

THE  
GOVERNMENT  
PROCUREMENT  
REVIEW

EIGHTH EDITION

**Editors**

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

THE  
GOVERNMENT  
PROCUREMENT  
REVIEW

EIGHTH EDITION

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This article was first published in May 2020  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK  
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ISBN 978-1-83862-458-3

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADDLESHAW GODDARD LLP

ARRUDA ALVIM, ARAGÃO, LINS & SATO ADVOGADOS

BAKER MCKENZIE

CROWELL & MORING LLP

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

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# CONTENTS

PREFACE.....	v
<i>Jonathan Davey and Amy Gatenby</i>	
Chapter 1	AUSTRALIA..... 1
<i>Geoff Wood, Anne Petterd and Sally Pierce</i>	
Chapter 2	AUSTRIA..... 14
<i>Philipp J Marboe</i>	
Chapter 3	BELGIUM ..... 25
<i>Frank Judo and Klaas Goetbals</i>	
Chapter 4	BRAZIL..... 39
<i>Teresa Arruda Alvim and David Pereira Cardoso</i>	
Chapter 5	CANADA..... 50
<i>Theo Ling, Karina Kudinova and Nadia Rauf</i>	
Chapter 6	DOMINICAN REPUBLIC ..... 66
<i>Luis Ernesto Peña Jiménez</i>	
Chapter 7	EUROPEAN UNION ..... 74
<i>Bill Gilliam, Michael Rainey, Clare Dwyer and Alexandra Rose</i>	
Chapter 8	GERMANY..... 88
<i>Jan Bonhage and Simone Terbrack</i>	
Chapter 9	GREECE..... 102
<i>Emmanuel J Velegrakis</i>	
Chapter 10	ITALY ..... 113
<i>Filippo Pacciani and Ada Esposito</i>	

## Contents

---

Chapter 11	MEXICO .....	134
	<i>Federico Hernández A, Ana P Rumualdo Flores and Julio S Zugasti González</i>	
Chapter 12	RUSSIA .....	144
	<i>Olga Revzina, Lola Shamirzayeva and Olga Polkownikova</i>	
Chapter 13	SWITZERLAND .....	158
	<i>Astrid Waser and Benoit Merkt</i>	
Chapter 14	UNITED KINGDOM .....	168
	<i>Louise Dobson, Ryan Geldart and Jack Doukov-Eustice</i>	
Chapter 15	UNITED STATES .....	187
	<i>Daniel Forman, Adelia Cliffe, Judy Choi and Christian Curran</i>	
Appendix 1	ABOUT THE AUTHORS.....	199
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	213

# PREFACE

It is our pleasure to introduce the eighth edition of *The Government Procurement Review*.

Our geographical coverage this year remains impressive, covering 15 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

When we started to produce this edition, we imagined that we would be focusing in detail once again in this preface principally on the trials and tribulations of Brexit: how quickly the landscape has changed! Suddenly all talk in procurement circles in the EU and beyond centres on the exigencies of the covid-19 crisis, whether that be modifications to existing contracts to reflect the ‘new normal’ (for instance in the recasting of rail franchise agreements in the UK) or the tension between procurement procedures and the need for urgent procurement of PPE and other medical needs. Many national chapters also consider the changes to procurement practice and rules centring around the imperative to kick-start economies as soon as the worst of the pandemic is behind us.

All of this has resulted in specific guidance at EU level and in the US, Germany, the UK (with the publication of three Procurement Policy Notes in short order) and elsewhere. So far, the European Commission has limited its communications to clarifying the current law. In due course, however, it is possible that there will be a relaxation of procurement law to enable authorities to respond more flexibly to the unprecedented challenges they are facing, and may face in the future. By way of example of changes already effected: (1) financial thresholds were raised in parts of Germany; and (2) new legislative provisions, adopted in February and March 2020 in Greece, allow use of the negotiated procedure for the supply not just of medical equipment but also other items necessary for contracting authorities and entities to adapt to the new situation. More generally, the proposed new legislation in Italy, with a strong focus on the treatment of subcontracting, is particularly noteworthy. There are also significant procurement law developments in Russia, including an extension of circumstances in which single sourcing is permitted.

Brexit is still out there! It remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond the transitional period. Her Majesty’s Government has pronounced itself committed to the need for continued regulation of procurement and, having secured approval from the World Trade Organization, the United Kingdom will become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, at the end of the Brexit transition period.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this eighth edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion, particularly given the effects of the pandemic and consequent lockdowns in most countries covered in this work. We trust you will find it to be a valued resource.

**Jonathan Davey and Amy Gatenby**

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London

May 2020



# AUSTRALIA

*Geoff Wood, Anne Petterd and Sally Pierce*<sup>1</sup>

## I INTRODUCTION

### i Legislation

Government procurement legislation exists for the Australian Commonwealth government, state and territory governments, and local governments.

#### *Commonwealth – key legislation and official guidance*

At the Commonwealth level, the key legislation on government procurement is the Public Governance, Performance and Accountability Act 2013 (Cth) (the PGPA Act), which commenced on 1 July 2014. The PGPA Act brought the fundamental elements of the Commonwealth financial framework together under one piece of legislation.

Official guidance on Commonwealth procurement is primarily contained in the Commonwealth Procurement Rules (CPRs) and the Public Governance, Performance and Accountability Rule 2014, which are issued under the PGPA Act. Further, the Government Procurement (Judicial Review) Act 2018 (Cth) (the Government Procurement Act) provides suppliers with significant rights to challenge a government procurement process for contravention of the CPRs.

The Department of Finance is primarily responsible for setting Commonwealth government procurement rules. It issues policies and directions for procurement, such as resource management guides dealing with liability, indemnity, payment terms and other positions to be applied in procurement and contracts.

There are a number of Commonwealth government procurement connected policies. Different government agencies are responsible for these policies. For example, the Department of Industry, Innovation and Science is responsible for the Australian industry participation policy, and the Attorney-General's Department is responsible for the policy to apply the Building Code 2013 and Building Code 2016 incorporating the Supporting Guidelines for Commonwealth Funding Entities.

At the Commonwealth level, substantial further official guidance is given for conducting defence procurement. Defence procurement is largely subject to the same legislation and official guidelines as other Commonwealth procurement. Additionally, the Department of Defence issues a Defence Procurement Policy Manual (DPPM) and other guidelines and policies applying to defence procurement. The DPPM was updated on 1 July 2019 to clarify mandatory requirements for Defence officials undertaking procurement.

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<sup>1</sup> Geoff Wood is of counsel, Anne Petterd is a partner and Sally Pierce is a senior associate at Baker McKenzie.

The Department of Defence also issues its own contract terms for a range of supply categories.

***State, territory and local government – key legislation and official guidance***

State and territory governments have all enacted legislation regulating how their respective government agencies are to conduct procurement. The approach applied across jurisdictions is broadly similar. States and territories each have a central body that sets procurement rules and conducts most procurement. Government agencies that undertake a substantial amount of procurement (such as health departments) tend to have greater control over their own procurement. Similar to the approach at the Commonwealth level, there are Treasurer's Instructions or similar that provide further policy and guidance on conducting procurement.

State and territory governments tend to establish more whole-of-government purchasing arrangements than their Commonwealth counterparts. Some of these arrangements are expressed to be available for purchasing by agencies in other states and territories (or even by Commonwealth agencies), although there does not tend to be a large take-up by other governments.

Each state also has a local government structure. Legislation is enacted by each state setting rules for local government procurement. Local government bodies will set further rules that regulate their procurement activities.

***WTO Agreement on Government Procurement***

In addition to the above, Australia has been an observer of the World Trade Organization (WTO) Agreement on Government Procurement (GPA) since 4 June 1996. On 5 April 2019, Australia submitted its instrument of accession to the WTO, and the GPA entered into force for Australia on 5 May 2019. Australia's membership of the GPA provides Australian businesses with reciprocal, legally binding access to government procurement markets of all current GPA members (currently 48 members worth approximately A\$2.3 trillion each year). China is expected to join alongside several other countries in the near future. Through the GPA, Australia is able to access markets where it does not have free trade agreements and other new opportunities.

**ii Fundamental procurement principles**

Procurement rules generally require that contracts be awarded to the bid demonstrating the best value for money and otherwise satisfying the conditions of participation. As an example, the principles for procurement set out in the CPRs are to apply the core rule of achieving value for money. This is supported by requirements in the CPRs to:

- a* encourage competition;
- b* make proper use of public resources by efficient, effective, economical and ethical procurement;
- c* ensure accountability and transparency in procurement activities;
- d* appropriately manage and address risks in procurement activities; and
- e* use an appropriate procurement method.

Other governments apply procurement principles largely consistent with those in the CPRs.

## II YEAR IN REVIEW

### i Key developments in legislation, case law, policy and guidance

#### *Policy and guidance*

In April 2019, the CPRs were updated to incorporate new requirements arising from the Government Procurement Act. These updates include narrowing the definition of procurement to those aspects covered by Australia's international obligations, further clarity on the application of exemptions, inclusion of an augmented Small and Medium Enterprises target and other minor amendments.

