension than grant it. Therefore, we consider that approximately 90 per cent of suspension requests are denied.

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

Unsuccessful bidders are notified during the award event of the reasons why the contracting entities and authorities did not select their bid. In the same event, such entities and authorities state that the successful bidder complied with all the requirements established by the bid instructions. After such event, the contract is signed.

The PWRS and the BGLRS include a very transparent award procedure that describes all the characteristics of the winner and the bidders that did not win the contract.

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

Access to the procurement file is always granted to an applicant during a bid objection, unless the procurement file contains confidential information or any other copyrights that may not be divulged to the public. In recent cases, confidential information and copyright laws have been breached by certain authorities.

A bidder can also access the procurement file using the Transparency Law, which allows any person to request any information that is not confidential relating to the procurement procedure.

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

Yes. Nevertheless, it is an ethical duty of procurement lawyers to advise their clients if a review has grounds or not, and to explain the penalties that the bidder could incur if the review is only made with the intention of delaying the procurement procedure.

The National Institute of Statistics and Geography (INEGI) implemented a system called INCONET in which the bid objections must be registered. However, such system is not used in practice.

The Ministry of Public Function issued a report from 2014–2015 in which it was established that during that period, 1,394 bid objections were filed. There is not a report from 2016–2017 yet.

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

Yes. Our opinion is that, under the Liability of the State Law, bidders that are affected by the illegal decision of a contracting entity, in an administrative or judicial review, can claim damages and losses. Nevertheless, affected parties usually have to get to the final instance to be successful.

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. In fact, review processes in Mexico have the effect of declaring null and void any act after the one that was considered unlawful as a result of the review or objection (award and signing of contract). If this happens, a procedure for termination for convenience of the contract (anticipated termination) has to be initiated.

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

Considering that any award that does not comply with the law can be subject to a review, any de facto award can be subject to a review where the objector demonstrates that it has a legal interest in the case. Nevertheless, according to the current rules, bid objections only proceed in some specific cases.

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

The administrative or judicial bodies may not charge anything for a litigation or procedure before them (constitutional right). The only costs the companies incur are the lawyers' fees, and administrative fees such as photocopies, etc.

COMAD , S.C.

Roberto Hernández García **rhernandez@comad.com.mx**
Adrián Roberto Villagómez Alemán **arvillagomez@comad.com.mx**
Cynthia Irene Osio Sanchez **cosio@comad.com.mx**

Febo 29, Col Crédito Constructor
03940 Mexico City
Mexico

Tel: +52 55 5661 3733
Fax: +52 55 5661 3733
www.comad.com.mx

Netherlands

Michel Chatelin and Koen de Weers
Eversheds Sutherland BV

Legislative framework

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 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) has been added to the DPPA. The DPPA now consists of the following sections:

- Part 1: General provisions;
- Part 2: Procurement procedures which meet the 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 (ESPD) and the Proportionality Guide are part of the Public Procurement Decree.

In the Netherlands public procurement law is enforced through litigation. The so-called committee of procurement experts does, however, also provide the possibility to complain about procurement procedures. The advice of this committee is non-binding.

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 describe 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.

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.

4 Are there proposals to change the legislation?

No, there are currently no proposals to change the legislation.

Applicability of procurement law

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 Court of Justice of the European Union (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 where:

- 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; or 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.

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:

Central government authorities	Works contracts, subsidised works contracts		€5,225,000
	All services concerning social and other specific services listed in Annex XIV		€750,000
	All subsidised services		€209,000
	All other service contracts and all design contests		€135,000
	All supplies contracts awarded by contracting authorities not operating in the field of defence		€135,000
	Supplies contracts awarded by contracting authorities operating in the field of defence	Concerning products listed in Annex III	€135,000
		Concerning other products	€135,000
Sub-central contracting authorities	Works contracts, subsidised works contracts		€5,225,000
	All services concerning social and other specific services listed in Annex XIV		€750,000
	All other service contracts, all design contests, subsidised service contracts, all supplies contracts		€209,000

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;
- transaction costs of the contracting authority and economic operators;
- number of potential economic operators;
- desired outcome;
- complexity of contract; and
- type of contract/sector.

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 (i) the EU thresholds and (ii) 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.

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.

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

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. (Tenders Electronic Daily). The DPPA also requires that the procurement contracts are advertised on the Dutch electronic publication system (TenderNed).

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 entities (SMEs) in public procurement. Any such requirements should be related and proportionate to the subject matter of the contract. In particular, contracting authorities should not be 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 a sufficient number of suitable candidates is 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.

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

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.

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 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 which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

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.

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.

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

In principle the open or restricted procedure is to be applied 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.

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

It follows from the case law of the CJEU (*Asitur*, C-538/07) that 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' is not allowed. 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.

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: (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions; (ii) it includes design or innovative solutions; (iii) the contract cannot be awarded without prior negotiations; or (iv) 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 IT projects. This procedure allows the contracting authority and economic operator to discuss the best solution for the contracting authority. This procedure is particularly useful if there is no easy solution for the need of a contracting authority, for example a design or innovative solution.

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.

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 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.

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 such as the use of 'self-certification' to

Update and trends

The current hot topic is the implementation of the European procurement directives in the DPPA.

assess whether the bidder meets the 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.

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.

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

Bids that change the tender specifications must be excluded by the contracting authority. This also applies to cases in which 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.

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.

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: (i) relative method; (ii) absolute method; and (iii) a combination of both 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 minimum 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. This clarification cannot not lead to an amendment of the bid. When the bid is dismissed as abnormally low, a new winner can be established.

Review proceedings

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.

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.

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. Suspension of a pending procurement can, however, be claimed by the plaintiff.

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.

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.

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).

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.

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 him or her if the contracting authority had not violated procurement rules.

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.

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 also claim damages.

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 quite costly.

EVERSHEDS SUTHERLAND

Michel Chatelin **michelchatelin@eversheds-sutherland.nl**
Koen de Weers **koendeweers@eversheds-sutherland.nl**

De Cuserstraat 85a
1081 CN
Amsterdam
Netherlands

Tel: +31 20 5600 600
Fax: +31 20 5600 500
www.eversheds-sutherland.com

Nigeria

Chike Ekwueme

Ekwueme, Ekwueme & Ekwueme

Legislative framework

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

The principal legislation governing the award of public contracts is the Public Procurement Act Cap 44 Laws of the Federation of Nigeria (2004 edition), which passed into law in 2007.

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

The Infrastructure Concession Regulatory Commission (Establishment) Act 2005 (the ICRC Act) governs projects for infrastructure development where the private sector partners with the government. The subject matter covered by the ICRC Act include investment and development projects relating to infrastructure of any federal government ministry, agency, corporation or body (section 1(2) of the ICRC Act). The contracts regulated by the ICRC Act include works or services concessions.

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

Nigeria's procurement regime is not governed by the EU procurement directives. Further, Nigeria is not a party to the World Trade Organization Agreement on Government Procurement (GPA).

4 Are there proposals to change the legislation?

The Senate of the Federal Republic of Nigeria is at an advanced stage of amending the Public Procurement Act. Amongst other things, the amendment seeks to introduce local content provisions into Nigeria's public procurement regime. It also provides that representatives of the Nigerian Institute of Architects and the Nigerian Institute of Quantity Surveyor (NIQS) shall be members of the National Council on Public Procurement. Other than this, there are no proposals to change the existing legislation.

Applicability of procurement law

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

There have been very few judicial decisions on the application of the Public Procurement Act generally, and, in fact, no decision on whether a particular entity constitutes a contracting authority (called a 'procurement entity' in the Act) or not. However, the Public Procurement Act expressly limits its application to contracts other than contracts regarding national security and defence, unless the approval of the President of Nigeria is obtained. Therefore, for instance, the military and the Ministry of Defence are not procurement entities except when undertaking procurements that do not deal with national security and defence.

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

While all contracts of the Federal Government of Nigeria and her procurement entities are subject to public procurement law, the Act provides that the Bureau of Public Procurement (the BPP) may prescribe threshold values for certain categories of contracts, which would permit a procurement entity to undertake the procurement in question, without engaging in the prequalification of bidders. Further, the BPP or the Secretary to the Government of the Federation prescribes threshold values enabling different authority levels within the procurement entities to undertake procurement of contracts of such values (albeit in accordance with the provisions of the legislation). These threshold values are, in practice, approved by the Federal Executive Council, whose existence is based on section 144(5) and 148 of the Constitution of the Federal Republic of Nigeria.

Finally, the Public Procurement Regulations for Goods and Works established under the Act stipulate that direct procurements of small value, for example, 1 million naira, may be undertaken without going through a competitive process; however, the approval of the BPP would, nevertheless, be required.

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

Yes, the Public Procurement Act permits the amendment of a contract between a procuring entity and a contractor, without a new procurement procedure.

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

As there is no provision in the Public Procurement Act relating to the amendment of concluded contracts, this issue has not come before the courts for determination.

9 In which circumstances do privatisations require a procurement procedure?

Privatisations in Nigeria are governed by the provisions of the Public Enterprises (Privatisation and Commercialisation) Act. The Act provides that an offer for the sale of the shares of a public enterprise shall be by public issue or private placement, as the case may be. An offer for the sale of shares by public issue to Nigerians may be made on the capital market. However, where the shares of an enterprise are not to be offered for sale by public issue or private placement, the National Council on Privatisation may approve the shares being offered for sale through a willing seller and willing buyer basis or by any other means. Thus, even though the Act does not stipulate a procurement procedure for the sale of a privatised enterprise's shares, in practice, the National Council on Privatisation tends to adopt means other than public issue or private placement for privatisation transactions, and invariably invites bids from prospective investors. The mode of privatisation is, thus, akin to the open competitive tender process adopted under the Public Procurement Act. This approach is not a requirement of the relevant legislation but has been adopted in almost all privatisations overseen by the Bureau of Public Enterprises since 1999.

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

As stated in question 2, public private partnerships are governed by the provisions of the ICRC Act. The ICRC Act provides that, upon an approval for any project or contract for financing, construction, operation or maintenance of any infrastructure or development project, the federal government ministry, agency, corporation or body concerned shall invite open competitive public bids for such project or

contract (section 4(1) of the ICRC Act). The procedure adopted in setting up a PPP is, thus, very similar to that provided for under the Public Procurement Act.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

All procurements under the Act must be advertised in at least two national newspapers, in English, as well as in the Federal Tenders Journal (Section 50 of the Public Procurement Regulations for Goods and Works). The Regulations also provide for advertisements on the website of the procuring entity as well as on the BPP's website. Where the procurement involves international competitive bidding, however, in addition to the above mediums, the bid solicitation must be advertised in one widely circulated international newspaper.

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 Procurement Act gives procurement entities considerable powers in determining pre-qualification criteria (section 23 of the Act); however the setting of such conditions by a procuring entity is limited largely by the value of the contract. Procuring entities are allowed to establish pre-qualification criteria only for contracts above certain values set by the Federal Executive Council and reviewed periodically.

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

Limitation on the numbers of bidders in a particular tender procedure is determined by the type of procurement process contemplated. There are at least six different procurement procedures feasible under the Public Procurement Act. When a request for quotations is made, for instance, a minimum of three unrelated bidders must be invited to participate in the tender procedure.

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?

Section 58 of the Act dealing with public procurement-related offences provides a period during which any legal person who has contravened provisions of the Act shall be barred from participating in any future public procurement. The period of the ban is five years. After this period has passed, the contractor may again participate in public procurements. Other than the time lapse, there is no provision for 'self-cleaning' or any similar concept to requalify the contractor for participation.

The procurement procedures

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 stipulates that a government agency or department undertaking procurement shall cause all submitted bids to be opened in public in the presence of the bidders or their representatives. The opening of the bids, to be as transparent as possible, must take place immediately following the deadline stipulated for the submission of bids by the procuring entity when advertising the contract (section 30 of the Public Procurement Act). Open competitive bidding is expressly prescribed by section 16 of the Act, which deals with fundamental principles for procurements. The section also provides that a requirement for one bidder shall apply equally to all bidders. The Act contains provisions designed to foster competition among various procurement entities.

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

Yes. The Public Procurement Act requires that procurement entities must be impartial and free from the influence of any contractor or third party.

17 How are conflicts of interest dealt with?

The Public Procurement Act defines a conflict of interest to include a situation where a person possesses a direct or indirect interest in or relationship with a bidder, supplier, contractor or service provider that may be implied or construed to make, or make possible, a personal gain to that person, because of the person's ability to influence dealings (section 12(b) of the Public Procurement Act). The Act goes further in stating that where a potential conflict exists, the person in question must declare it to the authorities, and remedial action may be taken (sections 10 and 11 of the Act). Further, a person involved in the disposal of assets shall not, either by a third party or by himself or herself, be interested in any manner in buying those assets directly or indirectly, and shall not have or obtain any type of advantage or revenue from the disposal of such assets for a period of three years after the disposal. Contravening any of these provisions amounts to the commission of an offence under the Act, punishable by up to five years' imprisonment without the option of a fine.

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

Under the Public Procurement Act, there is no provision for a bidder to be involved in the drafting of tender documents. In addition, the Act does not envisage a situation where a procuring entity collaborates with a potential bidder in determining the specifications of a proposed procurement. It is safe to say that, typically, in practice, where a potential bidder is involved in discussing possible specifications, his or her participation in the bid would be prohibited.

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

The open competitive bidding method is the standard procedure adopted by contracting authorities in Nigeria. The other methods, such as the two-stage tendering process, the restricted tendering process, request for quotations, direct procurements and emergency procurements are the exceptions to the rule.

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

Generally, related bidders cannot submit separate bids in one procurement procedure. In the case of a request for quotations, which is an exception to the standard procurement procedure (see question 19), the Public Procurement Act expressly provides that quotations shall be obtained from at least three unrelated contractors.

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

The procedures under the Public Procurement Act that involve negotiations with bidders are the two-stage tendering process and the restricted tendering process. The conditions that may give rise to the application of these processes include, in the case of the restricted tendering process, circumstances where:

- the goods, works or services are available only from a limited number of suppliers or contractors;
- 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; or
- the procedure is used as an exception rather than the norm.

In the case of the two-stage tendering process, the following conditions may give rise to its application:

- where it is not feasible for the procuring entity to formulate detailed specifications for the goods or works involved in the procurement;
- where the procuring entity seeks tenders, proposals or offers on various means of meeting its needs in order to obtain the most satisfactory solution to its procurement needs;
- where the nature of the goods or works is subject to rapid technological advances;
- where the procuring entity seeks to enter into a contract for research, experiment, study or development purposes;
- where the procuring entity applies the Act to procurement concerned with national security and determines that the selected method is the most appropriate method of procurement; or

Update and trends

The National Assembly of the Federal Republic of Nigeria is in the process of amending the principal legislation governing public procurement, in the form of the Public Procurement Act (amendment) bill, which has passed a third reading in the Senate. The bill has five sections, dealing largely with preferential treatment for local manufacturers, and speedier procurement processes. It also seeks to make procurements for national security and defence subject to the provisions of the public procurement system, as is not currently the case (unless the President's approval is obtained). The scope of public procurement will be considerably widened when the bill is passed into law. Finally, the applicability of the Public Procurement Act will, by the amendment, be made subject to the provisions of the Infrastructure Concession Regulatory Commission Act, which regulates public private partnerships in Nigeria.