The Federal Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (the Whistleblower Act) came into effect on 1 July 2019. The Whistleblower Act made changes to the Corporations Act 2001 (Cth) (the Corporations Act) and the Taxation Administration Act 1953 (Cth) with aims to encourage ethical whistleblowing while holding employers accountable for protecting whistleblowers. The Whistleblower Act affects almost all companies, including foreign corporations and Corporations Act companies incorporated by governments (such as government business enterprises, government-owned corporations, local government-owned corporations and university-owned commercial entities). This legislation brings the corporate and financial sectors closer in line with existing public sector whistleblower protections such as those provided under the Public Interest Disclosure Act 2013 (Cth). Key aspects of the legislation include:

- a* increasing the breadth of protected individuals through the definition of 'eligible whistleblowers' to include any individual who has ever had a relationship with a company (such as former employees and contractors);
- b* extension of what constitutes 'protected disclosures' to include breaches of tax and other laws and conduct that is not illegal but indicates systemic issues; and
- c* overall stronger protections for whistleblowers, including anonymity, increased immunities against prosecution and protection against victimisation.

Maximum penalties for breaching an eligible whistleblower's confidentiality or inciting victimisation include up to A\$1.05 million for individuals and either A\$1.05 million or 10 per cent of annual turnover for companies. From 1 January 2020, certain companies must have implemented a compliant whistleblower policy.

From 1 July 2019, businesses seeking to tender for Australian government procurement contracts over A\$4 million are required to provide a statement from the Australian Taxation Office showing they have a satisfactory tax record in accordance with the Black Economy Procurement Connected Policy. All non-corporate Commonwealth entities are required to comply with the policy, while corporate Commonwealth entities are encouraged to comply. This policy aims to increase the integrity of government procurement, as recommended in the Black Economy Taskforce's final report.

On 29 November 2019, the Procurement Board Direction (PBD) 2019-05 Enforceable Procurement Provisions (the EPP Direction) began, which imposes legal requirements on New South Wales government agencies arising from international procurement agreements. The EPP Direction applies to 41 New South Wales government agencies, and covers the procurement of goods and services in a range of circumstances. Various procurements are exempt, including procurement of land, existing buildings, health services and education

services. Government agencies subject to the EPP Direction must use an 'open approach to market' for all procurements, award contracts to tenderers who provide the best value for money, and provide debriefings to unsuccessful tenderers if requested.

## **ii Case law**

Litigation concerning government procurement is infrequent, and there were no related cases of note reported in the previous year. Historically, decisions have primarily reinforced existing principles, and the application of judicial review to a government decision has been difficult. However, litigation may increase going forward as suppliers activate their rights under the Government Procurement Act to apply to the Federal Court for an injunction or compensation for contravention of the CPRs.

## **III SCOPE OF PROCUREMENT REGULATION**

### **i Regulated authorities**

There are typically two types of regulated government bodies for procurement purposes:

- a* departments and agencies that do not have a legal identity separate from the Crown. Complying with the procurement laws and policies in most cases is mandatory for these bodies; and
- b* other government-created bodies that have a legal identity separate from the Crown (e.g., bodies created by statute or government-owned companies). Treatment of these bodies differs. Sometimes they may choose whether to subject themselves to the procurement laws and policies. In other cases they can be directed to comply.

### **ii Regulated contracts**

Any contracts awarded by government bodies using public money or relating to public property will generally be regulated (or covered) by the procurement rules.

Under the CPRs, activities that are not considered to be 'covered' procurement activities are:

- a* grants;
- b* investments and divestments;
- c* sales by tender;
- d* loans;
- e* purchases of goods or services for resale, or of goods or services used in the production of goods for resale;
- f* any property right not acquired through the expenditure of public money (e.g., a right to make a claim for negligence);
- g* statutory or ministerial appointments; or
- h* engagement of employees.

Rules still apply to spending public funds on non-procurement activities. For example, the Commonwealth Grant Rules and Guidelines contain rules for grant programmes that are similar to the CPRs.

At the Commonwealth level, the CPRs contain rules in two divisions. Division 1 applies to all procurements regardless of value. Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The

Division 2 rules require a higher level of transparency (e.g., stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement). The procurement thresholds are those described below in Section IX.

For states and territories, the financial threshold for a contract usually determines the procurement method that must be used.

There are some exceptions to the obligation to advertise or hold a competitive procedure. Sole sourcing (or direct sourcing) is permitted in limited circumstances, such as:

- a* where, in response to an approach to the market, no suitable submissions were received;
- b* for reasons of extreme urgency;
- c* for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals or unsolicited innovative proposals, noting that in recent years, all states and territories have released guidelines for the submission and assessment of unsolicited proposals (the most recent of which came into effect from 16 March 2020 in Western Australia); or
- d* where the property or services can only be supplied by a particular business and there is no reasonable alternative.

Sole sourcing cannot be used to avoid competition or discriminate against any domestic or foreign supplier.

In any sole or direct sourcing arrangement, the general procurement policy framework still applies, including the requirement to achieve value for money.

Free trade agreements containing a non-discrimination in procurement obligation may also allow certain procurements to be conducted without being advertised or on a sole sourcing basis. For example, Australia's free trade agreements in many cases do not cover defence procurement or the procurement of health and welfare services, education services, utility services or motor vehicles.

For defence procurement, there is further policy guidance issued about the basis upon which defence procurement might be conducted on a sole sourcing basis.

Contracting parties are generally free to agree to vary a contract or transfer the contract to a different supplier. However, in the case of contract variations, the customer will need to consider whether the extent of the variations is so substantial as to constitute a different procurement to the one already conducted. If so, the variation may fall outside the sole sourcing rules and require a new approach to the market.

## **IV SPECIAL CONTRACTUAL FORMS**

### **i Framework agreements and central purchasing**

One agency is usually appointed as the lead agency to conduct a coordinated or whole-of-government procurement. At the Commonwealth level, the lead agency is usually the Department of Finance.

The Commonwealth, state and territory governments all use whole-of-government procurement arrangements for certain types of supplies. Where there is such an arrangement for a type of supply, it is usually mandatory for government customers to purchase under the arrangement (unless an exemption applies). In some jurisdictions, local governments participate in joint procurement arrangements where they appoint a party to conduct procurement for a number of local government bodies.

The supplies typically subject to whole-of-government arrangements are items routinely purchased by government bodies without the need to be further customised prior to use (e.g., supplies for hospitals, computer equipment, telecommunications services and cleaning services).

Some panel arrangements are established for more bespoke services, such as to pre-qualify suppliers able to provide certain IT services. From the pre-qualified list, government bodies may then conduct a further procurement to select a provider for particular projects (e.g., to select a systems integrator to implement a new system).

Defence establishes panel arrangements for some types of supplies (such as IT services or to pre-qualify to participate in defence research programmes).

## **ii Joint ventures**

Government-owned bodies (regardless of whether they are part of a joint venture) are typically subject to less stringent procurement rules than government departments. However, in practice they tend to apply procurement rules consistent with those applying to government bodies. Most of these bodies will be subject to requirements to make effective and efficient use of resources and other requirements that usually result in them having policies requiring that they conduct open procurements in much the same way as other government bodies.

Public-private partnerships (PPPs) are not typically established with a requirement that they be bound by government procurement rules when buying, but accountability for use of public resources will still influence how the PPP conducts procurement. At the Commonwealth level, guidance issued under the PGPA Act includes accountability obligations on officials to cooperate with others (including participants in PPPs) to achieve common objectives, where practicable.

The National Public Private Partnership Policy and Guidelines, endorsed by the Council of Australian Governments on 29 November 2008, address partnering with the private sector for the provision of public infrastructure and related services, including on procurement. The Commonwealth, and state and territory governments have agreed that PPPs must be considered for any project with a value in excess of A\$50 million.

PPPs typically incorporate a significant consideration of whole-of-life costs, allowing the government to lock in long-term allowances for project maintenance, asset and quality control. In most PPPs, the government allocates the risk of additional future costs to the private sector concessionaire. This impacts the procurement approach. For example, the concessionaire usually has discretion to determine how to best manage these risks (e.g., by subcontracting them to a builder or operator, pricing for risks or building in contract measures to give relief for risks).

## **V THE BIDDING PROCESS**

### **i Notice**

The Commonwealth government and each state and territory government maintain public websites where procurement opportunities must be advertised.

At the Commonwealth level, as part of the CPRs' requirement to show accountability and transparency in procurement, the CPRs require that each agency publish, by 1 July each year, the agency's annual procurement plan containing details about planned approaches to

market on the AusTender website. AusTender must also be used to publish multi-use list opportunities, open tenders above the procurement threshold and, where practicable, request documentation.

The CPRs also require details about awarded and amended contracts to be published on AusTender if the contract is valued at or over the reporting threshold, which is A\$10,000 for non-corporate Commonwealth entities. For prescribed Commonwealth entities bound by the CPRs, the reporting threshold is A\$400,000 for procurements other than procurement of construction services, or A\$7.5 million for procurement of construction services.

## **ii Procedures**

Procurement rules generally require that contracts be awarded to the bid demonstrating the best value for money and otherwise satisfying the conditions of participation.

At the Commonwealth level, if a procurement is above the procurement threshold, the CPRs require that, unless contrary to the public interest, an agency must award a contract to the bidder that the agency has determined:

- a* satisfies the conditions for participation;
- b* is fully capable of undertaking the contract; and
- c* will provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and tender documentation.

It is common for tender terms to give the agency some flexibility in awarding contracts. Tender terms will typically state that the lowest price bid will not necessarily be accepted, and that the customer may exercise discretion to accept a non-compliant or alternate bid, or decide not to proceed at all.

The majority of procurements conducted have online lodgement requirements. For example, at the Commonwealth level most tenders are required to be lodged via AusTender.

Defence procurements will require lodgement via AusTender or other electronic means where appropriate. If, for example, the request for tender documents involves security classified or other sensitive information, then lodgement via hard copy or physical delivery to a tender box may be used.

## **iii Amending bids**

At the Commonwealth level, the CPRs permit customers to change terms applying to the procurement provided all bidders are treated equitably. Where a procurement is above the procurement threshold, additional change notification requirements apply.

The tender terms will usually define the basis upon which final tenders may be changed pre-award. Tender terms will typically give the customer flexibility to discuss proposals with one or more shortlisted bidders and seek further responses from them without needing to go back to excluded bidders.

It could be more difficult for a customer to justify that a significant change made during the preferred bidder stage does not breach procurement rules. For example, if the issued tender terms stated a requirement was mandatory and bidders were excluded for not meeting that requirement, it could be problematic for the customer to keep dealing with a preferred tenderer who, at the preferred bidder stage, said it did not meet the mandatory requirement. This could be unfair to the excluded bidders (and, if so, could breach the procurement rules).

## **VI ELIGIBILITY**

### **i Qualification to bid**

The tender terms will typically give the customer discretion to exclude a bidder for breach of the tender conditions or inappropriate behaviour in connection with the tender.

If a party has been involved in an earlier stage of the project being tendered (e.g., in preparing the requirements document), such party may find itself excluded from competing in the later tender. Alternatively, the party may need to implement measures to quarantine its staff involved in that earlier work from the tender. This issue often arises for large defence procurement and in PPPs (partly because they can take place over several years).

Bidders can be excluded through conditions for participation or for failing to meet the mandatory requirements. A bidder might also be excluded for failing to comply with mandatory procurement policy.

Procurement frameworks usually enable government agencies to exclude bidders on grounds such as insolvency, false declarations or significant deficiencies in performance under a prior contract.

It is not uncommon, particularly in PPPs and large defence projects, where tendering costs can be very high, for the initial selection phase to be an 'expression of interest' process where those consortia interested in tendering are reduced to a small number (often two or three) on the basis of demonstrated technical experience and financial capacity, with only those selected invited to continue in the next 'request for proposal' phase.

### **ii Conflicts of interest**

Tender terms usually require tenderers, to avoid an actual or apparent conflict of interest arising, to promptly report any such conflict and to comply with any directions issued for how the conflict is handled.

Defence procurements and PPPs usually contain more detailed terms for handling conflicts of interest. Procurement terms will typically contain a prohibition on improper assistance, and on a bidder using recently departed customer personnel or a contractor who may have been involved with the project. What is an actual or apparent conflict of interest is typically left as a matter for the judgement of the customer. The Defence Instruction Administrative Policy (which came into force on 8 August 2019) requires Defence personnel to report any conflict of interest in writing as soon as it is identified. If the conflict relates to a contract or tender, Defence personnel must also report the conflict to the relevant contract manager or panel.

### **iii Foreign suppliers**

Foreign suppliers may bid for government procurement opportunities. Foreign suppliers are not required to set up a local branch or subsidiary, or have local tax permanent establishment presence to do business with public authorities.

Government bodies are required to comply with Australia's sanctions regime, which applies the United Nations Security Council as well as autonomous sanctions. As a result, a government customer would be unable to do business with a foreign supplier if that would breach Australian sanctions.

Free trade agreements (FTAs) have impacted Australia's procurement rules and requirements. Australia has agreed several FTAs containing requirements to eliminate preferential treatment of local suppliers and provide transparency in the government



procurement process. These goals have been incorporated into procurement frameworks across all Australian governments. For example, the CPRs prohibit discrimination that would otherwise favour local suppliers. However, the FTA non-discrimination in government procurement requirements contain exemptions, for example, to allow Australian governments to apply preferences to small to medium-sized enterprises. Moreover, it is not yet clear how the FTA non-discrimination requirement will interact with the new requirement in Division 2 of the CPRs that officials must consider the benefit of a procurement above A\$4 million in value to the Australian economy in light of the various international trade agreements to which Australia is a party.

Foreign suppliers are generally eligible to bid for defence contracts, but may face restrictions where the project would involve access to classified information. For example, the DPPM reflects that in the case of a foreign tenderer or contractor, under most circumstances, only companies from those countries with which Australia has a bilateral security instrument for the reciprocal exchange of classified information are eligible for access to Australian security classified information.

## **VII AWARD**

### **i Evaluating tenders**

Most tender terms will set out evaluation criteria (sometimes, however, stated to be not necessarily exhaustive).

At the Commonwealth level, the CPRs require agencies to include relevant evaluation criteria in tender documentation to enable the evaluation of bids on a fair, common and appropriately transparent basis. If a procurement is above the relevant procurement threshold, the CPRs require that the tender requirements include evaluation criteria to be considered in assessing submissions. Value for money is usually the overarching criterion.

### **ii National interest and public policy considerations**

National interest and local, social and environmental considerations are taken into account in different ways in procurement. Some public policy requirements are included in tender evaluation criteria. Others operate as a bar to doing business with the government. Examples of those requirements at the Commonwealth level are:

- a* for procurements over A\$4 million, the new requirement in Division 2 of the CPRs that officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party;
- b* the Australian Industry Participation (AIP) National Framework, which applies to major Commonwealth government procurements (generally above A\$20 million), pursuant to which, tenderers for certain Commonwealth procurements are required to prepare and implement an AIP Plan; and
- c* the Workplace Gender Equality Procurement Principles and User Guide require government agencies to obtain a letter of compliance from certain tenderers (employers with 100 or more employees) that indicates compliance with their obligations under the Workplace Gender Equality Act 2012 (Cth).

## **VIII INFORMATION FLOW**

The tender terms will usually contain a term giving bidders the opportunity for a debriefing.

The CPRs require that after the rejection of a bid, officials must promptly inform affected bidders of the decision. Debriefings must be made available, on request, to unsuccessful bidders, outlining the reasons their submissions were unsuccessful. There are mixed approaches by government bodies as to whether they are willing to provide a debrief before a contract is executed or afterwards.

Confidentiality obligations for tenders are governed by the tender terms. There is usually an obligation on each party to use and disclose each other's confidential information only for the purpose of conducting the procurement.

## **IX CHALLENGING AWARDS**

Historically, legal challenges to procurement decisions have been infrequent and, in the absence of serious wrongful conduct by a government body, challenges do not tend to succeed.

The Government Procurement Act confers standing on a wide group of potential complainants to seek either or both of an injunction and an order of compensation through the courts for contravention of the CPRs during the tender process. This applies to 'covered procurements' being those to which both Divisions 1 and 2 of the CPRs apply. This means that the procurement value is estimated at, or above, the following thresholds:

- a* A\$80,000 for non-corporate Commonwealth entities (non-construction services);
- b* A\$400,000 for prescribed corporate Commonwealth entities (non-construction services); and
- c* A\$7.5 million for non-corporate and prescribed corporate Commonwealth entities (construction services).

As of April 2019, the CPRs will support the legal remedies under the new Government Procurement Act by declaring certain provisions to be 'relevant provisions' under the CPRs for the purposes of that Act. The rights to seek injunctions or orders of compensation apply only in relation to contraventions of 'relevant CPRs'. These are now outlined explicitly under Rule 6.9 of the CPRs.

At a state level, in New South Wales the Public Works and Procurement Amendment (Enforcement) Act 2018 (NSW) enables the NSW Procurement Board to issue policies and directions concerning the procurement of goods and services by and for government agencies. The legislation establishes a set of enforcement powers and rules relevant to challenging awards, including:

- a* a procedure to lodge complaints about the conduct of government agencies where it is alleged they have contravened procurement provisions; and
- b* power for the Supreme Court to issue injunctions or award compensation for contraventions of procurement provisions.

Procurement decisions are likely to come under judicial scrutiny in future as complainants challenge the conduct of government agencies at both a federal and, to a limited extent, state level. However, awards made in relation to unsolicited proposals are governed by separate guidelines, and, therefore, it is unlikely such awards will be subject to challenge by judicial review.

## **i Procedures**

There are processes for handling procurement complaints. Prior to the enactment of the Government Procurement Act, they were purely administrative, and the complainant had no legal rights. However, they can provide a quick resolution.

At a Commonwealth level, the CPRs require government bodies to have a timely, equitable and non-discriminatory procurement complaint handling procedure. Legislation also allows suppliers to lodge a written complaint to the procuring body for any alleged breaches of the CPRs. This will trigger an investigation and attempted resolution of the complaint by an accountable authority of the procuring body. The procurement may also be suspended until a complaint is resolved, unless suspension of the procurement would be contrary to the public interest.

There is an administrative process through the Department of Finance whereby some types of complaints are made to the Procurement Coordinator. Complaints about current tenders will only be considered where the Procurement Coordinator determines the issue raised is sufficiently material and relevant to warrant being raised with the procuring government body, and if there is sufficient time to deal adequately with the complaint before the tender closes.

The Procurement Coordinator has no authority to compel a government body to reconsider the conduct or outcome of tender processes for which that body is accountable.