- where the standard tender proceedings have been utilised but were not successful or the tenders were rejected by the procuring entity and the procuring entity considers that engaging in new tendering proceedings will not result in a procurement contract (section 39 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?

At the time of writing, no particular procedure is used more regularly than the other.

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

Nigerian public procurement law does not feature a framework agreement.

24 May a framework agreement with several suppliers be concluded?

See question 23.

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

Bidding consortia are not expressly recognised in the Public Procurement Act. However, it is not uncommon for consortia to be formed for privatisatons of public enterprises. There are, however, no provisions in the relevant legislation for the changing of members of consortia in the course of privatisation exercises.

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 regulations provide that contracts shall not be split into smaller units in order to avoid competitive bidding or be distributed among various lots to different bidders to enlarge bidder participation at the cost of lesser economy and efficiency (Regulation 39 of the Public Procurement Goods and Works Regulations). Thus, whenever splitting the contract in question into smaller units or lots would result in reduced efficiency, the regulations forbid it. However, in practice, certain agencies do advertise and award contracts in lots. The relative acceptance of, or non-challenge to, these proceedings could raise the presumption that the award did not in fact result in reduced economy or efficiency. There are, however, no rules generally limiting the number of lots single bidders may be awarded, but such limits are not uncommonly included in instructions to bidders.

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

There are no provisions for the admissibility of variant bids in Nigerian public procurement. Generally, bidders must respond to invitations in the terms specified in the notices issued by the procurement entities. Such notices do not as a rule include the option of submitting variant bids.

28 Must a contracting authority take variant bids into account?

See question 27.

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

There is no leeway under the Public Procurement Act and subsidiary legislation for bidders to change tender specifications or to submit their own standard terms of business. The Act expressly provides that the criteria stipulated as the basis upon which suppliers or contractors would be evaluated shall not be changed in the course of any procurement proceeding (section 16(15) of the Public Procurement Act). An attempt to submit its own terms of business or to change tender specifications would likely result in a bidder being disqualified.

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

The law is to the effect that the contract will be awarded in favour of the lowest evaluated responsive bid from the bidders substantially responsive to the bid solicitation (section 16(17) of the Public Procurement Act). As this standard is specifically provided in the Act, the contracting authorities have no room to determine criteria outside of this.

31 What constitutes an 'abnormally low' bid?

There is no provision for an abnormally low bid in the Public Procurement Act.

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

See question 31.

Review proceedings

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

The authorities empowered under the Act to rule on review applications are the accounting officer of the procuring entity and the BPP. As discussed in question 38, a complaint regarding a particular procurement process must first be made to the accounting officer of the entity concerned. Where the complainant is unsatisfied with the decision of the accounting officer, a further complaint may be made to the BPP. It is only when these procedures have been exhausted that the complainant may approach the Federal High Court, which has jurisdiction to entertain matters arising out of the operations of the Public Procurement Act (section 54 (7) of the Act), as in the case of *AC Egbe Nig Limited v Director General of the Bureau of Public Procurement & four others*. An action brought before the Federal High Court would constitute an appeal against the review decision of the BPP.

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

As indicated above, the authorities do not rule on review applications simultaneously and thus a remedy granted by an authority such as the BPP, for instance, would not arise if the decision of the accounting officer of the procurement entity satisfactorily dispensed with the application. The remedy of a higher reviewing authority may well be different from that delivered by an authority lower in the chain of review.

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

The accounting officer of the procurement entity concerned has 15 working days from the time of submission of the complaint to render a decision in writing. If the accounting officer's decision is unsatisfactory, the bidder may make a further complaint to the BPP, which must make a decision within 21 working days of receiving the subsequent complaint (section 54(6) of the Public Procurement Act). As stated above, it is only when these two processes have been exhausted that the bidder may appeal to the Federal High Court.

Thus, the administrative review procedure can take between 15 and 37 working days to resolve. The judicial review process that is undertaken by the Federal High Court is another matter, however. From experience, a case may be heard and dispensed with by the Federal High Court within one year (*AC Egbe Nig Limited v Director General of the Bureau of Public Procurement & four others*).

36 What are the admissibility requirements?

A bidder in a particular procurement process may seek an administrative review for any omission or breach by a procuring or disposing entity, of the provisions of the Public Procurement Act, of any regulations or guidelines made under the Act, or of the provisions of the relevant bidding documents. Once a company or individual is involved in the procurement exercise, he or she would be entitled to request an administrative review of the process where any infraction is alleged.

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

Section 54(1) of the Act deals with administrative review of procurement proceedings and is unclear as to the time limit within which an application for review must be made by an interested party. The section provides that a complaint should be made within 15 working days from the date the bidder first became aware of the circumstances giving rise to the complaint or should have become aware of such circumstances (whichever is earlier). The Complaints Procedure Manual issued by the Bureau of Public Procurement, however, expressly states that the complaint should be made within 15 working days from the time the bidder became aware of the irregularity or breach.

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 of a procurement process made to the accounting officer of the entity concerned does not automatically block the continuation of the procurement or contract award. However, if the accounting officer so determines, following the complaint by a bidder, he or she may compel corrective measures to be taken, including the suspension of the procurement proceedings where he or she deems it necessary, giving reasons for his or her decision. On the other hand, where the complainant is dissatisfied with the decision of the accounting officer and lodges a further complaint with the BPP, the BPP must suspend further action on the procurement while it arrives at its own decision on the matter (section 54(3) of the Public Procurement Act).

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

Applications for the lifting of automatic suspension of procurement proceedings are not provided for under the Act, the Regulations made thereunder or under the BPP's Complaints Procedure. The BPP may, however, lift a suspension of procurement proceedings where it has taken a decision regarding a complaint. The BPP is also empowered to nullify the whole or part of the entire procurement proceedings as part of its decision.

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

There is no requirement that unsuccessful bidders be notified before conclusion of the contract with the successful bidder.

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

Section 19 of the Act provides to the effect that losing bidders in a particular procurement exercise may request a briefing on the procurement. In such a case, the procurement entity involved shall deliver the briefing to the applicant. Beyond this, the Public Procurement Act provides in section 38 that every procurement entity shall maintain a record of comprehensive procurement proceedings, which shall, upon request, be made available to any contractor that participated in the procurement.

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

Data on the number of review applications from June 2015 until the time of writing are currently unavailable. However, from January to June 2015, 217 complaints (an average of about 36 per month) were treated by the BPP regarding procurement exercises conducted by various ministries, departments and agencies of the government. This does not take into account complaints that were settled at the level of the procurement entity involved and were not, therefore, escalated to the BPP. Thus, disadvantaged bidders commonly tend to file review applications with respect to procurements undertaken in Nigeria.

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

The usual remedy would be for an injunction preventing the winner of the contract from proceeding with its execution. There could also be a mandatory injunction or a claim for mandamus to compel proper conduct of procurement proceedings. A claim for damages might be difficult to establish, as there is no guarantee that a disadvantaged bidder involved in a bid with several other bidders would have won 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?

Yes. By virtue of the Public Procurement Act's fundamental principles for procurements, the BPP may direct, even after the award of a contract, either that the procurement proceedings be entirely cancelled or that the procuring entity conduct a retender (section 16(19) of the Act). This would arise where the award in question violated the requirement of awarding the contract to the lowest evaluated responsive bidder, under section 16(17).

Ekwueme, Ekwueme & Ekwueme

Chike Ekwueme **chike@ekwueme.com**

Second Floor, Foresight House
163/165 Broad Street
Lagos
Nigeria

Tel: +234 818 172 1138
www.ekwueme.com

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

Legal protection is afforded to the party in question seeking redress in a court of law alleging the contravention of the provisions of the Public Procurement Act. In practice, the BPP publishes contracts that are awarded and where the Act and regulations made thereunder were not followed in such awards, any interested party may challenge the award. The Act not only provides for members of the public to be present at procurement proceedings, but also provides that certain procurement records shall be open to inspection by the public. Thus, an environment is created whereby the public, including interested contractors, are entitled to know what transpires with respect to procurements and contract awards generally.

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 will be assessed at different phases, the first being at the level of the procurement entity involved. At this stage, the costs will include fees for receiving instructions, reviewing the bid documentation, and analysing the facts against the provisions of the Act and extant regulations – which would normally result in the provision of a preliminary legal opinion. The legal fees applicable at this stage include the time taken to compose, submit and follow up the application at the relevant public entity. The value of the contract in contemplation would invariably be an additional important factor in billing in this regard. Without taking the contract value into account, however, the legal cost of challenging a procurement proceeding at the level of the contracting entity ranges from 1 million to 2.5 million naira and could increase to 3.5 million naira if the complaint is escalated to the Bureau of Public Procurement. Were the matter to proceed to litigation, the value of the contract in question would play an even greater part in determining the legal fees chargeable. Leaving this aside, legal costs of between 3 and 5 million naira should be budgeted for.

Norway

Trygve Olavson Laake
Difi – Agency for Public Management and eGovernment

Legislative framework

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, EU directives in accordance with Norway's obligations under the EEA Agreement. 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 2017, No. 73 (LOV-2016-06-17-73); 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.

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 Public Procurement 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 European Union (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 Security Act of 20 March 1988, No. 10.

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.

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 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 1.1 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. Furthermore, contracting authorities shall comply with the basic principles of competition, equal treatment, non-discrimination on the basis of nationality, transparency, accountability and proportionality. It is possible to publish voluntary simple notices for contracts of low value on Doffin. 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 1.1 million kroner for central government contracts, and 1.75 million kroner (excluding VAT) for other contracting authorities subject to the Public Procurement Regulation, and 3.5 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.

4 Are there proposals to change the legislation?

The Storting decided in 2016 that the government should introduce a requirement that environmental criteria should carry a weight of 30 per cent, where appropriate. Against this background, the Ministry of Trade, Industry and Fisheries has submitted for hearing a proposal to amend the public procurement regulations, requiring public entities to minimise the environmental impact of public procurement.

Applicability of procurement law

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 confirms and sums up 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.

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 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 the ESA granted an exemption for contracts intended to enable the following services to be carried out in Norway and in particular on the Norwegian Continental Shelf: (i) exploration for crude oil and natural gas; (ii) production of crude oil; and (iii) production of natural gas.

By its decision of 6 July 2005 the ESA granted an exemption for certain postal services. This decision is no longer relevant after the entry into force of the legislation implementing the new directives.

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 of course still be subject of internal instructions, policies or routines on finance, purchasing, good governance, etc, establishing similar principles and procedures.

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 case of a change of contractor as a consequence of corporate restructuring or insolvency, provided it does not entail substantial modifications and is not aimed at circumventing the procurement rules; and
- in case of other amendments which 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 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, and after a detailed assessment of the facts of the case, 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.

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 its decision of 18 August 2008 (Case 2008/37), the KOFA dealt with a case where the contractor, after having been awarded the contract, wanted to cancel due to lack of personnel. This was not accepted by the contracting authority. Instead it accepted that the contract was transferred to the 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 again 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 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 (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, the special circumstances taken into account. The contracts were long-term, up to 20 years, and implied significant investments. The contracts were continued on the same conditions as before. Personnel and equipment were 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.

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.)

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

PPPs are considered to require a procurement procedure in accordance with the procurement legislation where the 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

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the Doffin, the Norwegian national database for public procurement, which will forward notices for publication in TED where relevant.

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 as regards the possibility to limit 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.

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 directives in respect of 'self-cleaning' measures to avoid exclusion have been implemented in the new procurement legislation. The Public Procurement Regulation provides that a contracting authority may not exclude a contractor who can prove that the following measures have been taken, demonstrating required integrity:

- payment of compensation for any damage caused;
- active cooperation with relevant authorities in order to clarify facts and circumstances;
- appropriate technical, organisational and personnel measures to prevent repeated offences.

As far back as January 2011 the Ministry of Trade, Industry and Fisheries published a 21-page letter providing 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 Court of Justice of the European Union (CJEU), 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, pp. 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.

In its decision of 3 March 2013 (Case 2011/206), the KOFA found that the chosen contractor should instead have been excluded due to identification with an employee responsible for providing the services who had been sentenced for corruption and who had a key role with 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 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.

The procurement procedures

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.

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 of the Act on Public Administration regarding conflict of interest also apply in public procurement. Although the regulations do not explicitly require the contracting authority to be independent and impartial, these principles apply implicitly, in accordance with general principles of good governance and administration.

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 he or she is employed by the contracting authority, 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 shall be given a strict interpretation in competitive situations.

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 kind of 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.

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

The new legislation entered into force on 1 January 2017. The impression is that the majority of published contract notices above the EU/EEA thresholds still indicate the use of the open tender 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.

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

The procurement regulations implement the EU directives as regards 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).

As regards 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?

The trend, taking into account that new legislation entered into force on 1 January 2017, seems to be that the competitive procedure with prior publication of a call for competition is more regularly used, most probably because it does not require as many resources and skills as competitive dialogue or innovation partnerships.

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.

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. Inter alia, 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.

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 below 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 below 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 use of the voluntary ('simplified') notice is encouraged by the Ministry of Trade, Industry and Fisheries in its letter dated 14 March 2017, following up on previous similar policy measures. Furthermore, the Ministry urged contracting authorities to consider division into lots, to make use of proportionate requirements, and to use balanced standard contracts.

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, which 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.

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, inter alia in the form of its 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.

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 as regards 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 the contracting authority an unrestricted freedom of choice as regards the award of the contract to a bidder. Award criteria should not include criteria that are not aimed at identifying the bid that is economically the most advantageous, but are instead essentially linked to the evaluation of the bidders' ability to perform the contract in question.

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 a bid could be rejected if the low price indicated a risk of low quality, or implied a risk of non-performance.

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 which 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 not compliant with its requirement that prices for work on basis of time and material should reflect actual costs and that hourly prices should include mark-up covering indirect costs, risk and profit. Some of these cost items had been priced at 1 krone and others were priced much too high. The KOFA accepted the purpose of avoiding tactical pricing. It noted, however, that this could result in unnecessary high prices, and could prevent an economic operator who would be willing to price low in order to enter the market. In this particular case the KOFA found that the price format was transparent and the affected cost items of limited value. Thus, the requirement was legal and the rejection was accepted.

Review proceedings

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 CJEU case law (joined cases C-20/01 and C-28/01, *Commission v Germany*) and the infringement policy adopted by the European 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 claims that Kristiansand: (i) failed to publish an EEA-wide contract notice; (ii) did not respect the minimum time limit for the submission of applications in an award procedure; and (iii) incorrectly described the subject matter of the public contract by failing to use the correct CPV codes. The ESA considered that the subject matter of the contract was a 'works concession', while Norway maintained that it constituted a 'service concession', 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.

Although not 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 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.

Update and trends

The Ministry is to start working on a white paper on public procurement, which is expected to be published in the first half of 2018.

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 contract. 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.

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, the case will be given priority. Statistics show that on average, priority cases took two months (62 days) in 2016, and other cases took four months (114 days). Because illegal direct award cases are quite demanding, case handling time is expected to increase.