Legislation also allows a complaint about procurement to be made to the Commonwealth Ombudsman. The Ombudsman has powers to investigate and make a recommendation but no power to change a decision.

The person with standing to bring the relevant legal cause of action may commence litigation to challenge the award of a tender. Usually this will be an aggrieved tenderer. The party will need to find a public or private law cause of action.

The limitation period for applying for a remedy will usually be set out in the limitation legislation for the relevant jurisdiction. Some causes of action found under legislation will specify a limitation period in that piece of legislation (e.g., the Competition and Consumer Act 2010 (Cth), and usually legislation giving administrative law remedies).

The general limitation period is six years from the date the cause of action accrued. Different periods are set for particular causes of action. If the cause of action arose under an agreement executed as a deed, the limitation period could be 12 or 15 years from the date the cause of action accrued, depending on the jurisdiction.

Complaints raised under the Government Procurement Act for alleged breaches of the CPRs must be raised with the courts within 10 days of the contravention occurring.

## **ii Grounds for challenge**

In practice, challenging procurement decisions can be difficult in the absence of serious wrongful conduct.

While complainants can now make an application under the Government Procurement Act to the Federal Court for an injunction or an order of compensation for contravention of the CPRs by a government body, or both, even if the court finds that the CPRs have been contravened, the court is not able to overturn the awarded contract.

Administrative and private law actions may also be available to provide a remedy for a procurement complaint. For example, administrative law may allow a claim based on denial of natural justice, a lack of procedural fairness or on the legitimate expectation doctrine;

or legislation allowing the review of administrative decisions made under an enactment. However, these cases are rare, as procurement decisions are not usually found to have been made under an enactment.

- Depending on the circumstances, private law remedies may be available. For example:
- a most procurements will be conducted under a tender process contract. Where a process contract has been created, an action in breach of contract may be available if the government body fails to follow the procurement process;
  - b if the government body has acted in a misleading manner in conducting the procurement, it may be liable for misleading conduct in breach of the Competition and Consumer Act 2010 (Cth), or under corresponding state and territory fair trading legislation. However, there are differences between jurisdictions in whether the government can be liable under the legislation; or
  - c the doctrine of estoppel may be available to provide redress for a tendering complaint where representation, reliance and detriment can be shown to have occurred.

There are few cases where remedies have been obtained against the government for procurement practices.

*Hughes Aircraft Systems International v. Airservices Australia*<sup>2</sup> established that under Australian law, a public tender could be governed by a 'process contract'. In *Hughes*, the process contract contained the express tender terms (which included confidentiality obligations that were found to have been breached) and the implied term that the government body was to evaluate all tenders fairly and in good faith (which was breached as tenderers were not treated fairly).

*JS McMillan Pty Ltd v. Commonwealth*<sup>3</sup> is the leading Australian authority for procurement disputes based on misleading conduct by government. In *McMillan*, the Commonwealth government conducted a procurement to outsource its printing operations. *McMillan* accused the government of having engaged in misleading conduct under the predecessor to the Competition and Consumer Act 2010 (Cth). For the government to be liable, the test for applying the Act to the Crown's activities needed to be satisfied. The test was whether the government could be treated as carrying on a business. It was held that outsourcing printing operations was not carrying on a business, and so the Act did not apply.

### iii Remedies

For private law causes of action, the courts may grant injunctions, set aside contracts, order new tenders and award damages for breach of tender process contracts. However, contracts are rarely undone. If a bidder obtains a court decision in its favour concerning the conduct of the procurement, the most likely remedy is damages to compensate the bidder for loss.

There is no separate body of procurement law under which damages can be awarded.

No fines are available for breach of procurement procedures.

For private law causes of action, the remedies may be quite limited. For example, powers to review an administrative law decision may only grant the court the power to require that the decision be remade (which may not change the outcome). Damages are also not an

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2 (1997) 146 ALR 1.

3 (1997) 147 ALR 419.

available remedy for all administrative law actions. However, as noted in Section II, the Government Procurement Act now provides an avenue for seeking an order for payment of compensation for contravention of the CPRs in relation to a covered procurement.

## **X OUTLOOK**

Given the recent accession to membership of the WTO, government procurement in Australia is likely to turn outwards in the near future to take advantage of the increased reach provided by GPA membership. In addition, the EPP Direction for New South Wales suggests that the government procurement processes will focus more on transparency and validity of process.

Government contractors should ensure they are familiar with the requirements under the CPRs and seek legal advice where they suspect a contravention of the CPRs affecting their interests in a tender process.

Finally, the enactment of the Whistleblower Act is likely to affect companies (including those incorporated by government bodies) by increasing their awareness of risks relating to treatment of whistleblowers. Issues such as kickbacks, fraud and corruption will be given increased scrutiny and visibility around the procurement process will be essential moving forward.

# AUSTRIA

*Philipp J Marboe*<sup>1</sup>

## I INTRODUCTION

The main sources of law for public procurement in Austria are the Federal Public Procurement Act 2018 (BVerG), the Federal Act on the Award of Concession Contracts 2018 (BVerGKonz) and the Federal Act on the Award of Contracts in the Fields of Defence and Security 2012 (BVerGVs) as amended. Owing to the country's federal structure (federal state, provinces and municipalities), there are a further nine separate public procurement acts at the regional level.

The BVerG applies for the entirety of public tenders awarded by the nine Austrian provinces and the communities and public bodies governed by them. In contrast, the review proceedings at the regional level are exempted from the BVerG; these are regulated by the nine distinct regional laws. However, these regional laws do not deviate significantly from the review proceedings stipulated in the BVerG.

The BVerG transposes the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive and the Remedies Directive. The BVerGKonz implements the 2014 Concession Contracts Directive, whereas the BVerGVs transcribes the Defence and Procurement Directive. In addition, the case law of the Federal Administrative Court (BVwG), the nine administrative courts, the Supreme Administrative Court (VwGH), the Supreme Constitutional Court (VfGH) and the Court of Justice of the European Union (CJEU) applies.

Austria has implemented its obligations under the World Trade Organization's Agreement on Government Procurement (GPA). As an EU Member State, Austria is at the same time a contracting party to the Agreement between the European Community and the Swiss Confederation on Public Procurement (and another six sectors).

The general principles of public procurement were formulated in compliance with the EU directives, the EC Treaty and the Federal Constitution. Accordingly, the basic principles for public procurement are free and fair competition, equal treatment of all candidates and tenderers in due consideration of the Community rules on fundamental freedoms, and non-discrimination. Pursuant to Section 20, Paragraph 1 of the BVerG, contracts shall be awarded to authorised, capable and reliable entrepreneurs at reasonable prices.

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## II YEAR IN REVIEW

The past year was marked by the first experiences in practice with the application of the totally new BVerG, which entered into force in August 2018. As the BVerG tackled the entirety of the issues provided for in the 2014 Procurement Directives it introduced a multitude of changes and novelties to the current law. Accordingly, the past year brought uncertainty and discussion as to the exact meaning of certain provisions about the requirement to offer unrestricted and full direct access to the procurement documents from the date of publication of a notice. Another area of uncertainty was the new exclusion ground, where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract with a contracting authority, which led to early termination, damages or other comparable sanctions.

Concerning recent jurisprudence, one ruling stood out as to its relevance to economic operators and their responsibility to thoroughly prepare review proceedings. The VwGH<sup>2</sup> held that an application for review proceedings must compulsorily contain a determined claim. The latter has to include the application for the annulment of a separately challengeable decision. If the economic operator fails to formulate his or her claim correctly, this fault is, pursuant to the VwGH, not mendable. Therefore, the court concerned may not grant room for improvement or give the claim a new explanation. It is rather obliged to reject the application outright.

## III SCOPE OF PROCUREMENT REGULATION

### i Regulated authorities

The ‘classic’ contracting authorities covered by the BVerG are the federal state, the provinces (regional states) and municipalities, associations formed by the previously mentioned bodies, and ‘bodies governed by public law’.

A body governed by public law is an entity that is controlled, financed or supervised by contracting authorities and established for the specific purpose of serving needs in the general interest, and not having an industrial or commercial character.

In the utilities sector, three groups of contracting authorities may be differentiated: the classic contracting authorities; public undertakings engaging in a utility activity; and (private) entities carrying out utility activities based on special or exclusive rights. Thus, in practice, the utility regime also applies to a variety of private sector utilities including, for example, water companies.

### ii Regulated contracts

In general, supply contracts, service contracts and works contracts awarded by the aforementioned contracting authorities are subject to the procurement regulations. In the utilities sector, a less strict regime applies. The contracting authority benefits from more freedom in the execution of the procurement procedure (e.g., a wider choice of eligible tender procedures).

In addition, the BVerGKonz sets forth specific rules and provisions applicable for awarding service and works concession contracts. Pursuant to Section 5, Paragraph 1 and Section 6, Paragraph 1 of the BVerGKonz, service and works concession contracts

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2 Ra 2020/04/0005, 27 January 2020.

are contracts of the same type as service and works contracts, except for the fact that the consideration for the services or works to be carried out consists either solely of the right to exploit the services or construction, or of such a right together with a specific amount of payment. According to Section 7 of the BVergGKonz, on concessions comprising both services and works, the provisions of the contract type that constitutes the main subject matter of the concession contract shall apply. The term of concession contracts must be determined. If the term exceeds five years, it must not pass the period in which the concessionaire is able to generate the capital expenditures plus a return. Generally, the BVergGKonz leans on the structure of the BVergG, but imposes a less strict regime. For instance, the contracting authority is generally free to shape the award procedure of the concessionaire as long as the provisions of the BVergGKonz are observed. Likewise, the remedy regime is similar to that of the BVergG, assigning the competence to the BVwG.