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 procurement rules are enforced by the ordinary courts. 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.

As regards an application for damages, the statute of limitations (normally three years) applies.

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.

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).

As regards 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.

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.

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, etc, 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.

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 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.

The KOFA began operating in 2003. Since then, the complaints received have been as follows:

Year	Number of complaints
2003	268
2004	287
2005	287
2006	158
2007	155
2008	224
2009	287
2010	396
2011	331
2012	234
2013	143
2014	131
2015	140
2016	194

The drop in complaints in 2006 is probably due to the decision to raise the threshold for the national procedures from 200,000 kroner to 500,000 kroner. Likewise, a fee increase implemented on 1 July 2012 is likely to have had an effect on the decrease in that year.

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 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.

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, that is 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.

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.

difi Agency for Public Management and eGovernment

Trygve Olavson Laake **trygve.laake@difi.no**

PO Box 8115 Dep
0032 Oslo
Norway

Tel: +47 22 45 10 00
www.difi.no

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. However, the economic operator may claim compensation for costs incurred trying to stop the infringement.

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, parties are represented by lawyers. Legal costs may vary considerably. The main rule is that the losing party has to 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 has to 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 the parties are represented by lawyers, the costs are normally much lower than in court cases (ie, due to the written procedure). The parties cover their own costs.

Poland

Tomasz Zalewski
Wierzbowski Eversheds Sutherland

Legislative framework

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

The Polish legislation framework regulating the award of public contracts consists of EU law and the 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 2015 on the average exchange rate of the zloty to the euro constituting the basis for calculating the value of a contract;
- Regulation of the President of the Council of Ministers of 28 December 2015 on the thresholds of contracts and design contests that require the dispatch of a notice to the Publications Office of the European Union;
- 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;
- Regulation of the President of the Council of Ministers of 22 March 2010 on the rules of procedure concerning the examination of appeals; 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.

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

The PPL regulates all types of public procurement, including the defence procurement and utility procurement. The PPL is supplemented by two acts regulating private–public partnership, 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 public–private partnership.

There are also a few examples of specific legislation that regulates the procedures leading to 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 award of contracts related to the construction of Polish nuclear power plants or in the case of tenders for waste management.

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 as procurements above the thresholds, though there are some differences (eg, notices are published in a special bulletin in Polish, an ESPD 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 Government Procurement Agreement (GPA). Polish awarding authorities must indicate in each procurement notice published in the Official Journal of the EU 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 European Union 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.

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 initial plan assumes preparation of the new law in 2017, however, it is unlikely that the whole legislative path will be completed before 2018.

Applicability of procurement law

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, 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, or 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.

There is only one European Commission decision regarding the Polish utility sector that grants an exemption under article 30 of Directive 2004/17: Commission Decision of 11 September 2008 establishing that article 30(1) of Directive 2004/17/EC is not applicable to the production and wholesale of electricity in Poland.

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:
- €135,000 – for supply and service contracts awarded by public finance sector entities;
- €209,000 – for supply and service contracts awarded by other public entities;
- €418,000 – for supply and service contracts awarded by awarding entities in the utility sector and the defence and security sector; and
- €5,225,000 – for construction works contracts awarded by any awarding entity.

The value of the contract is calculated as net value, without VAT.

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 2014/24 EU Directive.

According to article 144 of the PPL, the general principle is that any changes in the provisions of a concluded contract or framework agreement, as regards 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; and
  - 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;
- 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 as regards 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 would 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, there is no new case law on the scope of permitted amendments to the concluded contracts.

There is a lot of case law on the previous regulations in this area, however, it is no longer relevant as previous regulation was very restrictive and allowed only for insignificant amendments (as defined in the CJEU decision in C-454/06 pressetext), while 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.

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.

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

PPP is regulated by the Act of 19 December 2008 on Public–Private Partnership. 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 public–private partnership or mainly such right together with payment of a sum of money, then the selection of the private partner and the public–private partnership contract are governed by the Act on Concessions for Works or Services of 9 January 2009.

In other cases, the selection of the private partner and the public–private partnership contract are governed by the PPL (to the extent not regulated in PPP legislation).

Advertisement and selection

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, 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 Official Journal of the European Union.

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 Official Journal of the European Union or the Public Procurement Bulletin.

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 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 the 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 the bidders that meet the conditions for participation is greater than the one 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 fewer than the one specified in the contract notice, the awarding entity shall invite all contractors to submit their tenders.

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

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 the public procurement set out in the Directives (ie, fair competition, equal treatment of economic operators, proportionality and transparency).

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.

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 or acting member of its managing or supervisory body or its commercial proxy authorised to represent the contractor remain in relationships 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.

The conflict of interest is understood widely 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.

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, contract for specific work, 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.

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, the most popular type of the contract award procedure is open tendering.

In cases of procurement proceedings of a value exceeding the EU thresholds, the open tendering was used in 96.55 per cent of cases. Other procedures were used much more rarely: restricted tendering was used in 2.53 per cent of cases, negotiated procedure with publication in 0.27 per cent and contest in 0.15 per cent.

In cases of procurement proceedings of a value below the EU thresholds, the open tendering is even more popular and was used in 99.03 per cent of cases. Other procedures were used very rarely: restricted tendering in 0.55 per cent of cases, negotiated procedure with publication in 0.04 per cent, competitive dialogue in 0.01 per cent, electronic auction in 0.28 per cent and contest in 0.08 per cent.

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 day 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.

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

The procedures involving negotiations can be used only in specific situations. The competitive dialogue and the 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 no request for participation in the proceedings was 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 of 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 the 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 it 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 a control of the correctness of public procurement procedures.

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?

The 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 a 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 a 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.

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.

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 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, therefore the general rules of proportionality and equal treatment shall apply.

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.

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

Such bid shall be rejected as its content does not correspond with the content of the specification of the tender.

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 (i) the price; (ii) the cost; or (iii) 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 aftersales service, and technical assistance or terms of supply.

The 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 protocol to the procurement procedure how the life-cycle costs were taken into account in the description of the object of the contract.

Update and trends

There are some traditional topics that very often appear in the complaints filed by the contractors, for example:

- abnormally low tenders;
- reservation of non-disclosure of information that is considered a business secret of an enterprise;
- award criteria; and
- bid bonds submitted by consortia.

The recent changes in the PPL triggered the appearance of many trends. For example, there is ongoing discussion about the scope of the new basis for complaints in procurements below the EU threshold. There are many doubts in practice with the right of contractors to rely on the capacities of other entities. Also, the practice of using the European Standard Procurement Document has not settled down yet.

31 What constitutes an 'abnormally low' bid?

There is no legal definition of abnormally low bid. An abnormally low bid is a bid where the offered price or cost, or its significant components, appears to be abnormally low in relation to the object of the contract and gives rise to the awarding entity's doubts as to the possibilities 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 the explanations, 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 in 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

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.

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 take 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 a 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.

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.

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.

In case of rejecting the tenders, the information shall contain clarification of the reasons for which evidence presented by the contractor has been deemed insufficient by the awarding entity.

The information about the choice of the most advantageous tender must also be made available on a website of the awarding entity.

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.

The access may be in person or by sending a request to provide copies of selected documents.

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

Filing a review application happens very often. Every year the 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.

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 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.

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 when 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 publication of the information about it, the deadline for filing the complaint is prolonged up to six months from conclusion of the contract in case of procurement above the EU thresholds, or one month in other cases.

WIERZBOWSKI EVERSHEDS SUTHERLAND

Tomasz Zalewski **tomasz.zalewski@eversheds-sutherland.pl**

14/16A Jasna Street
00-041 Warsaw
Poland

Tel: +48 22 50 50 796
Fax: +48 22 50 50 701
www.eversheds-sutherland.pl

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 the type of subject of the procurement. The fee for a judicial complaint is from €17,800 to €23,800.

Portugal

Ana Marta Castro
Vieira de Almeida & Associados

Legislative framework

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 considered to be the key legislation regulating the award of public contracts. 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.

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 recently approved the Regional Legislative Decree 27/2015/A of 29 December, which consolidated in a sole diploma the main provisions referring to the award of public contracts in said autonomous region and has already transposed some provisions of the EU Directives on public procurement not yet transposed into the national framework.

Finally, a reference must be made to the new Administrative Procedure Code (APC), approved as an appendix to Decree-Law 4/2015 of 7 January, and also to the revisions introduced to the Administrative Courts Procedure Code (ACPC) and to the Statute of Administrative and Tax Courts by Decree-Law 214-G/2015 of 2 October, which are subsidiarily applicable to public procurement procedures in general.

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 EC Treaty, this Decree-Law also stipulates that some specific contracts are excluded from its scope of application.

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

Portugal is a European Union member and is also a signatory to the World Trade Organization's (WTO) Government Procurement Agreement (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.

4 Are there proposals to change the legislation?

Portugal has not yet transposed the new EU Directives on public procurement into the national framework although the transposal deadline expired in April 2016.

The government launched a public consultation of the draft legislation for the revision of the PCC during the second half of 2016. However, the final version of the revised PCC has not yet been approved.

Applicability of procurement law

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

The PCC has 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 – for example, 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 in article 2/1 of the PCC and it is composed of the traditional public sector (central, regional and local authorities). This group includes the Portuguese state, the autonomous regions, municipalities, public institutes, public foundations, public associations, as well as associations financed, for the most part, by the previous entities, or subject to management supervision of those authorities or bodies, or where the major part of the members of the administrative, managerial or supervisory board are, directly or indirectly, appointed by the mentioned entities.

The second group of entities is foreseen in article 2/2 of the PCC, and it is composed of bodies governed by public law, namely, entities with legal personality, independently of their public or private nature, 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, or subject to management supervision of those authorities or bodies, or having an administrative, managerial or supervisory board, where more than half of their 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 with legal personality, independently of their public or private nature, which 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, with an industrial or commercial character and operating in one of the utilities sector, over which any entity considered a traditional public entity or a body governed by public law may exercise directly or indirectly a dominant influence, including when holding the major part of the share capital or the major part of the voting rights, or holding the management supervision, or the right to appoint the major part of the members of the administrative, managerial or supervisory board;

(ii) entities with legal personality, independently of their public or private nature, not considered a traditional public entity nor a body governed by public law, holding special or exclusive rights that have not been granted within the scope of an internationally advertised competitive procedure, the effect of which is to limit the exercise of activities in the utilities sector, and that substantially affects the ability of other entities to carry out such activity; and
(iii) entities that were exclusively incorporated by the entities referred to in (i) and (ii), or financed by the same, for the most part, or 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 same, 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.

Finally, 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.

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

Relevant thresholds, referring to the value net of VAT, differ depending on the contracting authority at stake, 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 law 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.

For entities pertaining to the traditional public sector or that are considered bodies governed by public law, the threshold for public service contracts, leasing contracts or public supply is €75,000; for public works contracts, the threshold is €150,000; and for other type of contracts the threshold is €100,000.

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 threshold for public service contracts, leasing contracts or public supply is €418,000; for public works contracts the threshold is €5.225 million; and for service contracts for social and other specific services the threshold is €1 million.

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.

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 have changed in an abnormal and unpredictable way and the new obligations arising for the contractor would seriously increase the risks assumed by said contractor in 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).

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.

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 (as amended)), the Law regarding the disposal of shares held by public shareholders, approved by Law 71/88 of 24 May (Law 71/88), subsequently regulated by Decree-Law 328/88 of 27 September, amended by Decree-Law 290/89 of 2 September and the Framework Law on Privatisations, approved by Law 11/90 of 5 April, and amended by Law 102/2003 of 15 November, and Law 50/2011 of 13 September (Law 11/90).

Law 71/88 applies to regular privatisation procedures while Law 11/90 is a specific legal regime applicable to the so-called reprivatisation procedures. The latter exclusively regulates the (re)privatisation processes of companies, nationalised after the end of the Portuguese dictatorial regime, which will return to private ownership.

Under Law 71/88, with few exceptions specifically foreseen, the privatisation can be held through a public tender or an IPO, in case the sale is of a majority shareholding and the value of the company is greater than a certain threshold, reviewed on an annual basis, which 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.

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

See question 1.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the National Gazette, *Diário da República*, and in the Official Journal of the European Union (OJEU).

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 the ones foreseen in the EU Directives on public procurement, 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 are not permitted to evaluate the 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 referred 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.

To ensure the assessment of the financial capability of economic operators, the PCC stipulates a minimum economic criterion based on a specific mathematic formula, which is based on the estimated value of the contract and is mandatory for certain 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 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', provided that bidders demonstrate they comply with all the minimum qualitative selection criteria established, they will be invited to the second stage of the tender.

Under the simple system, the PCC also establishes an alternative way for bidders to demonstrate their financial and economic capability, other than the mathematic formula referred in the previous question. PCC stipulates that bidders may alternatively submit a specific bank declaration or, in case of a consortium, a simple declaration stating that one of its members is a bank established in the European Union.

In accordance with the second system for the qualification of bidders, the 'selection' system, the economic operators are evaluated based on their economic and financial standing as well as on their technical capability to carry out the contract and solely the best 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.

Finally, 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.

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 it is specifically foreseen in the new EU Directives on public procurement, is not yet established under the Portuguese legal framework since said Directives have not yet been transposed.

Economic operators that fall within any of the exclusion situations foreseen in the PCC have to wait for the lifting of the respective sanctions.

The procurement procedures

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

Yes. PCC states that the fundamental principles for tender procedures are the principles of transparency, equal treatment and competition.

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 refered to in question 15. Moreover, the APC, which subsidiarily applies to the PCC and to contracting authorities in general, foresees two 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 directly or indirectly a personal interest in the outcome of such procedure); and situations under which members of contracting authorities are able to ask, in specific situations, for non-intervention in a certain procedure with the purpose of not raising any doubt about the impartiality of the decisions to be taken therein.

17 How are conflicts of interest dealt with?

See question 16.

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, exclusion will happen exclusively in situations under which such intervention is considered to have conferred advantages to such bidder and prejudices competition.

Although a change in the wording of said provision has been introduced in the revision of the PCC, time will tell how judicial courts will deal with this kind of intervention of bidders in the preparation of tender procedures.

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.

For competitive procurement procedures, the prevailing type is the public tender.

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 bidders.

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.

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

The use of procedures involving negotiation with bidders in Portugal is limited to certain specific circumstances.

The procedure with a negotiation phase that is less common is the competitive dialogue, in which contracting authorities conduct a dialogue with the candidates admitted to such procedure aiming to contribute to the development of a suitable solution capable of meeting the pre-established requirements of the contracting authority. Based on that dialogue, all admitted candidates are invited to tender in the following phase.

A competitive dialogue may only be launched in situations of particularly complex contracts, which may not be awarded through the typical public procurement procedures – the public tender or the limited tender with prior qualification.

Another procedure that allows for a negotiation stage is the negotiation procedure, which in terms of phases and organisation is similar to limited tenders with prior qualification. This procedure can be launched for the award of public works or service concession contracts and for the memorandum and articles of association, independently of the value of the contract at stake.

This procedure may also be launched for public works contracts, public supply contracts, public service contracts and leasing contracts:

- when no tenders or no suitable tenders or no applications have been submitted in response to a public tender or a limited tender with prior qualification;
- for situations in which it is impossible to pre-establish an estimated value of the contract to be awarded;
- for public works contracts for investigation purposes;
- when it is impossible to pre-establish objective evaluation criteria for the supply of intellectual or financial services; and
- for contracts that may be preceded by a public tender or a limited tender with prior qualification without an announcement published at the OJEU.

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.

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

The PCC allows for two different types of framework agreements: with a single supplier or with several suppliers.

The conclusion of a framework agreement is usually preceded by a public tender or a limited tender with prior qualification since those procurement procedures do not have any threshold. On the contrary, if a framework agreement is executed through a direct award, 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 concluded with several suppliers. In that case, the award of contracts under such 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 shall be awarded within the limits of the terms laid down in the framework agreement. Those terms have to have been sufficiently specified in the procurement procedure that preceded the execution of the framework agreement under which they were evaluated.

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.

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?

PCC has no specific rule or mechanism that would further the participation of small and medium-sized enterprises, but those rules and mechanisms are expected to be implemented with the transposition of the EU Directives on public procurement.

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 authorises its submission.

28 Must a contracting authority take variant bids into account?

See question 27.

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.

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

There are two award criteria provided in the PCC, 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, namely 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.

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.

Provided that the contracting authority has stipulated in the tender specifications any estimated value for the contract, the PCC stipulates that a tender will be considered as an abnormally low bid in case the proposed price is 40 per cent lower than the estimated price in case of public works contracts or 50 per cent lower than the estimated price in case of any other contract.

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 percentages criteria foreseen in the PCC, that bidder must submit with its offer a declaration with the grounds for the submission of said price.

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

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.

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 has to 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, 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 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.

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 Administrative Courts Procedure Code, 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.

In what concerns 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.

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.

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 have to demonstrate a legitimate interest in having access to such documents and information.

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

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

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 the cases in which judicial decisions determine the cancelation of an executed contract, contracting authorities usually appeal of such decisions and when final and non-appealable decisions are finally issued contracts are almost completed.

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.

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

The filing of an application for the review of a procurement decision usually costs around €200.

VIEIRA DE ALMEIDA

Ana Marta Castro **cma@vda.pt**

Av Duarte Pacheco, no. 26
1070-110 Lisbon
Portugal

Tel: + 351 21 311 34 61
www.vda.pt

Romania

Alexandru Ambrozie and Ramona Pentilescu

Popovici Nițu Stoica & Asociații

Legislative framework

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

The main legal framework applicable to public procurement contracts consists of:

- Law No. 98/2016 on public procurements (Law No. 98/2016);
- Government Decision No. 395/2016 on the approval of application rules of the legal provisions regarding the award of the public procurement contract/framework agreement regulated by Law No. 98/2016 on public procurements (GD No. 395/2016); and
- Law No. 101/2016 on remedies and appeals regarding the award of public procurement contracts, sectorial contracts and works and services concession contracts, as well as for the organisation and functioning of the National Council for Solving Complaints (the NCSC).

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

The legal framework applicable to public procurement contracts is supplemented by the following legislation, regulating the other types of public contracts:

- Law No. 100/2016 on the concession of works and services (Law No. 100/2016);
- Law No. 99/2016 on the sectorial (utilities) procurement (Law No. 99/2016);
- Law No. 233/2016 on the public-private partnership (Law No. 233/2016); and
- Government Ordinance No. 114/2011 on the award of certain public procurement contracts in the field of defence and security (GO No. 114/2011).

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

The relevant legislation adopted for public procurement contracts, as well as for utilities, concession and remedies, mostly supplements the new EU procurement directives in what concerns the regulation of remedy procedures.

4 Are there proposals to change the legislation?

The relevant legislation adopted for public procurement contracts, as well as for utilities, concession and remedies, has been recently adopted (May 2016) and is in line with the new EU public procurement directives, namely 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 2014/24); 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 2014/25); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Directive 2014/23).

Consequently, new substantial amendments to the legal framework are not expected in the near future. However, tertiary legislation might be adopted in order to provide interpretation or detailed rules for the implementation of some legal provisions.

Applicability of procurement law

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

In principle, a private entity, including privatised former public companies, is not considered to be a contracting authority. However, a private entity might be subject to public procurement legislation for the award of certain contracts, in the conditions regulated by Law No. 98/2016 (ie, if it receives financing for more than 50 per cent of the value of a certain contract and the value of such contract is situated above the thresholds applicable to public procurement contracts).

Any new entity in a utility sector must apply Law No. 99/2016 for the award of contracts related to the deployment of the relevant utility activity. National legislation provides for the exemption regulated by article 34 of Directive 2014/25, regulating that Law No. 99/2016 shall not apply if the relevant activity for which the contract is to be awarded is exposed directly to competition on a market with unrestricted access. Such circumstances shall be ascertained by the European Commission at the request of the interested party, which shall submit written notification in this respect.

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

The awarding procedures regulated by Law No. 98/2016 are applicable when the value of the contracts to be awarded is situated under the following thresholds:

- 23,227,215 lei – for works public procurement contracts or framework agreements;
- 600,129 lei – for services or supply public procurement contracts or framework agreements; and
- 3,334,050 lei – for works public procurement contracts or framework agreements concerning social services or other services presented in Annex 2 to the law (ie, health, legal, social security services).

Under these thresholds, the contracting authority shall implement a simplified awarding procedure regulated by GD No. 395/2016, with the observance of the general principles for a awarding the public procurement contract.

A contracting authority may award directly product and services contracts if the estimated value is under 132,519 lei, and works contracts if the estimated value is under 441,730 lei.

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

The new public procurement legislation regulates the following cases when the amendment of a concluded contract may be done without a new procurement procedure:

- when the amendments, regardless if they are valuable in money or not and regardless of their value, have been provided in the initial award documentation throughout clear, precise and unequivocal reviewing clauses, such as price review clauses or any other options;
- when the initial contractor is replaced by a new contractor (this could be done only in certain circumstances, expressly provided by the law, namely, as the reorganisation of the initial contractor leading to a new entity, or the case when the option to replace the initial contractor has been provided in the initial award documentation);

- when the amendments, regardless of their value, are not substantial (the law providing for express criteria to determine the substantial nature of an amendment); and
- when the following conditions are cumulatively met:
  - the value of the amendments is lower than the thresholds provided by the law; and
  - the value of the amendments is less than 10 per cent of the contract's initial price in the case of supply and services contracts and less than 15 per cent of the contract's initial price in the case of works contracts.

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

As the legal framework has recently been adopted, no relevant case law in this respect has been noticed so far.

9 In which circumstances do privatisations require a procurement procedure?

The privatisation procedures do not fall under the public procurement legislation. The privatisation procedures are subject to special regulations (Law No. 137/2002 on certain measures for the acceleration of the privatisation process) distinct from the public procurement framework and do not require a procurement procedure to be followed.

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

The public-private partnership is subject to special regulations (Law 233/2016 on public-private partnerships) distinct from the public procurement framework and do not require a public procurement procedure. Law No. 233/2016 on public-private partnerships, however, sets forth special award procedures of the public partnership contract, which resemble in character and scope of the public procurement procedures.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

Public procurement procedures announcements, award notices, as well as all communications related to public procurement procedures are to be published in an integrated public procurement informatic system – SEAP (the Electronic System for Public Procurements). Also, most contracting authorities publish such announcements on their websites.

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 law specifically regulates the criteria and conditions that a contracting authority may set for the qualification of an economical operator to a public procurement procedure. Such criteria and conditions may refer only to:

- exclusion grounds, as regulated by the law; and
- the capacity criteria of the economical operator (legal capacity to perform, economic and financial capacity, technical and professional capacity).

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

In certain public procurement procedures – such as restricted procedure, competitive dialogue, competitive procedure with negotiation, innovation partnership – the numbers of bidders may be limited throughout a prior selection procedure.

The numbers of bidders qualified to be invited to submit an offer after the selection procedure must be expressly provided in the award documentation and shall not be fewer than three candidates, for competitive dialogue, competitive procedure with negotiation, innovation partnership, and five candidates in the case of the restricted procedure.

The contracting authorities shall invite a number of candidates at least equal to the minimum number. However, where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities. In the context of the same procedure, the contracting authority shall not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

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?

If any of the exclusion criteria regulated by the law (ie, criminal convictions, grave professional misconduct) apply to a bidder, such bidder may provide evidence of undertaking the necessary measures for proving its credibility in relation to the applicable exclusion criteria.

In this respect, a bidder could provide proof 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 contracting authority shall analyse the proof provided by the bidder and, if it considers such proof to be sufficient, may decide not to exclude the bidder from the procedure. However, a bidder which has been excluded from participating in public procurement or concession award procedures by a final judgement of a court of law shall not be entitled to make use of the possibility to self-clean its credibility during the period of exclusion resulting from that judgment, if such judgement is enforceable in Romania.

The procurement procedures

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

Law No. 98/2016 provides that: (i) its purpose is to ensure the legal framework for the procurement of goods, services and works, with economic and social efficiency: and that (ii) the award of public procurements contract and of design contests shall be made according to the following principles: non-discrimination, equal treatment, mutual recognition, transparency and undertaking of liability.

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

Law No. 98/2016 expressly provides that the contracting authority shall elaborate the award documentation such as to ensure unrestricted access to the procedure to all potential bidders. Also, the law specifically provides that a contracting authority may not, in any way, favour or create unfair advantages to a specific bidder, the principle of equal treatment being applicable all throughout the procedure.

17 How are conflicts of interest dealt with?

The law specifically regulates the cases that are considered to have a conflict of interests and also provides for the obligation of the contracting authority to undertake, all throughout the procedure, all measures in order to prevent, identify and remedy any potential conflict of interest, so as not to obstruct competition and to ensure equal treatment for all bidders.

One example of a conflict of interests is a situation in which members of the contracting authority staff or of any service provider that acts in the name of the contracting authority that are implicated in the implementation of the public procurement procedure or that can influence its result have, directly or indirectly, a financial, economic or personal interest, that might compromise their impartiality or independence.

The law regulates also some examples of potential conflict of interest situation, such as:

- participation to the offers/participation requests control/evaluation process of persons who own social parts or interests, shares to the capital of a bidder or candidate, third sustaining party, proposed subcontractor, or persons from the administration board, management or supervisory body of one of the bidders or candidates, third sustaining party or proposed subcontractor;

- participation to the offers/participation requests control/evaluation process of a person who is a spouse, relative or affiliate, up to the second degree inclusively, with persons from the administration board, management or supervisory body of one of the bidders or candidates, third sustaining party or proposed subcontractor;
- participation to the offers/participation requests control/evaluation process of a person regarding whom it is established or there are reasonable grounds or specific information that it might have a direct or indirect financial, economic or personal interest or any type of interest, or that it is in a position that might affect its impartiality and independence throughout the evaluation process;
- if the individual or associate bidder/candidate/proposed subcontractor/third sustaining party has members in the administration board/management or supervisory body or has significant shareholders or associates (ie, who have at least 10 per cent of the social capital or at least 10 per cent of votes) who are a spouse, relatives or affiliates, up to the second degree inclusively, or who are in commercial relationships with decision making persons from the contracting authority or with the procurement service supplier for that public procurement procedure; and
- when the bidder or candidate has nominated, amongst the main persons designated for the implementation of the contract, persons who are a spouse, relatives or affiliates, up to the second degree inclusively, or who are in commercial relationships with decision making persons from the contracting authority or with the procurement service supplier for that public procurement procedure.

The contracting authority must specify, in the award documentation, the names of the clerks that are to be involved in the decision process related to the procedure, in order to provide all information needed for a conflict check.

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

In principle any economic operator, including one that has participated in drafting the award documentation, may submit an offer. The contracting authority may exclude a bidder that has participated in drafting the award documentation only if its participation to the procedure has led to a distortion of competition and such distortion could not be remedied by less severe actions.

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

Contracting authority mostly use the open procedure. However, depending on the complexity of the contract to be awarded, other procedures are seldom used in practice also.

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

Related bidders are not expressly excluded from participation to public procurement procedures. However, the situation when either the same persons or persons that are spouse, relative or affiliate up to the second degree inclusively or have a personal, financial, economic or any other type of common interest hold a position in the management bodies of two or more bidders, is considered to be a sign of unfair competition agreements and might lead to exclusion from the procedure. In such a case, the contracting authority must request the opinion of the Competition Council before excluding a bidder.

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

Procedures involving negotiations with tenders may be used in the cases expressly regulated by Law No. 98/2016. Thus:

The contracting authority may use competitive procedure with negotiation or a competitive dialogue in the following situations:

- works, supplies or services fulfilling one or more of the following criteria:
  - the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - they 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; and
  - the 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 within the meaning of points 2 to 5 of Annex VII; and
- works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers that satisfy the qualification criteria set out in the award documentation and that, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

- where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
- where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
  - the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - competition is absent for technical reasons; and
  - the protection of exclusive rights, including intellectual property rights; and
- insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not, in any event, be attributable to the contracting authority.

The negotiated procedure without prior publication may be used for public supply contracts in the following cases:

- where the products involved are manufactured purely for the purpose of research, experimentation, study or development; however, contracts awarded pursuant to this point shall not include quantity production to establish commercial viability or to recover research and development costs;
- for additional deliveries by the original supplier that are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years;
- for supplies quoted and purchased on a commodity market; and
- for the purchase of supplies or services on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure.

The negotiated procedure without prior publication may be used for new works or services, if the following conditions are met:

- the award is made to the initial contractor and the works or services consist in the repetition of similar works or services that comply with the requirements of the initial award documentation;
- the estimated value of the initial contract was determined taking into consideration the value of the additional works or services;
- the option to award additional works or services from the winning bidder has been provided in the initial award documentation; and
- the negotiated procedure without prior publication is used within the three years following the conclusion of the initial 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?

The new legal framework has been in force for less that a year. Based on the old practices, we can assume that negotiated procedures involving a public notice shall be more frequently used than the negotiated procedure without prior publication.

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

The contracting authority may award a framework agreement, throughout the procedures regulated by Law No. 98/2016, for a period of maximum of four years (in exceptional cases, justified by the nature of the contract, for a longer period), to one or several suppliers or contractors.

Throughout the duration of the framework agreement, the contracting authority shall send purchase requests and shall award subsequent contracts having the same object or nature as the framework agreement.

The framework agreement does not constitute a firm obligation to buy the services,products or works. However, the contracting authority may not conclude, throughout the duration of the framework agreement, contracts having the same object as the framework agreement with any other economic operator than the one or ones to whom the framework agreement had been awarded.

24 May a framework agreement with several suppliers be concluded?

A framework agreement may be concluded with several suppliers, by any of the procedures regulated by law.

When a framework agreement is concluded with several suppliers, the subsequent contracts shall be awarded:

- Without reinitiating the competition between the economic operators to whom the framework agreement had been awarded. This procedure may be followed only when all the terms and conditions governing the subsequent contracts, as well as the terms establishing which one of the contractors shall be awarded a particular subsequent contract had been already established in the framework agreement.
- By reinitiating the competition between the economic operators to whom the framework agreement had been awarded when the specific terms for the award of a subsequent contract have not been set forth in the framework agreement.
- Partially, by either reinitiating or not initiating the competition, when such an option has been provided in the award documentation for the framework agreement and the framework agreement contains all terms and conditions for the execution of works, services or the supply of products it refers to.