The BVergG does not apply when the special provisions of the BVergGVS prevail. The latter provides special rules for defence and security procurement. It covers the supply of military or sensitive equipment, including any parts, components or subassemblies thereof. Moreover, the BVergGVS regulates works, supplies and services directly related to the aforementioned equipment, and works and services for special military purposes, or sensitive works and sensitive services. However, neither the BVergG nor the BVergGVS are applicable to public contracts when they come under the exemption pursuant to Article 346(1)(a) of the TFEU. Pursuant thereto, EU countries may not be obliged to provide information whose disclosure is, in their opinion, contrary to its vital security interests. Austria has exercised this exemption right in Section 9, Subparagraph 4 of the BVergG and Section 9, Paragraph 1, Subparagraph 1 of the BVergGVS.

Pursuant to the respective Commission Delegated Regulations (EU) on the application thresholds for the procedures for the award of contracts,<sup>3</sup> new application thresholds for the procedures for the awards of contracts do apply as of 1 January 2020. The thresholds have been lowered insignificantly as follows:

<b>Public service and public supply contracts</b>	Public Sector Directive	From €139,000 (specified contracting authorities, e.g., ministries) to €214,000 (€144,000 to €221,000, previously)
<b>Public service and public supply contracts</b>	Utilities Directive Defence Directive	€428,000 (€443,000, previously)
<b>Public works contracts</b>	Public Sector Directive Utilities Directive Defence Directive	€5.350 million (€5.548 million, previously)
<b>Concession contracts</b>	Concession Contracts Directive	€5.350 million (€5.548 million, previously)

Note that the BVergG, BVergGKonz and BVergGVS also apply below these thresholds. Whether the contract exceeds the thresholds is relevant for the scope of the applicable regulations (e.g., with regard to the number and conditions of the eligible tender procedures). The rules for contracts below the thresholds are, in general, less stringent (e.g., providing for simplified rules on publication obligations). In contrast, more formalised and transparent procedures apply above the thresholds.

Moreover, within the scope of the BVergG, contracts that do not exceed a value of €100,000 may be awarded directly. Direct awards with a prior market survey are applicable to

<sup>3</sup> Commission Delegated Regulations (EU) 2019/1827, 1828 and 1829 of 30 October 2019.



supply and service contracts with a contract value less than €130,000 in the classic sector and €200,000 in the utilities sector, respectively; the contract value of works contracts must not exceed €500,000. When resorting to direct awards with a prior market survey, the contracting authority is obliged to publish a notice prior and subsequent to the awarding procedure. The course of the awarding procedure may be determined by the contracting authority, but in due consideration of the general principles of the TFEU.

The BVergG allows various exemptions for contracts. The procurement regulations shall not apply, for instance, to:

- a* contracts concerning the acquisition or lease of rights to real estate, buildings or other immovable property;
- b* employment contracts;
- c* arbitration and conciliation services;
- d* certain international contracts;
- e* central bank services and certain financial services;
- f* in-house procurement and public–public cooperation;
- g* certain research and development services;
- h* certain broadcasting services; and
- i* shall apply in part to service contracts on public passenger transport services by rail or underground.

The applicability of these exemptions must be demonstrated and documented by the contracting authority and is subject to review proceedings before the administrative courts. The majority of the above-mentioned exceptions correspond to the exceptions provided for the utilities sector, irrespective of minor differences (e.g., in relation to contracts on financial services). However, certain exemptions are reserved to the utilities sector exclusively, such as specific contracts awarded for purposes of resale or lease to third parties.

## IV SPECIAL CONTRACTUAL FORMS

### **i Framework agreements and central purchasing**

Framework agreements are widely used, in particular in market sectors characterised by significant price dynamics (e.g., information technology or the power and gas markets). However, framework agreements are merely available in open, restricted or negotiated procedures. In principle, the term of a framework agreement must not exceed a four-year period. Framework agreements can be concluded between one or several contracting authorities on the one side and one or several entities on the other. This results in enhanced competition and flexibility – both advantages widely appreciated by contracting authorities.

Contracting authorities are entitled to conduct tender procedures jointly. Moreover, the BVergG allows the establishment of central purchasing entities. One such entity is the Austrian Federal Purchasing Agency (BBG). Its main task is to provide procurement services to the federal state, the provinces and municipalities, as well as to associations formed by the previously mentioned bodies. The BVergG introduced new provisions in order to foster joint cross-border tender procedures, including through central purchasing.

## ii Joint ventures

Public-public joint ventures are common in Austria. In practice, one of the most relevant forms thereof is the ‘intercommunal cooperation’. Already, in the groundbreaking *Stadtreinigung Hamburg*<sup>4</sup> decision, the CJEU pointed out that a public authority is entitled to perform the public interest tasks conferred on it by using its own resources without being obliged to conduct a procurement procedure. Moreover, the public authority may do so in cooperation with other public authorities and this cooperation is not subject to a control criterion.

Section 10, Paragraph 3 of the BVergG codified the aforementioned exemption under the designation of ‘public-public cooperation’. In order to rely on the exemption, the involved contracting authorities must aim at the fulfilment of common goals, pursue exclusively public interest and perform by their cooperation less than 20 per cent of the respective activities on the open market.

Another important exemption is the ‘in-house’ exemption, which corresponds to the jurisdiction of the CJEU (e.g., *Teckal*<sup>5</sup> and *Stadt Halle*<sup>6</sup>). However, the BVergG extended and differentiated its scope. Pursuant to Section 10, Paragraph 1, contracts that a contracting authority awards to a legally distinct entity do not come under the BVergG if the contracting authority exercises over the distinct entity in question a control that is similar to that over its own departments, if the entity carries out more than 80 per cent of its activities with the contracting authority or authorities that control it, and if there is no private ownership or participation in the entity. However, the BVergG introduces a narrow exemption from the interdiction of private participation. According to Section 10, Paragraph 1, Subparagraph 1 c, non-controlling and non-blocking forms of private capital participation required by national legislative provisions that do not exert a decisive influence are admissible. Further, the BVergG widens the scope of the ‘in-house’ exemption to the ‘bottom-up’ and ‘affiliate’ in-house awards.

Moreover, the BVergG does not apply if sectoral entities award contracts to an affiliated company, or if a joint venture (formed by several sectoral entities for the purpose of performing sectoral activities) awards the contract to one of those sectoral entities or to an affiliated company, provided that at least 80 per cent of the average annual turnover of the seller has been realised by performing such services to the joint venture.

There is no specific legislation applicable to the awarding of public-private partnership (PPP) projects, but rather they are regulated by general public procurement rules (i.e., the BVergGKonz). The notion of PPP is not recognised by Austrian public procurement law, and PPPs are typically classified as service or works concessions.

## V THE BIDDING PROCESS

### i Notice

Contracts that come under the procurement regulations must be advertised in the OJEU. In addition, they have to be published at a nationwide level. As of 1 March 2019, all domestic advertisements must be executed within the scope of the Open Government Data system.

<sup>4</sup> C-480/06, *Commission v. Germany*.

<sup>5</sup> C-107/98, *Teckal Srl v. Comune di Viano*.

<sup>6</sup> C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*.

The contract authorities are obliged to communicate the metadata of their procurement procedures accordingly. This should ensure better accessibility of information on tenders. Contracts not exceeding the thresholds may but do not need to be advertised at the EU level.

## **ii Procedures**

Contracting authorities must use one of the tender procedures provided for in the BVerG: open, restricted or negotiated procedures; direct award (with or without prior public market survey); competitive dialogue; framework agreements; a dynamic purchasing system; design and realisation contests; or innovation partnership procedures.

Whereas the open procedure and the restricted procedure can be chosen regularly, other procedures are subject to certain conditions. In the open procedure, an unrestricted number of economic operators are publicly invited to submit tenders. In restricted procedures (with prior notice), any undertaking may submit an application for participation, whereupon the contracting authority merely invites a restricted number of qualified undertakings among the applicants to submit tenders. Subsequently, the full scope of the contract is negotiable.

In principle, the negotiated procedure (with prior notice) may be chosen unless an open or restricted procedure with prior notice has resulted in any tenders, or in any tenders appropriate for the purchase. However, the original terms and conditions for the contract must not be modified and amended materially. Moreover, the negotiated procedure may be selected if the special characteristics of the contract do not allow an open or a restricted procedure, or the services of the contract cannot be stipulated in contractual specifications. The BVerG has widened the possibilities to choose the negotiated procedure with prior notice.

In the negotiated procedure without prior notice, the contracting authority calls upon economic operators designated preliminarily to submit an offer. Subsequently, the terms and conditions of the contract are negotiated. The admissibility of this procedure is subject to particular conditions, such as, for instance, extreme urgency, recurrence of similar circumstances or if only one specific economic operator is able to execute the contract.

The competitive dialogue is most appropriate if solutions to particularly complex projects are sought. This is the case when the contracting authority is not capable of determining the technical specifications or legal or financial conditions of the project.