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

The law does not expressly provide for this specific situation. However, based on common principles and the practice set out in the former legal framework, changing one of the members of a consortium during the procurement procedure may be interpreted as a change of the offer, leading to the rejection of the offer.

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 the former legal framework, small and medium-sized enterprises were granted reduction from participation and execution bonds. These advantages have been ruled out in the new legal framework.

However, Law No. 98/2016 sets out the rule that the award of a public procurement contract must be made by division into lots. If a contracting authority decides not divide the contract into lots, it has to justify its decision in this respect.

In the case where the procedure is divided into lots, the contracting authority shall provide in the award documentation if the offers may be submitted for only one, more or all lots. Even if an offer may be submitted to more or all lots, the contracting authority may limit the number of lots that may be awarded to the same bidder. The maximum number of lots to be awarded for the same bidder must be provided in the award documentation.

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

A contracting authority may allow or request variant bids only if this option has been expressly provided within the award documentation. In such a case, the award documentation must also provide for the minimum requirements or specific conditions when a variant offer may be submitted.

28 Must a contracting authority take variant bids into account?

A variant offer may be taken into account only of the option to submit such an offer has been expressly provided in the award documentation and the variant offer meets the minimum requirements provided in the award documentation.

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

The bidders may not change the tender specifications that are minimum and compulsory, but they may propose higher specifications.

The bidder's terms of business may be included in the offer, as proposal to amend the contractual clauses. However, the contracting authority may reject such terms if it considers them to be obviously detrimental. In such a case, the contracting authority shall inform the bidder that it does not agree with the proposal to amend the contractual clauses. If the bidder does not retract its proposal, its offer shall be rejected.

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

Contracting authorities shall base the award of public contracts on the most economically advantageous tender.

For the identification of the most economically advantageous tender, the contracting authority may apply the following criteria:

- the lowest price;
- the lowest cost;
- the best price-quality ratio; and
- the best cost-quality ratio.

The contracting authority may not apply the lowest price or cost criteria for the award of the following contracts:

- certain works or services contracts or framework agreements that have in their scope intellectual services and that imply high complexity activities; and
- certain works or services contracts or framework agreements that are awarded in relation to trans-European transport infrastructure projects or district roads.

31 What constitutes an 'abnormally low' bid?

The new public procurement framework does not provide criteria for determining 'abnormally low' bids, leaving this operation to the appreciation of the contracting authority.

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

Law No. 98/2016 provides for the obligation of a contracting authority to request clarifications on the price offered for any potential 'abnormally low' bid it identifies. Such clarification may include:

- economic grounds for the price, in respect to production process, services or building methods used;
- technical solution adopted or any other favourable conditions the bidder benefits from;
- originality of the works, services or products offered;
- the observance of the environment, social and labour rules and regulation;
- the observance of payment duties to subcontractors; and
- the possibility that the bidder benefits from state aid.

In case the clarifications submitted by the bidder do not justify the cost offered, the contracting authority shall reject the offer.

Review proceedings

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

Any decision of a contracting authority may be reviewed either directly before the courts of law, either by a specialised administrative body dedicated to solving complaints regarding the public procurement procedures – The NCSC.

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

Only one authority may rule on a specific review application on the same procedural stage and for the same decision of a contracting authority.

In case review applications of the same decision of a contracting authority are sent, either by the same plaintiff or by different plaintiffs, both to the court of law as well as to the NCSC, the review file shall be sent to the court of law.

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

Both administrative and judicial review proceedings are considered to be urgent proceedings and short terms are applicable in both jurisdictions.

The NCSC has to pass a decision on a complaint within 20 days of receipt of a complaint, when a full review is made, or 10 days of receipt of the review application when a procedural ground does not allow the application to be reviewed in full.

The court of law seized with a review application shall set the first hearing no later than 20 days of receipt of the review application. The subsequent hearings may not be set more than 15 days apart and the entire judicial proceeding may not last longer than 45 days.

36 What are the admissibility requirements?

Any injured person that considers his or her rights or legitimate interests have been injured by an act issued by a contracting authority or by failure to solve a request within the legal term may request the cancellation of the act, the compelling of the contracting authority to issue an act or to adopt remedy measures, the recognition of its right or legitimate interest, either in front of the NCSC or in front of a court of law.

Any economical operator that cumulatively fulfils the following conditions is considered to be an injured person:

- has or has had an interest regarding an award procedure; and
- has suffered, is suffering or may suffer a prejudice as result of an act issued by the contracting authority, which may have legal effects, or as a result of failure to solve a request within the legal term, regarding an award procedure.

Prior to entering an application review, an injured party must first send a prior notification to the contracting authority stating its demands. If the contracting authority does not answer to the prior notification or its answers are not considered satisfactory or complete, the injured person may submit a review application. If the prior notification procedure is not followed, the review application shall be dismissed as inadmissible.

The review application shall be made in writing and must contain specific elements provided by the law (ie, identification of the parties and of the award procedure, identification of the act deemed to be illegal, the legal and factual grounds for the review, any evidentiary proof). In case the review application is incomplete, the NCSC or the court of law may ask for the plaintiff to remedy it, under sanction of annulment of the application.

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

A review application may be submitted within:

- 10 days, if the estimated value of the public procurement procedure is equal or higher than the thresholds for publishing a notice in the Official Journal of the European Union (23,227,215 lei for works, 600,129 lei for products and services and 3,334,050 lei for social services and other specific services); or
- five days, if the estimated value of the public procurement procedure is lower than the thresholds for publishing a notice in the Official Journal of the European Union.

The terms are calculated either from the date the plaintiff has been informed of the contracting authority's reply to the prior notification (either a negative or a positive reply); or from the date that the legal term for replying to the prior notification has expired.

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 review does not automatically suspend the procedure but it automatically suspends the right of the contracting authority to conclude the public procurement contract until a decision of the NCSC or of the court of law – in first instance, is passed. The contract concluded without observing this suspension is null.

In all other cases, the interested person may request either by administrative or judicial procedure the suspension of the procedure if it proves a justifiable case and the necessity to prevent an imminent prejudice.

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

An automatic suspension of the procedure may not be lifted either by review application or any other means. It operates de jure.

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 bidders of the result of the procedure, as soon as possible, but no later than five days from the issues of its decision.

The communication regarding the result of the procedure must contain:

- for every rejected candidate, the reasons for rejecting its participation request;
- for every bidder that has submitted an unacceptable or non -compliant offer, the reasons sustaining the contracting authority's decision;
- for every bidder that has entered an admissible offer which has not been declared winner, the characteristics and advantages of the winning offer or offers in relation to its own offer, as well as the name of the contractor or contractors to which the public procurement contract or framework agreement has been awarded; and
- for every bidder that has entered an admissible bid, information related to the development and progress of negotiations and dialogue with the other bidders.

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

The public procurement file becomes a public document after the procedure is closed. Until then, access to the procurement file is restricted.

However, after the communication of the result of the procedure, the contracting authority must grant the bidders participating to the procedure access to the procedure report, as well as to the information within the qualification documentation, technical and financial proposals entered into the procedure, with the exception of the parts that have been declared by the bidder as confidential, classified or protected by a intellectual property right.

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

It is customary for disadvantaged bidders to file review applications. According to the data published by the NCSC, during 2016, 2,348 review application files have been solved by the Council, while 19,079 procedures have been registered in SEAP.

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

The law provides that disadvantaged bidders may request to be compensated for damages resulted from illegal actions within a public procurement procedure, before the competent court of law (tribunal). No

other special conditions to be met for such a request are regulated by the public procurement legislation, thus the common law applies.

However, we note that, in practice such actions are rarely seen and that the courts of law tend to set the damages very low.

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?

Any interested person may request a court of law to ascertain the nullity of the contract or addendum to the contract that has been concluded with the infringement of the requirements of the public procurement, utilities or concession legislation as well as to reinstate the previous situation, in the following cases:

- the contracting authority has awarded the contract without observance of the rules imposing the publication of a notice, according to the public procurement, utilities or concession legislation;
- when the contracting authority aims at obtaining the execution of works, services or supply of a product that would place the contract as one subject to public procurement, utilities or concession legislation, but the contracting authority awards a different type of contract, not observing the law;
- the contract or addendum has been concluded in less favourable conditions than those provided in the winner's technical or financial offers;
- the qualification and selection criteria or evaluation factors provided in the contract notice have not been observed in relation to the winning offer, thus the result of the procedure being altered, by diminishing or cancelling competitive advantages; and
- the contract has been concluded prior to receipt of the NCSC or the court's decision on a review application.

Nevertheless, in the even that, after review of all relevant issues, the court appreciated that imperative norms of general interest demand the continuation of the contract, it may decide not to cancel the contract but to apply alternative sanctions such as:

- limitation of the effects of the contract, by reducing its execution term; or
- apply a fine to the contracting authority, between 2 per cent and 15 per cent of the value of the contract.

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

As per the answers provided above, any interested party may request the cancellation of the contract awarded without following a procedure regulated by the law.

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

A review application to NCSC is free of charge.

A review application submitted directly to a court of law, shall be charged with a judgement tax of:

- 2 per cent of the estimated value of the contract when such value lies below 450.000 lei inclusively;
- when the estimated value of the contract lies between 450.001 and 4.500.000 lei inclusively – 9.000 lei plus 0.2 per cent of what surpasses 450.001 lei;
- when the estimated value of the contract lies between 4.500.001 and 45.000.000 lei inclusively – 18.000 lei plus 0.02 per cent of what surpasses 4.500.001 lei;
- when the estimated value of the contract lies between 45.000.001 and 450.000.000 lei inclusively – 27.000 lei plus 0.002 per cent of what surpasses 45.000.001 lei;
- when the estimated value of the contract lies between 450.000.001 and 4.500.000.000 lei inclusively – 358.000 lei plus 0.0002 per cent of what surpasses 450.000.001 lei;
- when the estimated value of the contract is higher than 4.500.000.001 lei – 45.000 lei plus 0.00002 per cent of what surpasses 4.500.000.001 lei.

Application reviews that are not evaluable in money are charged with a 450 lei judgment tax.

Appeals against the NCSC decisions are taxed with 50 per cent of the taxes listed above.

POPOVICI NIȚU STOICA & ASOCIAȚII
Attorneys at Law

Alexandru Ambrozie **alexandru.ambrozie@pnsa.ro**
Ramona Pentilescu **ramona.pentilescu@pnsa.ro**

239 Calea Dorobanți, 6th Floor
1st District
Bucharest 010567
Romania

Tel: +40 21 317 79 19
Fax: +40 21 317 85 00
www.pnsa.ro

Spain

Alberto Dorrego and Andrés Jiménez
Eversheds Sutherland Nicea

Legislative framework

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

The main pieces of national legislation are the following:

- Royal Legislative Decree 3/2011, dated 14 November, on approval of the rewritten text of the Act on contracts of the public sector (RLD 3/2011);
- 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).

Likewise, certain Spanish regions have enacted their own legislation:

- Navarra: Act 6/2006, dated 9 June, 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.

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

Yes, there is special legislation for defence, which is set out in Act 24/2011, dated 1 August, on public procurement in the fields of defence and national security.

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

The legislation in force incorporated the former EU procurement directives 2004/17/CE and 2004/18/CE. Some of the regulations in such legislation is also based in the rules of the Agreement on Government Procurement of the GPA, to which the EU is a member state (for instance, the special compatibility rules set out in article 56 of RDL 3/2011).

4 Are there proposals to change the legislation?

Yes, there is currently a bill in the Spanish parliament, the purpose of which is to incorporate the new EU directives on public procurement 2014/23/EU, 2014/24/EU and 2014/25/EU.

Applicability of procurement law

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

Any private undertaking participated or controlled by less than 50 per cent by any entity of the public sector is not subject to the legislation on public procurement.

Likewise, public bodies that are either engaged in any profit-making activity of goods manufacture or services provision or that are mostly financed by incomes received as consideration for the provision of goods of services shall not be subject to the legislation on public procurement. In any event, please note that in practice, these institutions are very scarce.

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 the foregoing, minor contracts, which are those with a value less than €50,000 (works contracts) or €18,000 (remaining contracts) have very light requirements: public expense approval, registry of the relevant invoice and, if possible, the submission of at least three offers.

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 this last 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 Union Court of Justice. See, for example, the judgment dated 29 April 2004, *CAS Succhi di Frutta SpA*, C-496/99 P, EU:C:2000:595.

9 In which circumstances do privatisations require a procurement procedure?

Privatisation is ruled by the public properties legislation, not public procurement regulations.

Despite the foregoing, 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 scheme, it shall be obliged to choose the private undertaking by means of a public tender, which shall be ruled by the public procurement legislation.

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

In case of the management of public services or utilities by means of the granting of concessions in favour of private undertakings or in case of the incorporation of companies allocated to the management of such services and owned by public and private shareholders.

In both cases, the private undertaking (concessionaire or private shareholder) shall be chosen according to a public tender.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

In official gazettes and in the contracting profile of the contracting authority.

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 RDL 3/2011 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 base of exclusivity, in the case that only such single bidder is able to execute the purpose of the contract for technical or artistic reasons or for any reasons related to the protection of industrial property rights.

In the cases set out in the RDL 3/2011 that allow the contracting authorities the use of the competitive dialogue, such authorities shall request offers from at least three undertakings.

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 not currently recognised but it is set out in the bill in the Spanish parliament, the purpose of which is to incorporate the new EU Directives on public procurement 2014/23/EU, 2014/24/EU and 2014/25/EU.

The procurement procedures

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 RDL 3/2011.

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.

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 shall request recusal before the contracting authority and the officer could be recused if it is deemed that there is a conflict of interests that must be avoided.

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.

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

The prevailing type of procurement procedure is the open and restricted proceedings.

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

No, they cannot.

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 the one used more regularly since it is easier to justify its use.

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 take place 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.

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

In general terms, the use of the framework agreements shall not be made in a fraudulent manner or have as a result a distortion of the free competition, and their 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 does require an additional competitive procedure, but such competitive procedure shall only be based in the award criteria of such contract and not the framework agreement itself.

Please note that the bill in the Spanish parliament, the purpose of which is to incorporate the new EU directives on public procurement 2014/23/EU, 2014/24/EU and 2014/25/EU, sets out the award of contracts under framework agreements without the need to issue an additional competitive procedure, provided that certain requirements are met.

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 the documents related to the financial solvency and technical ability of each of the members of such bidding consortium.

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.

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

This possibility is 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 the bidders to propose variant bids or improvements.

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.

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, and technical assistance after sales or customer services or any other similar features.

The award criteria shall be set out by the contracting authority and expressly indicated in the tender documents. Such criteria shall not refer to the technical ability or financial solvency of the bidders, which are tender admission criteria, not tender award criteria.

In case the contracting authority decides to set out only one single award criterion, such criterion shall be the price offered.