Framework agreements do not entail a purchase obligation but a non-binding basis for future purchases. A dynamic purchasing system is an entirely electronic process that is restricted to certain services in line with standard market conditions ('off-the-shelf' products or services).

Design contests are procedures in which plans or designs are selected by a jury; they can be conducted with or without prizes or payments to participants.

Under an innovation partnership procedure, introduced by the BVerG, the contracting authority uses a negotiation procedure to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market.

## **iii Amending bids**

Whether amendments to bids are admissible, and the scope thereof, depends on the tender procedure chosen. In open or restricted procedures, bidders are not allowed to amend their bids when the time limit for receipt of tenders has expired. However, queries to the contracting authority for clarification are admissible provided that all bidders are treated

equally. In contrast, in negotiated procedures, generally, the entire content of the contract is negotiable. However, these negotiations must not modify the essential characteristics of the contract.

## **VI ELIGIBILITY**

### **i Qualification to bid**

To be qualified to bid, the bidders must prove their suitability, their technical and professional ability, and their economic and financial standing.

In this respect, the bidder is entitled to submit the European single procurement document pursuant to Section 80, Paragraph 2 of the BVergG. This declaration serves as preliminary evidence of the qualification requirements. If proof of suitability is not provided, the bidder can hand them in later within an appropriate time limit. The evidence of the required ability or suitability can be substituted by a third party (Section 86 of the BVergG).

Tenderers shall be excluded from participating in award procedures, particularly in cases of:

- a* a final judgment against them or natural persons on their managerial body because of participation in a criminal organisation, corruption, fraud or money laundering;
- b* bankruptcy or composition (reorganisation) proceedings against them, or bankruptcy proceedings rejected in the absence of sufficient assets;
- c* liquidating or winding up the business;
- d* guilt of grave professional misconduct, in particular violation of provisions of labour or social laws, according to evidence available to the purchaser or a final judgment against the tenderers or natural persons on their managerial body challenging their professional conduct;
- e* violation of their obligations to pay social security contributions or taxes and levies;
- f* a conflict of interest cannot be eliminated through less drastic measures (newly introduced by the BVergG);
- g* performance in earlier public contracts showing major or permanent deficiencies (newly introduced by the BVergG); or
- h* guilt of serious misrepresentation in providing information.

However, in certain cases, a tenderer may be permitted to participate in a procedure despite the application of an exclusion ground if they provide evidence of 'self-cleansing'. To do so, the tenderer is – in accordance with the respective tightened provisions pursuant to Section 83, Paragraph 2 of the BVergG – obliged to prove that he or she has (1) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; (2) clarified the facts and circumstances in a wide-ranging manner by actively collaborating with the investigating authorities; and (3) taken effective technical, organisational, personal and other measures that are suitable to prevent further criminal offences or misconduct.

### **ii Conflicts of interest**

Pursuant to Section 26, Paragraph 1 of the BVergG, the contracting authority must take appropriate measures in order to prevent conflicts of interest. Such a conflict of interest is established if personnel of the contracting authority involved in the tender procedure might have, directly or indirectly, a financial, economic or other personal interest that may impair

their impartiality and independence. In addition, according to Section 25, Paragraph 2 of the BVergG, economic operators or bidders that have advised the contracting authority or have participated by other means in the preparation of the tender procedure must be excluded if their participation would distort equal and fair competition in consideration of the principle of equal treatment. However, prior to any exclusion, the contracting authority is obliged to afford the economic operator the possibility to prove that his or her participation could not distort equal and fair competition.

### **iii Foreign suppliers**

In principle, foreign (non-EU or EEA) suppliers may also participate in public tender procedures. However, they are obliged to comply fully with the conditions and requirements of the tender documents including, inter alia, the minimum eligibility and qualification criteria. The establishment of a local branch or subsidiary is generally not a precondition to participate.

In the utilities sector, a contracting authority can exclude a foreign candidate or bidder from an award procedure above the thresholds with regard to products originating from countries that are not EEA signatories or have no agreement with the EU according to which actual access to their national markets is guaranteed in favour of EU-based entities, and that have a legal situation comparable to the one provided by the BVergG. Moreover, the bidder can be excluded if 50 per cent of the required products stem from a country that is not an EA signatory or has not concluded an agreement with the EU on the aforementioned terms.

The GPA establishes the principles of equal treatment and non-discrimination in favour of candidates and bidders originating from the signatory states and parties to the GPA.

## **VII AWARD**

### **i Evaluating tenders**

Tenders may be evaluated either on the basis of the most economically advantageous tender or merely on the lowest price. If the most economically advantageous tender is chosen, all awarding criteria must be specified and notified. These may refer to quality, price, running costs, aesthetic and functional characteristics, environmental characteristics, technical merit, cost-effectiveness, after-sales services and technical assistance, delivery date and delivery period, or period of completion. Awarding criteria may also refer to the whole life cycle of the subject matter of the contract. In addition, for the sake of transparency, the contracting authority is compelled to notify the weighting that is linked to each awarding criteria. Ultimately, the award should be made in accordance with what the individual contracting authority considers the most economically advantageous solution among those offered. The BVergG strengthened the preference of the 'most economically advantageous principle'. The latter may be based on the lowest cost or best price–quality ratio.

Alternative bids are exclusively admissible if explicitly mentioned in the tender documents. Unless stated otherwise in the tender documents, they have to be submitted in addition to a 'main' offer in conformity with the tender conditions.

In contrast, bids marginally amending the tender are permitted unless explicitly stated otherwise in the tender documents. However, they may merely entail minor technical modifications of the contract.

## **ii National interest and public policy considerations**

National interest and, in particular, public policy considerations, can be taken into account exclusively to the (limited) extent conceded by the legislator and, in particular, in due consideration of the procurement principles.

## **VIII INFORMATION FLOW**

Contracting authorities are obliged by law to assure fair and transparent award procedures in accordance with the procurement principles, above all the principle of equal treatment and non-discrimination. On the one hand, this means, essentially, that candidates and bidders must be notified with the same information to guarantee a level playing field. On the other hand, contracting authorities are compelled by law to protect the confidential character of all information provided to them, especially trade and business secrets.

Tenderers are entitled to request clarification about the tender or pre-qualification documents. The contracting authority must respond to such requests. It must summarise the anonymised questions and the answers and communicate them to all participating candidates or bidders.

The contracting authority is obliged to notify the bidders other than the successful tenderer to which the award shall be made. Moreover, it must indicate the award sum, the characteristics and advantages of the winning tender, the reasons for the bidder's non-selection and the end of the standstill period.

## **IX CHALLENGING AWARDS**

### **i Procedures**

There are two distinct main types of proceedings before the administrative courts: review proceedings that can be brought in prior to the award of the contract, and proceedings for declaratory decisions subsequent thereto. Applications for review proceedings seek to have decisions by the contracting authority declared null and void. Applications for declaratory decisions tend to seek to have award procedure faults declared unlawful.

Subject to the type of proceedings and the means of communication of the decision concerned, there are distinct time limits. Applications for review proceedings must be filed within 10 days if the decision was transmitted by electronic means. Applications for declaratory decisions have to be submitted within six months of the moment in which the applicant had or should have had knowledge of the challenged decision (e.g., award). However, the sanction to cancel the contract or to declare the contract null and void is subject to an (absolute) application term of six months subsequent to the challenged award.

### **ii Grounds for challenge**

According to the BVerfG, only certain explicitly enumerated decisions by the contracting authority may be challenged by economic operators and bidders. These decisions refer, inter alia, to the selected award procedure, the tender documents, the invitation to tender, the selection (or exclusion) of the bids, and the award decision.

The legitimacy to file a complaint is subject to an interest in obtaining the relevant contract. In addition, the plaintiff must be harmed by the alleged infringement or at least face the risk of being harmed.

Challenges are quite frequent in Austria. As to the chances of success, in the reporting period from 1 February 2018 to 31 January 2019, almost 34 per cent of appeals filed with the BVwG were granted.

For each application, a fixed basic fee has to be paid. The amount depends on the contract and the type of proceeding and varies from €324 to €6,482. The basic fee may be further increased (e.g., trebled when the estimated contract value is more than 10 times higher than the relevant thresholds) or reduced (e.g., quartered in the case of applications for review of tender documents).

The decision deadline for the courts is six weeks.

### iii Remedies

The main remedies, which correspond to the two main types of proceedings, are applications for review proceedings and for proceedings for a declaratory judgment. The administrative courts have the power to annul decisions taken by the contracting authority (e.g., the award decision). The contracting authority is obliged to adhere to the court's ruling and release a corresponding decision, anew. To safeguard the effectiveness of the review proceedings, the authority is entitled to grant interim relief (upon a respective application) and suspend the tender procedure or certain decisions.

The courts may declare contracts null and void. If they refrain from doing so, they generally must impose fines instead. The highest fine imposed (on BBG) to date amounted to €367,000.<sup>7</sup> In this respect, the VwGH<sup>8</sup> held that an imposed fine still has to be paid even if the incriminated contract has been terminated.

Judgments in procurement cases are rendered in both the first and last instance. They can be further challenged exclusively through complaints before the VwGH or VfGH.

Infringements of the procurement law entitle disregarded economic operators to claim forbearance, abatement and damages under the Unfair Competition Act. In addition, they may claim damages under civil law. However, entitlement to bring a claim before the civil courts is conditional upon a declaratory judgment of violation of the procurement law.