Award criteria can be appraised either: (i) automatically, by means of formulas; or (ii) upon a value judgment. The appraisal of (ii) shall be carried out before (i) to avoid lack of impartiality.

In general terms, award criterion (i) shall count for more than (ii). When (ii) receives a higher score than (i), the contracting authority shall constitute an expert committee of at least three members that carry out the appraisal of the award criteria based on a value judgement, or that command such appraisal to a specialised technical body.

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, the 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, the innovation of the proposed provisions, and the compliance with the provisions related to the employment protection and the labour 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

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 whose decisions 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.

Update and trends

There is currently a bill in the Spanish parliament, whose purpose is to incorporate the new EU Directives on public procurement 2014/23/EU, 2014/24/EU and 2014/25/EU.

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 the ruling is subsequently 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.

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 the challenge is filed against the award, the administrative tribunal of contractual complaints shall automatically suspend the conclusion of the contract.

Upon 30 working days as from the filing, the administrative tribunal of contractual complaints shall review such decision and decide to resume the conclusion of the contract if new circumstances require such continuation.

Besides, 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 any 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.

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.

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

Yes.

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 1,000 resolutions in 2016).

Considering that the special appeal on contracting in the new bill currently in the Spanish parliament will be compulsory and not optional, this number is expected to increase.

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.

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

Yes. In such cases, the award decision is null and void and can be challenged by any party interested in the contract.

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

There are no fixed costs for filing an appeal before administrative tribunals of contractual complaints, nor before the relevant courts.

The expenses depend on the lawyers and agent's court fees and the issuance of technical reports. These normally depend on many factors, such as the value of the contract.

EVERSHEDS SUTHERLAND NICEA

Alberto Dorrego **adorrego@eversheds-sutherland.es**
Andrés Jiménez **ajimenez@eversheds-sutherland.es**

Paseo de la Castellana, 66
28046 Madrid
Spain

Tel: +34 914 294 333
Fax: +34 914 299 100
www.eversheds-sutherland.es

Sweden

Fredrik Linder, Emma Berglund and Mikael Dubois
Hamilton

Legislative framework

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

There are three main acts on public procurement, which entered into force on 1 January 2017; 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).

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 which is covered by one of these acts.

The PPA, UPA and CPA are enforced by the administrative courts, the civil courts and by 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 2017.

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 he or she considers 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. 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 the 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.

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

The rules are different for public procurement above and below the EU threshold values respectively. For procurement above the threshold values, the PPA, UPA and CPA are mainly based on EU directives and the GPA.

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). As a general rule, these procurements 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 for submitting tenders and the contracting authority or entity invites some of the applicants to submit tenders;
- direct procurement – if the value of the procurement is 28 per cent of the threshold values for procurement according to the PPA (approximately 535,000 Swedish kronor) and 26 per cent of the threshold values for procurement according to the UPA (approximately 993,000 kronor) or less, or if there are exceptional reasons, this procurement procedure without formal requirements for tenders may be applied; and
- competitive dialogue – 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 still always comply with the fundamental EU principles. Direct procurement may be applied if the value of the procurement is 5 per cent of the threshold values for procurement of concessions (approximately 2,388,000 kronor) or less, or if there are exceptional reasons.

4 Are there proposals to change the legislation?

On 1 January 2017 the PPA, UPA and CPA came into force. By the new legislation Sweden implemented 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). However, provisions regarding certain labour conditions proposed by the government were not approved by the parliament. On 16 March 2017, the government issued a revised proposal for provisions regarding labour conditions which has been submitted to the parliament. Basically, the proposed legislation regards provisions stipulating that contracting authorities and entities shall require that bidders comply with certain terms regarding wages, vacation rights and working hours, if necessary and if the terms can be determined. According to the proposal, such terms shall comply with certain minimum requirements provided in central collective agreements applied in the whole of Sweden. Minimum provisions in legislation must also be considered. Before the terms are decided, a central employee organisation and a central employer's organisation must be consulted. The rules are pending parliament approval and are proposed to enter into force on 1 June 2017.

A report was submitted in 2015 (SOU 2015:12) regarding an overview of the procurement remedy system and review proceedings. However, this report has not resulted in any changes to the legislation. The government has recently stated that a renewed government review of the procurement remedy system and review proceedings will be conducted.

Applicability of procurement law

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 very frequently examined by courts. The Supreme Administrative Court has held that Akademiska Hus (a state-owned company in the real estate business) 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. This verdict has been appealed to the Supreme Administrative Court and a review permit has been granted. In February 2017, the Stockholm Administrative Court of Appeal ruled that Systembolaget (a state-owned chain of stores that sells alcoholic beverages) does not constitute a contracting authority. This verdict has been appealed to the Supreme Administrative Court.

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, two exemptions have been granted by the European Commission (under article 30 of the Directive 2004/17). The first decision 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).

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

See question 3.

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;

- if the value of the modification is below both the applicable threshold value, and 10 per cent of the initial contract value for service and supply contracts (and all concession contracts) and below 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 initial procurement documents. The clause or option must state the scope and the nature of the modifications that may be made; and
- owing to unforeseeable circumstances. For contracts covered by the PPA, and for certain concession contracts, 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 an additional 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; and
- a modification consisting of a change 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 initially established. Such a change of supplier must not entail other substantial modifications to the contract. A subcontractor to the original supplier may also enter 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, 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 on 1 January 2017, no precedents clarifying the application of the new provisions regarding the amendments of concluded contracts have been established.

9 In which circumstances do privatisations require a procurement procedure?

Privatisation, where 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.

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 public-private partnerships (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

11 In which publications must regulated procurement contracts be advertised?

For procurements above the threshold values, the contracting authority or entity must advertise the procurement electronically to the Publications Office of the European Union. 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 European Union (OJEU) and *Tenders Electronic Daily* (TED).

As a general rule, procurements below the threshold values must be advertised in an electronic database open to the public.

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 an award 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 European Union;
- 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 it 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 violation of applicable environmental, social and labour law obligations;
- the supplier is bankrupt, the business is being wound up, is the subject of proceedings for a declaration of bankruptcy, where it is in an arrangement with creditors or 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 been in a material breach of a prior procured contract that led to the termination of the contract or an obligation for the supplier to pay damages;
- the contracting authority or entity cannot 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 has a 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 procurements 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 procurements 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 procurements covered by the UPA and CPA respectively, no minimum number of suppliers is specified.

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

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 in a non-discriminatory way, and that procurements shall be conducted in an open way. Furthermore, the PPA, UPA and CPA state that procurements shall be conducted in accordance with the principles of mutual recognition and proportionality, and that a procurement must not be arranged with an intention of narrowing competition, so that certain suppliers are unduly favoured or disadvantaged.

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 obliged to be independent and impartial.

17 How are conflicts of interest dealt with?

There are no specific rules on how to deal with conflicts of interest in the PPA, UPA or the CPA. However, 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.

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.

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 procurements which have to be advertised, is the simplified procedure. Regarding procurements above the threshold values, the prevailing procurement procedure is the open 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. See question 18.

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 which permit negotiations in accordance with the PPA:

- negotiated procedure with prior publication. This procedure 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 attaching to them;
  - 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. This procedure may be used on the same conditions as the negotiated procedure with prior publication;
- negotiated procedure without prior publication. This procedure 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 procurements of goods (inter alia, when the goods 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. This procedure may be used to procure goods, 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 is 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 which permit 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 procurements 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 procurements 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 procurement are very restrictive.

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 for the purpose of establishing the conditions governing sub-orders during a certain period of time. A framework agreement may only be used by those contracting authorities clearly identified for this purpose in the procurement documents of 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.

If a framework agreement is entered into with one supplier, the general rule is that the conditions cannot be amended when sub-orders are made. 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 sub-orders are available. If all conditions for sub-orders are established in advance, a distribution key must be set up with objective conditions for determining which supplier shall be awarded the sub-order (for example, a ranking order). If all conditions for sub-orders 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 sub-orders 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.

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. Sub-orders 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.

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.

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 which is 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.

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 alternative bids into account, if this is indicated in the procurement documents.

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 must be fulfilled by the bidder.

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.

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 linked 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-effectiveness, 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. Those weightings can be expressed by providing a range with an appropriate maximum spread. The government bill regarding the PPA and UPA contains the following example of appropriate maximum spread: 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 descending order of importance.

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.

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 has to 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 Treaty on the Functioning of the European Union (TFEU). If the supplier fails to show such compatibility, the bid must be rejected.

In a decision by the Göteborg Administrative Court of Appeal, the court held – confirming a previous statement in the case by the Swedish Competition Authority – that the contracting authority must show that the bid is abnormally low as such. If this burden of proof is fulfilled, the supplier must show that its explanation is satisfactory in order to avoid the risk of the tender being refused.

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, inter alia, 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 – who had offered higher prices for the services covered by the call-off contract at hand – to be offered the call-off contract instead.

There are no rules concerning abnormally low bids in the CPA.

Update and trends

There is currently an intense discussion in Sweden concerning how the new rules on amendments and modifications to contracts and framework agreements will be applied in practice, and how they will be interpreted by the courts. These rules are of immediate relevance for contracting authorities and entities, since the rules are not applicable only to contracts (and framework agreements) entered into following procurements in accordance with the PPA, UPA and CPA which entered into force on 1 January 2017, but also to contracts which have been concluded in accordance with the previously applicable procurement legislation. One aspect discussed in particular is how a review clause must be drafted in order to be 'clear, precise and unequivocal'.

Review proceedings

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 who has been, 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 the infringement has been remedied.

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, inter alia, in case the conclusion of the contract was preceded by an unlawful direct procurement (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. 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 during the appeal process.

If a supplier considers itself to have 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 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.

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

It depends, inter alia, 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. 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.

The decision of an administrative court can be appealed (see question 33).

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).

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.

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.

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 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.

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.

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

Approximately 20,000 public procurement procedures with advertisement are conducted annually. In 2015, almost 3,000 review applications were filed by disadvantaged bidders and in 2016 the number arose to almost 4,200 applications. These statistics include procurements that have not been advertised.

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.

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.

hamilton

Fredrik Linder **fredrik.linder@hamilton.se**
Emma Berglund **emma.berglund@hamilton.se**
Mikael Dubois **mikael.dubois@hamilton.se**

Hamngatan 27
PO Box 715
101 33 Stockholm
Sweden

Tel: +46 8 505 501 00
Fax: +46 8 505 501 01
www.hamilton.se

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 the administrative court for review of the effectiveness of the contract. A contract may be declared ineffective if the conclusion of the contract was preceded by an unlawful direct procurement. A contract may also be declared ineffective in certain other situations, inter alia, 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, for example in the event of a direct procurement, announce in advance that they intend to use a direct procurement 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 procurement 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.

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 procurement procedure is not permitted according to the PPA, UPA or CPA (see question 44).

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.

Switzerland

Bernhard C Lauterburg and Philipp E Zurkinden

Prager Dreifuss Ltd

Legislative framework

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 even on a municipal level. Switzerland's international obligations are incorporated in the GPA, the bilateral agreement between Switzerland and the European Union and the EFTA 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).

Both the Law on Cartels and the Law on Internal Markets complement the legislative framework on public procurement. The competent enforcement authority is the Federal Competition Commission, subject to review by the Federal Administrative Court.

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).

Federal public procurement legislation is enforced by the Federal Administrative Court and cantonal public procurement legislation by the cantonal administrative courts. Appeals from 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 raises a fundamental question of law.

The entire legislative framework is currently under revision to implement the GPA 2012, which Switzerland signed but has not yet ratified. 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 (primarily federal procurement law) and not the reform proposal.

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.

Note that 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 (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.

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 European Union on public procurement entered into force to extend the regulations set forth in the GPA to regions and municipalities, 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, airports as well as river and sea transport.

4 Are there proposals to change the legislation?

See 'Update and trends'.

Applicability of procurement law

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.

It should first be mentioned that, unlike in the EU, Switzerland did not opt 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, the 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)).

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	8,700,000
Postal coach service (GPA)	700,000	700,000	8,700,000
Entities active in the electricity sector (CH–EU)	766,000	766,000	9,575,000
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 2017. The applicable threshold values are available at www.simap.ch.

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 Swiss 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	Services	Construction
Limited tendering procedure	Below 50,000 Swiss francs	Below 150,000 Swiss francs	Below 150,000 Swiss francs
Tender by invitation	Between 50,000 Swiss francs and the applicable threshold value	Between 150,000 Swiss francs and the applicable threshold value	Between 150,000 and 2 million Swiss francs

Cantonal threshold values for those areas and sectors captured by Switzerland's international obligations are shown in the following table:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Cantons (GPA)	350,000	350,000	8,700,000
Public authorities and undertakings in the water, energy, transport and telecoms sector (GPA)	700,000	700,000	8,700,000
Municipalities and regions (CH–EU)	350,000	350,000	8,700,000
Private undertakings with exclusive or special rights in the water, energy and transportation sector (CH–EU)	700,000	700,000	8,700,000
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 shown in the following table:

	Supplies	Services	Construction related	Construction
No-bid or direct award	Below 100,000 Swiss francs	Below 150,000 Swiss francs	Below 150,000 Swiss francs	Below 300,000 Swiss francs
Tender by invitation	Below 250,000 Swiss francs	Below 250,000 Swiss francs	Below 250,000 Swiss francs	Below 500,000 Swiss francs
Open bid or selective bid proceeding	From 250,000 Swiss francs	From 250,000 Swiss francs	From 250,000 Swiss francs	From 500,000 Swiss francs

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 solely 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, although each case must be assessed individually.

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.

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

Roughly three types of PPP may be distinguished:

- the state establishes a joint venture with a private entity;
- the state transfers the provision of a public function to a private entity by way of a concession; and
- the state enters into a long-term contractual relation with a private partner for the provision of certain services to the public.

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 polity and a private entity to build and operate certain infrastructure. Procurement law applies in cases where a private entity will assume a public function against remuneration.

Advertisement and selection

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 www.simap.ch, a joint electronic platform of the federal government, the cantons and the municipalities.

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, note that, 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 amongst bidders must be ensured at all times.

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 known 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

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 the principles of procurement procedure are followed by tenderers (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.

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.

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.

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.

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.

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.

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 Swiss 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.

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

Unlike in the EU, for example, there are no specific rules on framework agreements in Switzerland. However, the federal contracting authorities regularly enter into framework agreements.

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.

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 for bidding consortia. 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.

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 SME participation. 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.

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.

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.

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. Generally not permitted are criteria related to fiscal or structural policy. As a matter of transparency, all award criteria must be listed in the tender documentation according to their relevance and weight.

Update and trends

After the revised GPA has been formally adopted, the contracting parties, including Switzerland, were called upon to implement the revised rules into national law. The cantons and the federal government are currently working on a reform project to implement the new WTO rules and harmonise the national rules. At present, different rules on public procurement exist at federal and cantonal level, for example, different time periods to file appeals, different threshold values, different rules regarding negotiations on the price or rebates, etc. The federal government recently dispatched its revision proposal to Parliament. The Federal Council will ratify the revised GPA after Parliament has adopted the revised GPA; the revised FAPP; and the intercantonal conference on public procurement law has approved the draft proposal to be sent to each of the cantonal parliaments.

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 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; domestic bidders) and treat men and women equally in terms of wage payments (article 8(1)(c) of the FAPP; 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.

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 likely to be taken into account. On a cantonal level, for example, in the cantons of Berne (article 28 of the cantonal procurement ordinance) or 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

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.

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 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: here, the applicant neither participated 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. Accordingly, the applicant must establish that he has an immediate interest in supplying the goods and services requested by the contracting authority and that the good and services he would have proposed to deliver were capable to substitute those 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 IT services, the suppliers of open-source solutions could not establish that their solution was capable to substitute 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).

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.

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 www.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.

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.

Bernhard C Lauterburg **bernhard.lauterburg@prager-dreifuss.com**
Philipp E Zurkinden **philipp.zurkinden@prager-dreifuss.com**

Schweizerhof-Passage 7
3001 Berne
Switzerland

Tel: +41 31 327 54 54
Fax: +41 31 327 54 99
www.prager-dreifuss.com

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.

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

It is not customary. From January 2016 until April 2017, there were only around 30 decisions published on the website of the Federal Administrative Court concerning federal procurement projects.

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.

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.

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

It depends on the amount in dispute.

Taiwan

Edward Liu and Anna Y F Wang
Chen & Lin Attorneys-at-Law

Legislative framework

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 covers areas such as invitation to tender; award of contracts; administration of contract performance; inspection and acceptance; dispute settlement; penal provisions; and supplementary provisions. These are 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 Government Procurement Act detail the requirements of the awarding of public contracts. (For further information, see question 30.)

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 act 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 Government Procurement Act shall not apply.

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 on which 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).

4 Are there proposals to change the legislation?

There was a proposal to change the legislation on 27 July 2016. There are six additional articles, 19 amendments and total amendment of 25 articles. The essentials regarding the amendments are as follows:

- to amend penalties for defective manufacturers to meet the principle of proportionality;
- to revise or amend the norms in order to coordinate the needs of existing practice;
- to strengthen the provisions of fair government procurement;
- to simplify the operation procedures to improve procurement efficiency;
- to amend the provisions of the legal authority; and
- to integrate with the amended provisions of other laws.

Applicability of procurement law

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 Government Procurement Act. The following are not covered by the Government Procurement 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; and
  - personnel in the name of individuals themselves to purchase business tickets and accommodation and so on.

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 Government Procurement 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 NT$100,000 or less) an entity may conduct a 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.)

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.
  - 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.)

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 Government Procurement Act.

Privatised state-owned enterprises, where the government has less than 50 per cent of the shareholding, are not subject to the Government Procurement Act. So the tender does not need to be published in the government procurement bulletin or be posted on the information network.

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 Government Procurement Act with regard to the dispute resolutions for the invitation to tender, the evaluation of tender and the award of contract. (The regulations governing dispute resolutions shall be prescribed by the competent authority.)

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

In accordance with article 27 of the Government Procurement 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 on the responsible entity's government procurement information website.

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 Government Procurement Act, when conducting procurement, an entity may prescribe 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, manpower, 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 Government Procurement 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 Government Procurement Act.)

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 Government Procurement 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 Government Procurement Act.)

The procurement procedures

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 Government Procurement 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.

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 Government Procurement 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; and
- 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.

(See articles 6, 21 and 34 of the Government Procurement Act.)

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.)

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 Government Procurement Act.)

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 2015, published by the Public Construction Commission, Executive Yuan of Taiwan in 2016, out of the main three procurement procedures – open tendering, selective tendering and limited tendering – open tendering had the highest accumulative contract value in 2015.

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

An entity may, depending on the characteristics of an individual procurement (either to facilitate the management of interface of work, to facilitate effective competition, to meet the needs of introducing new technical methodology or the use of patent), specify in the tender documentation to allow joint tendering by a limited number of bidders. At the same time, a joint tendering by bidders in the same line of business shall meet the requirements of the Taiwan Fair Trade Act.

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 Government Procurement 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 Government Procurement Act provide the negotiation procedure for bidders if the entity cannot grant the award.

(See articles 55 to 57 of the Government Procurement Act.)

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 following website shows the different forms of inter-entity supply contract: www.bot.com.tw/procurement/procure_supply/supply_index/pages/default.aspx.

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 Government Procurement 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.

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.

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 Government Procurement 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 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 small and medium-sized enterprises, and publish them in the Government Procurement Gazette within two months from the beginning of each fiscal year.

There is 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 a small or medium-sized enterprise or encourage the tenderer to invite small or medium-sized enterprises 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, small and medium-sized enterprises shall be awarded in principle except where such small and medium-sized enterprises 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 Government Procurement Act.)

There is no specific regulation that limits the number of lots single bidders can be awarded at present.

Update and trends

There are discussions about future amendments to the Government Procurement Act. The following are some of the key issues and goals to achieve:

- to delete the provisions regarding the restrictions on the number of the tender suppliers to enhance efficiency;
- to update or amend the mechanism to prevent suppliers from low-price bidding and to harmonise public procurement with energy-saving policies and carbon-reduction measures;
- to supplement the inadequate or imbalanced norms, such as amending the standards regarding the behaviours of those former government officials, deleting the redundant requirements of e-procurement operations, strengthening the dispute resolution mechanism and further clarifying the application of 'bad supplier' and its process; and
- to comply with the principle of clarity of authorisation and the principle of legal retention.

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

According to the Enforcement Rules of the Government Procurement Act, there shall be only one tender submitted by each tenderer in each procurement. Where there are two or more tenders in a procurement submitted by branch companies of the same company or by a company and its branch company, it shall be deemed as a breach of the 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, the 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: (i) the tender submitted by such tenderer shall not be opened when such circumstance is found before tender opening; and (ii) the tender submitted by such tenderer shall not be accepted when such circumstance is found after tender opening.

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 Government Procurement Act.)

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.

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.

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

According to the Government Procurement 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.

Review proceedings

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: (i) the name, address and telephone number of the complaining supplier and the name, gender, birth date, and domicile or residence of the responsible person; (ii) the entity that handled the protest; (iii) the facts of and reasons for the complaint; (iv) evidence; and (v) 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.

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 have to 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 shall not be 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.

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.

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.

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

According to the Government Procurement 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.

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

From the official website of the CRBGP of Taipei City government, there were approximately 30 cases dealt with by such authority in 2016.

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. However, there are few or no precedents of a disadvantaged bidder successfully claiming such 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, 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 Government Procurement 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.

宏鑑法律事務所
Chen & Lin Attorneys-at-Law

Edward Liu **edwardliu@chenandlin.com**
Anna Y F Wang **yafengwang@chenandlin.com**

Bank Tower, 12th Floor
205 Tun Hwa North Road
Taipei 105
Taiwan

Tel: +886 2 2715 0270
Fax: +886 2 2514 7510
www.chenandlin.com

Generally speaking, a contract should be void under Taiwan Civil Code if the contracting authority and a tenderer deliberately break the law or act against public policy or morals.

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 Government Procurement Act, the relevant authority may bear civil liability. However, there are few precedents of a bidder successfully claiming such damages in Taiwanese courts.

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

According to the Regulations Governing Fees for the Complaint Review for Government Procurement, 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.

In the case of civil litigation, the typical costs of litigation proceedings will be decided by the value of the claim, which will be determined based on its transaction value at the time when the action was initiated or, in the absence of such transaction value, the interests in the claim as owned by the plaintiff. (See also article 77-1 and 77-13 of the Taiwan Code of Civil Procedure.)

United Kingdom

Totis Kotsonis
Eversheds Sutherland

Legislative framework

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

As a member of the European Union, 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, certain defence and security-related contracts as well as the availability of review procedures and remedies for breaches of procurement legislation (please refer to the EU chapter for more details).

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.

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

Yes, there is, see question 1 for further details.

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)).

4 Are there proposals to change the legislation?

There are currently no specific plans to amend the legislation. However, it is anticipated that following the UK's exit from the EU, UK procurement legislation would require at least some amendments to reflect the UK's status as a country that is no longer a member of the EU. The extent of such changes is likely to be affected by any UK–EU transitional arrangements and, ultimately, the type of trade agreement that the UK and the EU would reach.

Applicability of procurement law

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.

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 apply from 1 January 2016.

The PCR 2015 applies when the value of a works contract meets or exceeds £4,104,394. The value threshold for supplies and most services contracts is significantly lower at £164,176 (or £106,047 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 £589,148.

The UCR 2016 applies when the estimated value of a works contract meets or exceeds £4,104,394 or £328,352 for supplies and most services contracts. The value threshold for services contracts for social and certain other types of services stands at £785,530.

The CCR 2016 applies when the estimated value of a works or services contract meets or exceeds £4,104,394. 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 £328,352.

All of the above figures are exclusive of VAT.

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, 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 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 Official Journal of the European Union (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 (please refer to the EU chapter for further details).

Separately, in England the courts have recently considered the question of substantive modifications in the context of *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 other* [2015] EWHC 90 (QB) Andrews J; [2015] EWCA Civ 326; [2015] UKSC 45.

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.

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

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.

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 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 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.

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

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.

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.

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.

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.

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.

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, 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.

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 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; 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.

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 amongst 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.
- 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.

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).

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.

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.

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.

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,

Update and trends

The UK's exit from the EU is likely to have an impact on procurement legislation. The extent of such impact will depend on the type of trade arrangement that the UK and the EU negotiate. In the short term, the UK government has made it clear that it intends to legislate so as to convert, to the extent possible, the body of existing EU law into domestic legislation. The aim of this policy is to provide legal certainty by avoiding a regulatory 'cliff edge' on the day on which the UK exits the EU. The government can then decide which legislation to keep, amend or repeal. Even assuming that procurement legislation will remain substantively the same following Brexit, it would still require some amendments to reflect the UK's new status as a country that is no longer a member of the EU.

Separately, there have been a number of important judgments in the UK courts recently, with the courts taking a harder line in relation to certain breaches or alleged breaches of procurement legislation. For example, in a judgment on an application to vary consent orders relating to the establishment of a confidentiality ring in the context of a procurement law challenge (*Bombardier Transportation UK Limited v Merseytravel* [2017] EWHC 726 (TCC)), the court decided that despite some concerns about the possible risk of 'creep' and 'an unjustified fishing expedition', a claimant in the position of Bombardier was entitled to have appropriate access to the successful tenderer's bid. This was so as to be in a position to investigate fully the contracting authority's comparative treatment of the tenders, either to confirm existing unequal treatment concerns, or to establish new freestanding allegations.

Also, in a challenge against a contract award decision by the Nuclear Decommissioning Authority (*EnergySolutions EU Ltd v Nuclear Decommissioning Authority*, [2015] EWCA Civ 1262; [2016] EWHC 1988 (TCC); *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* [2017] UKSC 34) the High Court delivered a judgment of more than 300 pages, dealing in some detail with, among other things, the practical application of evaluation principles. The court found in favour of the claimant, concluding that there had been manifest errors in the evaluation and that the Nuclear Decommissioning Authority (NDA) had decided wrongly the outcome of the procurement process. In reaching this conclusion, the court criticised the lack of adequate record-keeping in relation to the negotiations with bidders and bid evaluation and reviewed and revised the scores that the NDA had awarded. The case, which has now settled out of court, ultimately reached the Supreme Court. An important aspect of the Supreme Court's judgment is the conclusion 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.

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.

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 which 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

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.

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.

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.

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.

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.

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. 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.

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.

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 EnergySolutions 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 one example of such a declaration being granted in the UK at the time of writing.

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

EVERSHEDS SUTHERLAND

Totis Kotsonis **totiskotsonis@eversheds-sutherland.com**

1 Wood Street
London
EC2V 7WS
United Kingdom

Tel: +44 20 7919 4500
Fax: +44 20 7919 4919
www.eversheds-sutherland.com

affected economic operators, subject to limitation periods, to seek a declaration of ineffectiveness or damages.

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.

United States

Jeffrey P Bialos, Paul C Freeman and Francis X Nolan
Eversheds Sutherland LLP

Legislative framework

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 America 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 U.S. 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. 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.

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

As discussed above, 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.

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

Not applicable.

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 sustainability and bio-based acquisition. See FAR Case 2015-033.

Earlier this year, the FAR Council, which manages, coordinates, controls, and monitors the maintenance and issuance of changes in the FAR, finalised a rule aimed at protecting small business subcontractors. See Federal Register Volume 81, Number 244, pp 93481-93488. Under

the rule, contracting officers will be required to track contractors who make late or reduced payments to subcontractors. The FAR Council also recently finalised a rule requiring contractors to undergo training relating to privacy rules, with the aim of protecting personally identifiable information to which they have access. Id at 93476-93481.

Applicability of procurement law

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;
- Federal Home Loan Banks;
- Federal Intermediate Credit Banks;
- Federal Land Banks;
- the National Credit Union Administration Central Liquidity Facility;
- Regional Banks for Cooperatives;
- the Rural Telephone Bank;
- the Financing Corporation;
- the Resolution Trust Corporation; and
- the Resolution Funding Corporation.

Exemptions for Types of Transactions

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').

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 $150,000. FAR Subpart 2.1. Threshold exceptions exist, for example, for contracts relating to defence against nuclear, chemical, or biological attack ($750,000 in the US; $1.5 million outside the US) and peacekeeping operations ($300,000). FAR Subpart 2.1.

Specific limits are also set for 'micro-purchases,' which is defined as 'an acquisition of supplies or services using simplified acquisition procedures, the aggregate of which does not exceed the micro-purchase threshold of $3,500,' with limited exceptions. FAR Subpart 2.1.

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, fee, 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 (see, 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.

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.

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

11 In which publications must regulated procurement contracts be advertised?

The contracting officer is required to advertise contracts with a value in excess of $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. In the 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.

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 programs necessary), record of ethical behavior, 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 18), 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.

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

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.

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.

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, and if so, to 'avoid, neutralize, or mitigate significant potential conflicts before contract award.' FAR Subpart 9.504(a).

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 nonpublic 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.
- 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.

In general, the 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 United States 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.

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 fact specific. (See question 17.)

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.

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 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 to the offer were set independently, without consultation, communication or agreement with any other bidder or competitor. FAR Subpart 52.203-2. 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.

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 ambiguous proposed terms. 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). 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. Further, the contracting officer may request that offerors revise their proposals to clarify any compromises reached during negotiation. 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.

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 frequent procurement procedure. The other procedures, such as sealed bidding, do not permit negotiations with bidders.

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).

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. Executive agencies have under this authority created a range of varied, flexible contract vehicles for such situations where 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 which all executive agencies can order from.

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 to another's) and also

raises questions of contractual liability between the parties under whatever teaming arrangements were agreed upon.

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 the contracting opportunities. To this end, executive agencies are required to 'set aside' certain contracts for small and disadvantaged business, and contractors awarded other contracts are required in most cases to establish a 'small business plan' designed to facilitate subcontract awards to small business. 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.

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)(i). The contracting officer will advise whether variant bids will be accepted.

28 Must a contracting authority take variant bids into account?

No, but they are permitted to do so. See question 27.

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.

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).