## X OUTLOOK

At the beginning of 2020, a new government was sworn in. In its government programme 2020–2024, it promulgated its plans in the area of public procurement. The key projects revealing the government's respective conduct for the five years concerned are as follows:

- a* the introduction of binding eco-social award criteria for nationwide procurement;
- b* strengthening of the regionalism within the scope of the 2014 Procurement Directives;
- c* utilisation of the public procurement law as a consequential instrument in the fight against climate change;
- d* a paradigm shift from the lowest price principle to the most economically advantageous principle as well as total cost of ownership;
- e* a new obligation of active disclosure of information, including public contracts from a certain threshold;

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7 BVwG, W187 2014517-1, 22 December 2014.

8 Ra 2017/04/0005, 23 October 2017.

- f* strengthening of public-public cooperation (e.g., in the IT sector and facility management), especially at the municipal level;
- g* increased consideration of building information modelling in public procurement; and
- h* less red tape in public procurement.



# BELGIUM

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## I INTRODUCTION

The Public Procurement Act of 17 June 2016, which replaced the former Act of 15 June 2006, is the transposition of the Public Procurement Directives 2014/24/EU and 2014/25/EU. As of 30 June 2017, this Act contains the essential rules on Belgian public procurement. Moreover, also on 17 June 2016, the Belgian legislator adopted the Concession Contracts Act, which in turn transposes the Concession Contracts Directive 2014/23/EU.

Both Acts were implemented in several Royal Decrees, which are:

- a* Royal Decree of 18 April 2017, concerning the award of public procurement contracts in the broader public sector;
- b* Royal Decree of 18 June 2017, concerning the award of public procurement contracts in the utilities sector;
- c* Royal Decree of 25 June 2017, concerning the award and general performance of concession contracts; and
- d* Royal Decree of 14 January 2013, concerning the general contracting conditions for public procurement contracts and for concessions of public works, as amended by the Royal Decree of 22 June 2017.

As a result, Belgium fully complies with the European procurement and concession rules.

The Procurement Act of 17 June 2016 also covers contracts below the European threshold levels. For these contracts, very similar rules apply as compared with European contracts. The main differences relate to:

- a* publication obligations (in principle, contracts below the threshold levels are only to be announced in an annex of the Belgian Official Gazette);<sup>2</sup>
- b* the extended possibility to apply the negotiated procedure without prior publication (which is possible for all contracts with a value up to €139,000,<sup>3</sup> and for research and development services, placement services and transport support services up to €214,000); and
- c* the standstill period, which does not apply to contracts below the European threshold levels, except for works contracts of half this estimated value.<sup>4</sup>

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2 Moniteur belge/Belgisch Staatsblad.

3 €428,000 in the utilities sector.

4 €2,675,000.

Directive 2009/81/EC on defence and security procurement has been transposed into national law through the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and through two Royal Decrees implementing this Act.<sup>5</sup> This legislation entered into force during the course of 2012.

In addition to this legislation, tendering authorities are, of course, subject to the fundamental principles of the Treaty on the Functioning of the European Union (TFEU) (the principles of transparency, non-discrimination, equal treatment, free competition and proportionality). These principles are also part of general Belgian constitutional and administrative law. Moreover, Belgian administrative law obliges public bodies (and thus most contracting authorities) to duly prepare and motivate all their decisions, including decisions concerning both the award and performance phase of a procurement contract (the principles of good governance).

In Belgium, there are no specific bodies with responsibility for setting government purchasing or procurement policy and enforcing compliance. Thus, public procurement law can only be enforced by means of a judicial review or through proceedings before the Belgian supreme administrative court (i.e., the Council of State) or the civil courts, or both.

## II YEAR IN REVIEW

From a legislative perspective, the new European procurement and concession rules having now been fully implemented, 2019 was not a particularly interesting year.

Nevertheless, it is worth mentioning the Ministerial Decree of 20 December 2019, which, in accordance with the Regulations issued by the European Commission on 30 October 2019,<sup>6</sup> modifies the thresholds that determine whether a procurement contract is subject to the European public procurement rules. These thresholds, laid down in the aforementioned Royal Decrees of 23 January 2012, 18 April 2017 and 18 June 2017, amount to €5,350,000 for works (instead of €5,548,000) and €214,000<sup>7</sup> for services and supplies (instead of €221,000) as from 1 January 2020.

In terms of case law, however, several interesting judgments were pronounced in 2019.

First of all, the Council of State ruled that a mandate to sign an offer must exist before the offer is signed. The tenderer cannot, by means of a declaration of honour that was made afterwards, claim that the person signing the offer disposed of a specific 'oral' mandate. The Council of State specified as well that it is the deposit report that needs to bear a qualified electronic signature from the authorised representative of the tenderer. An electronic signature placed on one of the individual documents of the offer does not suffice.<sup>8</sup> As regards the signing of an offer, the Council of State also had the opportunity to confirm, in line with its established case law, that this cannot be considered as an act falling within the scope of the day-to-day management of an undertaking and the signing of an offer therefore requires a

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5 Royal Decree of 23 January 2012 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and Royal Decree of 24 January 2012 on the entry into force of the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and on the rules on motivation, information and legal remedies for these contracts.

6 Commission Delegated Regulations of 30 October 2019, No. (EU) 2019/1830, (EU) 2019/1827, (EU) 2019/1828 and (EU) 2019/1829.

7 €139,000 (instead of €144,000) for contracting authorities on a central level and €428,000 (instead of €443,000) for defence and security, as well as utilities contracts.

8 Council of State, 30 December 2019, No. 246.539, *Toreon*.

specific mandate. In this respect, it is not relevant that submitting the offer in question was only of minor importance or required a prompt reaction. As soon as the contracting authority has established that the offer was not signed by a duly authorised person, it has the obligation to reject the offer.<sup>9</sup>

Since the 2014 procedural reform, the Council of State is competent to directly award compensation when a claimant establishes that the illegality sanctioned by the Council of State is the cause of a prejudice that he or she has suffered and which has not been fully repaired as a result of the mere annulment of the concerned decision (whereas before, the claimant could only obtain damages before the civil courts). In a recent judgment, the Council of State applied this new possibility in a public procurement context. The Council of State ruled that the illegality of the decision to award a public contract for bailiff services, which had already been annulled in 2016 because the contracting authority had organised a meeting with some of the tenderers, caused the loss of a chance for the claimant to be awarded the contract, and therefore entitled the claimant to compensation. The Council of State, however, reopened the debate in order to assess the precise amount of the compensation.<sup>10</sup>

In addition, the Council of State decided that if performance delays are taken into account in the award phase, the contracting authority must verify whether the delays proposed by the tenderers are realistic. The contracting authority does not have to explicitly justify why a performance delay is considered realistic if no particular difficulties were encountered in this regard, but it should be clear from the award decision, or at least from the underlying administrative documents, that this verification was indeed carried out.<sup>11</sup>

Furthermore, the Council of State suspended an award decision, based on the sole award criterion of the lowest price, because it only mentioned that the claimant obtained 0 points, whereas the successful tenderer obtained 100 points. According to the Council of State, the contracting authority did not duly motivate the award decision: although the claimant could deduce from the motivation of the decision that its offer was more expensive than the offer of the successful tenderer, it was necessary for the contracting authority to mention the coefficients that were applied (and thus also the prices that were offered) in order to enable the claimant to assess whether the contracting authority complied with the applicable provisions, in particular those relating to the analysis of prices.<sup>12</sup>

With regard to the European Single Procurement Document (ESPD), the Council of State ruled that a contracting authority cannot require a tenderer to produce this document if the estimated value of the contract does not meet the European thresholds. It is not relevant that the contracting authority may have voluntarily advertised the contract on a European level, by publishing the tender documents in the Official Journal of the European Union as well.<sup>13</sup>

Also worth mentioning is that the Council of State requested the Court of Justice of the European Union to render a preliminary ruling on the self-cleaning mechanism laid down in Directive 2014/24/EU. More particularly, the Council of State asked whether (1) the Directive allows a Member State to oblige a tenderer to inform the contracting authority on its own initiative that self-cleaning measures have been taken (which implies

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9 Council of State, 27 February 2019, No. 243.817, *Larcin*.

10 Council of State, 1 July 2019, No. 245.033, *RTS Tintin*.

11 Council of State, 27 February 2019, No. 243.819, *Bureau vers plus de bien-être*.

12 Council of State, 23 April 2019, No. 244.263, *Verbraeken Infra*.

13 Council of State, 8 March 2019, No. 243.915, *Entreprise Marcel Baguette*.

that the contracting authority should not explicitly give a tenderer the opportunity to do so when it considers that a ground for exclusion applies); and (2) the Directive has direct effect in this regard.<sup>14</sup> The Court of Justice has not yet rendered a ruling in this case.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The scope of Belgian procurement legislation *ratione personae* is currently defined in Article 2 of the Act of 17 June 2016.

The Belgian legislature has opted for a double approach: first of all, a non-exhaustive list of bodies and categories of bodies governed by public law is set out in the Act (including the state, regions, communities, provinces, municipalities and associations formed by one or more of these entities). Second, consistent with the European directives, public procurement rules are applicable to a category of bodies ‘governed by public law’, which are defined based on a set of cumulative criteria in the Act.