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 in the FAR, the 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

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

A disappointed bidder has an election 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.

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. As a consequence, 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.

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 timeframes, but in general the Court is, in practice, often willing to expedite such bid protests given the circumstances.

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?

Protests alleging improprieties in the underlying solicitation must be filed prior to the bid opening or the closing date for receipt of proposals. FAR Subpart 33.103(e); 4 CFR Section 21.2. In all other cases involving post-award protests, such protests with the relevant agency or GAO shall be filed no later than 10 days after 'the basis of protest is known or should have been known, whichever is earlier.' FAR Subpart 33.103(e). Challenges filed in the US Court of Federal Claims are not subject to such time limits for filing.

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

Pre-award protests filed on a timely basis with the GAO serve to stay the award of a contract by a federal agency once that agency has received notice from the GAO. 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 at the GAO (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 CFRSection 21.6; FAR Subpart 33.104(c). There is no automatic right to a suspension for bid protests filed with the US Court of Federal Claims, but the Court does have the authority to issue preliminary injunctive relief to stay the underlying award being challenged pending its consideration of the matter.

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).

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 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).

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.

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').

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

As noted above, the federal government cannot be sued for money 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).

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.

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

EVERSHEDS SUTHERLAND

Jeffrey P Bialos **jeffbialos@eversheds-sutherland.us**
Paul C Freeman **paulfreeman@eversheds-sutherland.us**
Francis X Nolan **franknolan@eversheds-sutherland.us**

700 6th Street NW Suite 700
Washington, DC 20001
United States

Tel: +1 202 383 0363
Fax: +1 202 637 3593
www.eversheds-sutherland.com

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.

Venezuela

José Gregorio Torrealba R
Hoet Pelaez Castillo & Duque

Legislative framework

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

The main piece of legislation applicable to public procurement is the Public Procurement Act 2009 (PPA) (*Official Gazette* No. 39165 dated 24 April 2009, amended on 19 November 2014, *Official Gazette Extraordinary* No. 6.154) and its Administrative Regulation established in Decree No. 6708 (*Official Gazette* No. 39189 dated 19 May 2009).

According to articles 4 and 5 of the PPA, there are some contracts that are excluded from the application of its rules. These contracts are: (i) those for the execution of works, acquisition of goods and provision of services, which are within the framework of international cooperation agreements between Venezuela and other states, including joint ventures incorporated within the frame of these agreements; (ii) employment contracts; (iii) real estate leasing and financial leasing; and (iv) sponsorship of sports, art, literature, science and academy.

The type of contracts that are excluded from the application of procurement procedures are set out below:

- the provision of professional services and employment;
- the provision of financial services;
- the acquisition and renting of real estate, including leasing;
- the acquisition of cattle;
- the acquisition of artistic, literary or scientific works;
- the commercial and strategic alliances for the acquisition of goods and provision of services between natural or juridical persons and contracting public bodies;
- the utilities required for the functioning of the public contracting entity;
- the acquisition of goods from other public entities;
- the acquisition of goods and services with day to day cash;
- the acquisition of goods and services during the validity of emergency decrees;
- acquisition of goods and services for defence and intelligence operations; and
- the provision of services and the execution of works entrusted to other public entities.

The authority in charge of enforcing the PPA is the National Contracting Service, the lead institution in public procurement, and is empowered to oversee compliance with the PPA by the contracting authority and contractors.

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

Yes, the Simplification of Proceedings for the Exportations and Importations of State-owned Companies Act (2009), published in the *Official Gazette Extraordinary* No. 5.933. This statutory legislation allows state-owned companies, previously authorised by the Central Planning Commission, to use the direct adjudication of the contract in all their contracts for the procurement of goods from foreign providers.

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

The EU procurement directives are not applicable and Venezuela is not a party to the GPA.

4 Are there proposals to change the legislation?

No. There are no proposals to change the legislation currently in force.

Applicability of procurement law

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

The PPA applies to the following subjects, which are the only contracting authorities:

(i) all public bodies and government agencies of the national state and municipal levels of government either centralised or decentralised;
(ii) public universities;
(iii) the Venezuelan Central Bank;
(iv) civil partnerships and mercantile companies where the Republic and the subjects named in (i), (ii) and (iii) above have an interest, which is equal or above 50 per cent of the patrimony or shareholding (state-owned companies in the first degree);
(v) civil partnerships and mercantile companies where state-owned companies in the first degree have an interest equal or above 50 per cent (state-owned companies in the second degree);
(vi) the foundations incorporated by any of the subjects named in (i) through (v) above; and
(vii) community councils or any other community organisation handling public funds.

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

There are no contracts excluded on the basis of value.

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

The amendment of an existing contract does not require a new procurement procedure. According to article 130, the contracting authority is allowed to amend the contract as needed, and the contractor will be notified of the amendment. The contractor also has the right to request a modification of the contract from the contracting authority if he or she considers it is convenient. The contractor is allowed to perform the modifications proposed when a written authorisation by the contracting authority is delivered, duly executed by the competent officer. Additionally, article 131 establishes that the contract will be amended in the following cases:

- the increase or reduction in the amount of works, goods or services provided for in the contract;
- the introduction of new items;
- the modification of the date established in the contract for the delivery of goods, the termination of the work or the provision of the service;
- variations in the amounts previously established in the original budget of the contract; or
- those grounds established in the Administrative Regulations of the PPA.

According to article 140 of the Administrative Regulations of the PPA, in addition to those established in article 131 of the PPA, the enactment of laws, regulations or decrees affecting the original conditions are also considered reasons for the amendment of the contract.

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

The possibility of amending a concluded public procurement contract has been widely accepted by Venezuelan case-law. The public contracting entity is also entitled to modify the contract unilaterally applying a privilege known as ius variandi. If the modification of the contract under the ius variandi causes any changes in the value of the contract, the contractor is entitled to an indemnification matching the change in the value.

9 In which circumstances do privatisations require a procurement procedure?

According to article 3 of the Privatisation Act 1997, the selling of shares of the state-owned companies to be privatised, can be made either by procurement procedure or through the ways provided for in the Securities Market Act 1998 (takeovers, etc). The decision is at the discretion of the corresponding public authority.

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

According to article 5.5 of the PPA, a procurement procedure will be required only when PPPs are formed to complete construction projects.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

According to the PPA, open tender proceedings have to be advertised on the National Contracting Service's website and the website of the public entities subject to the law.

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?

No. Since the contracting authorities are in charge of the preparation of the bidding package, it must include the requirements to qualify. However, article 84 of the PPA provides for the grounds for disqualification as follows:

- if the required information has not been submitted by the participant;
- if the participant is declared bankrupt during the qualification process;
- if one of the parties to a consortium or alliance resigns to participate;
- if the participant does not comply with one of the criteria established in the bidding package; or
- if the contracting entity determines that the participant has submitted false information.

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

No, it is not possible.

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 only way to be excluded because of past irregularities is if the contractor was sanctioned on the ground of breach of contract with the suspension from the National Contractors Registry in accordance with article 168 of the PPA. In that case, the only way to regain status of a suitable bidder is that the suspension has elapsed or that it was declared null and void by a competent authority.

The procurement procedures

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

Yes. According to article 2 of the PPA, its provisions must be construed according to the principles of economy, planning, transparency, honesty, efficiency, non-discrimination, competition and publicity. The same provisions also establish that the participation of the persons through any kind of partnership or association shall be motivated.

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

Yes, under the general rules and principles governing the activity of the public administration, the contracting authority is obliged to act on the basis of the principles of honesty, participation, celerity, efficiency, transparency, accountability and responsibility in the practice of public functions, and subject to the rule of law.

17 How are conflicts of interest dealt with?

There are several pieces of legislation dealing with conflicts of interest of public officials. In Venezuela, any conflict of interest of public officials gives rise to disciplinary and administrative sanctions. The disciplinary sanctions are established in the Statute of Public Function Act, which provides for the removal of the public official. The administrative sanctions are provided for in the General Controller's Office and National System of Accountability Act, which establishes sanctions that may vary from a fine; the suspension of the official up to 24 months; his or her removal from office; and a prohibition from the performance of public functions for up to 15 years. The Administrative Proceedings Organic Act also provides for remedies in the cases of conflict of interest of public officials, who may be challenged by the participants in public procurement procedures.

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

The participation of a bidder in the preparation of the bid package could be perceived as unfair competition. There are no explicit provisions in this regard in the PPA. The PPICR establishes the exception to this rule in article 18, where 10 per cent additional points will be granted to the bidder who proposed the project to be granted under the concession regime. Even in this case, the bidder participates only in the preparation of the project, and not in the preparation of the procedure.

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

The type of procedure depends upon the value of the contract. The different procurement procedures will be used according to the following threshold of values:

- open contest: the value of the goods is above 20,000 tax units (UT); or the services subject to the contract is above 30,000 UT or in the case of building works, when the contract to be awarded is above 50,000 UT;
- closed contest: when the contract for the acquisition of goods is above 5,000 UT and below 20,000 UT, or provision of services is above 10,000 UT to 30,000 UT; or in the case of building works, if the contract to be awarded is above 20,000 UT and below 50,000 UT;
- request for quotations: when the contract for the acquisition of goods or the provision of services is below 5,000 UT, and in the case of building works, if the contract is below 20,000 UT; and
- direct award: this is the only procurement procedure that is not related to the value of the contract, but to exceptional circumstances.

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

Article 76.5 of the PPA provides that the offers shall be rejected if it is proven that they themselves, their partners or shareholders, directors or managers participate in the integration or direction of another bidder.

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

The relevant legislation does not provide for proceedings where negotiations with bidders is allowed.

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.

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

Usually, a framework agreement would be subject to the corresponding public procurement procedure, as in the case of any other contract.

24 May a framework agreement with several suppliers be concluded?

Yes, several framework agreements may be concluded as far as they comply with the corresponding public procurement procedure. The contracts under the framework agreement, once awarded, do not require additional competitive procurement.

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 can be changed until the bid is submitted. Any change in the members of the consortium after the submission of the bid will result in its disqualification.

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 provides that the President of Venezuela is empowered to issue rules to give advantages to small and medium-sized enterprises in the procurement procedure. There are no measures of the kind currently in force.

Article 57 of the PPA prohibits the division of a contract into lots. This prohibition is based on the need to avoid contracting entities using bidding procedures that are not fit for the whole project.

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

Variant bids are banned as a general rule, unless they are allowed in the bidding conditions.

28 Must a contracting authority take variant bids into account?

Yes, if they are allowed in the bidding conditions. If not, the offers shall be rejected in accordance with article 76.3of the PPA.

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

The offer will be rejected in accordance with article 76.1 or 76.2 of the PPA, which explicitly provides for the rejection of the offers that do not comply with law and the tender specifications.

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

Article 109 of the PPA establishes that the contract must be awarded to the bid obtaining first place after the application of the assessment criteria, and complies with the requirements established in the bid package. Additionally, article 44.12 of the PPA establishes that the bidding package shall contain the assessment criteria, its consideration and the weight that the price and other requirements will have.

31 What constitutes an 'abnormally low' bid?

There is no provision regarding abnormally low bids. However, article 59 of the PPA provides for the obligation of the contracting authority to prepare a budget as a basis of the contracting process. This basic budget will be one of the elements of the bidding package and could be used as criteria for the rejection of bids.

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

Usually, if the bid is abnormally low, the contracting authority will reject it on the basis of article 71.2 of the PPA because of a substantial deviation from the requirements of the bid package.

Review proceedings

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

In Venezuela, the review of administrative matters may be requested through administrative or judicial remedies. The administrative review will be requested by filing a reconsideration petition with the contracting authority that rendered the decision. If the contracting authority dismisses the reconsideration petition, the general rule is that an appeal before the maximum authority of the public organisation may be filed.

If the decision of the maximum authority is to dismiss the appeal, or if the bidder prefers to avoid administrative review, it is possible to file an application for judicial review of administrative matters. The challenge of an administrative decision must be filed before the competent court for the judicial review of administrative matters, which will vary according to the rank of the public body that rendered the challenged decision.

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

Not applicable.

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

The administrative remedies should not exceed 15 working days in the case of a reconsideration petition, or 90 working days in the case of appeal before the maximum authority. Judicial remedies are governed by procedural rules established in the Supreme Tribunal Organic Act 2004. However, it is extremely difficult to predict how long a full proceeding would take.

36 What are the admissibility requirements?

The condition for an application for review to be accepted will vary according to the category of the application. In a reconsideration petition, the application must be filed before the same authority that rendered the challenged decision, and the right of standing would be crucial for its admissibility. In the administrative appeal, the application must be filed before the maximum authority of the public body, and the right of standing is also the main criteria for the admission.

In an application for a judicial review, the admissibility requirements established in article 19 of the Supreme Tribunal of Justice Act, which provides that any claim application or appeal will be inadmissible, are:

- when there is an explicit provision of the law;
- if the brief is filed before a tribunal that is not competent to hear the case;
- if the time limits for the filing of the application have elapsed;
- when contradictory or mutually exclusive applications have been jointly filed;
- when the basic documents have not been enclosed with the brief;
- in the case of pecuniary claims, if the compulsory administrative procedure previous to the filing of claims against the Republic has not been followed;
- if the application contains any offence;
- it is not possible to understand the drafting of the application;
- when there is no right of standing; and
- when there is res judicata.

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

The reconsideration petition must be filed within 15 working days after the decision has been notified to the bidder. The appeal before the maximum authority must be filed within 15 working days after the decision resolving the reconsideration petition has been notified to the bidder. The mentioned deadlines are established in articles 94 and 95 of the Administrative Proceedings Organic Act. For the application of judicial review, there is a statute of limitation of 180 days.

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, the filing of any application for review, either administrative or judicial, does not have a suspensive effect blocking the continuation of the procurement procedure. Such suspensive effect must be requested before the competent authority and a decision must be rendered in that regard.

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

Not applicable.

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

Yes, unsuccessful bidders will be notified of the award of the contract to the successful bidder once the contracting authority has assessed the offers and rendered a decision.

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

Yes, according to article 20 of the PPA, once the selection of the bidder has finished, the unsuccessful bidders will have the right to access the procurement file and to obtain certified copies of any document in it, unless they have been declared as confidential according to the provisions of the Administrative Proceedings Organic Act.

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

No, it is not customary for bidders to file review applications. There are usually commercial reasons behind the decision.

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

Yes. According to the Venezuelan regime for State Responsibility, those who have been damaged by the actions or omissions of the public administration, without regard of its legality, must be indemnified.

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. It is not usual that a participant in a bidding process acts against the contracting entity. However, when they decide to challenge the adjudication or the contract itself, the final decision would take at least four months if the decision is taken by the contracting entity, or 18 months if the challenge is filed before a court of law.

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

Yes. The interested parties would be able to challenge the contract either before the contracting entity itself or before a court of law.

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

There are no official costs involved in an administrative or judicial challenge to the contract.

José Gregorio Torrealba R **jtorrealba@hpcd.com**

Av Venezuela, Edificio Atrium, Piso 3
Urb El Rosal
Caracas 1060
Venezuela

Tel: +58 212 201 8600
Fax: +58 212 263 7744
www.hpcd.com

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