This concerns entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and financed, for the most part, by the public bodies explicitly mentioned in the list of Article 2 of the Act; or entities that are subject to management supervision by these bodies, or that have an administrative, managerial or supervisory board, of which more than half of the members are appointed by the bodies mentioned in Article 2.

In the utilities sector, ‘public undertakings’ (i.e., any undertaking over which the public authority has a dominant influence) and certain private entities with special or exclusive rights are also subject to public procurement rules, in addition to the aforementioned public entities that are subject to procurement rules in the ordinary sectors.

#### ii Regulated contracts

Belgian public procurement rules cover all contracts in writing for consideration between a contractor, a supplier or a service provider, and a public purchaser for the undertaking of works, supplies and services.

These concepts have the same meaning as in the 2014 Directives. In line with these Directives, the Act of 17 June 2016 no longer contains an annex with an enumeration of the different types of public services, which was still the case in the Act of 15 June 2006.

The Belgian public procurement regulation puts in place a much less stringent regime for contracts with a value under €30,000: ‘limited value contracts’. Only the basic procurement principles, the rules on the scope of the procurement legislation and the prescriptions concerning value estimation apply to these contracts.

From 30 June 2017, concession agreements (i.e., contracts by means of which the execution of a work or service is entrusted to an economic operator that subsequently obtains the right to exploit the work or service in question and will also bear the operating risk thereof) are regulated by the specific 2016 Concession Contracts Act. As previously mentioned, this Act transposes Directive 2014/23/EU.

Land agreements are not subject to public procurement obligations. However, as there are no specific rules, obligations regarding the award of land agreements can be said to

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<sup>14</sup> Council of State, 7 May 2019, No. 244.404, *RTS Infra*.

correspond to the basic standards regarding advertising and contract award embodied in the European Commission Communicative Interpretation on the Community Law applicable to contract awards not subject to the provisions of the Public Procurement Directives (2006/C 179/02).<sup>15</sup> Other principles of administrative law to be taken into account in this regard are the requirement of due care and the principle that decisions have to be duly motivated.

Neither are 'in-house' contracts governed by the 2016 public procurement obligations. The new rules have indeed incorporated the criteria established by the CJEU, and exclude from their application contracts: in which the contractors are monitored by the contracting authority in the same way as an entity belonging to the contracting authority itself; where more than 80 per cent of the activities of the legal person are performed for the contracting authority or another legal person monitored by the contracting authority; and in which the monitored legal person is not financed, even partly, by private funds, unless such private funds do not allow any significant influence on the legal person. All of the conditions must be cumulatively met to exclude the obligation of compliance with the 2016 rules.

The Royal Decree of 14 January 2013, concerning the general contracting conditions, which in principle applies to all contracts with a value of or above €30,000, entitles the contracting authority to modify unilaterally the original contract without organising a new tender, provided the object of the contract remains the same and, if necessary, on condition of lawful compensation. The Royal Decree also obliges contracting authorities to stipulate that contractors are allowed to apply for a review of the agreement if the contractual equilibrium is fundamentally altered. Moreover, just like Directive 2014/24/EU, the Royal Decree transposes and further develops the *Presstext* case law of the Court of Justice.<sup>16</sup> As a consequence, Belgian procurement law allows that a contract is modified if (among others) the modification in question is not substantial, or if the modification does not attain a *de minimis* threshold. Additional works, supplies or services may be performed by the initial contractor if changing contractors is not possible for economic or technical reasons and would result in severe inconveniences for the contracting authority. However, the total value of these additional works cannot be higher than 50 per cent of the initial amount of the tender.

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

Framework agreements have the same meaning as in the 2014 Public Procurement Directives, and are governed by rules that are mostly identical to those encompassed in these Directives.

It is very common in Belgium for different contracting authorities to set up the joint realisation of a public contract (e.g., a region and a local authority jointly contracting for road works). It is also possible to make purchases through a central purchasing body.

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15 Council of State, 22 December 2015, No. 233.355, *NV Kinopolis Mega*.

16 Court of Justice, 19 June 2008, No. C-454/06, *Presstext Nachrichtenagentur*.

## ii Joint ventures

There are no specific rules in Belgium regarding the establishment of contracts that initiate public-public joint ventures. As a general principle, these contracts will fall under the scope of the public procurement regulation if their actual objective is to provide works, supplies or services within the meaning of the latter regulation.<sup>17</sup> This is, however, not the case if the in-house criteria are fulfilled.

Regarding public-private partnerships, the private sector partner has to be competitively tendered if the partnership is set up for providing public works, supplies or services contracts in the sense of the Directives. This tender can be organised in one phase. It is not necessary to tender the selection of the private partner and the execution of the public contract separately.

## V THE BIDDING PROCESS

### i Notice

All contracts, whatever their value, must be advertised in advance in the Belgian Public Tender bulletin (BDA), which is an annex to the Belgian State Gazette. Since 2011, the BDA has been integrated in the electronic platform e-Notification<sup>18</sup> in order to facilitate electronic purchasing. Contracts meeting the European threshold levels are also to be published in the Official Journal, with an exception made for contracts awarded on the basis of a negotiated procedure without prior publication.

Once awarded, all contracts meeting the European threshold levels have to be published in both the BDA and the Official Journal, with an exception made for contracts that were awarded on the basis of a negotiated procedure without prior publication. This exception is based on public safety or secrecy.<sup>19</sup>

### ii Procedures

Belgian legislation distinguishes between the following types of procurement procedures:

- a* open procedures;
- b* restricted procedures;
- c* competitive procedures with negotiation;
- d* negotiated procedures without prior publication;
- e* competitive dialogue; and
- f* innovation partnerships.

The tendering authority can in principle freely choose between the open and the restricted procedure. The grounds for use of the competitive procedure with negotiation, the competitive dialogue and the innovation partnership are the same as the grounds stipulated in the European directives. Moreover, the negotiated procedure without prior publication can be applied for services and supplies with a value up to €139,000,<sup>20</sup> and for research and development services, placement services and transport support services up to €214,000.

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17 Council of State, 19 June 2009, No. 194.417, *SA Horizon Pleiades*.

18 <https://enot.publicprocurement.be>.

19 These contracts are in principle outside the scope of the Public Procurement Directives.

20 €428,000 in the utilities sector.

In an open procedure, all interested providers can tender. In a restricted procedure, only a limited number of these providers are invited to tender after having been selected in a first phase by the tendering authority.

Public contracts must be awarded on the basis of the most economically advantageous tender. In accordance with Directive 2014/24/EU, the Procurement Act of 17 June 2016 stipulates that the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing. This may also include the best price–quality ratio, which shall be assessed on the basis of criteria linked to the subject matter of the public contract in question (for instance quality, organisation of staff, aftersales service, etc.).

The 2016 Act extends the amount of situations in which competitive procedures (ex-negotiated procedure) and competitive dialogue can be used. The innovation partnership – a new procedure – has been embedded in the 2016 Act as well. It allows, by one single decision, and agreed-upon performance levels and maximum costs, the development of innovative products, services or works and the subsequent acquisition of the resulting products, services or works.

Electronic purchasing has become quite successful in Belgium. There is one official channel for Belgian public procurement contracts: the website e-notification.<sup>21</sup> Companies can find all Belgian public procurement notices on this platform.

To present or award a bid, the use of e-tendering is being introduced gradually depending on the procedures used. Since the 2016 Act entered into force on 30 June 2017, e-tendering has been required with regard to dynamic purchasing systems, electronic auctions and electronic catalogues. As regards the other procedures, e-tendering has become mandatory for EU tenders since 18 October 2018. As of 1 January 2020, this is also the case for non-EU tenders. The federal authorities have developed IT tools, which are made available to the other levels of government by the federal authorities, to process public contracts electronically so that companies can normally use the same environment.

Electronic auctions can be used for recurring works, supplies or services for which the specifications can be determined with precision. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders. Moreover, contracting authorities that decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest. The electronic auction can be based solely on the price, or on the price or other elements that are quantifiable. In the event of several tenderers who offered the same lowest price, the contracting authority must, as a rule, organise a lottery.

Contracting authorities are permitted to apply a dynamic purchasing system (i.e., an exclusively electronic system to award contracts relating to reiterative works, supplies or services that are generally available on the market and fulfil the requirements of the contracting authority). This system has a limited validity, which is determined freely by the contracting authority, and is open throughout this time to any economic operator that suits the selection criteria and has submitted an indicative tender. It can use not only a criterion based solely on price, but also other supplementary criteria. Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit additional information.

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21 <https://enot.publicprocurement.be>.

Further, contracting authorities may also enter into a framework (or umbrella) agreement that determines prices (aspects) and, if the occasion arises, desired quantities. Thus, individual contracts can be arranged with regard to this basic agreement.

### iii Amending bids

After the closing date for submission of tenders in the open or restricted procedures, it is no longer possible to amend the bids. The tendering authority may only contact tenderers to ask for clarifications or to complete the offer, as long as the content of the offer itself is not modified.<sup>22</sup>

During the competitive procedure with negotiation and the negotiated procedure without prior publication, the offers may be amended, as long as the object of the contract remains the same, and the principles of transparency and equal treatment are respected.<sup>23</sup> There are no specific legal provisions concerning changes at the preferred bidder stage. However, it is generally accepted that 'substantial' changes to the contract are no longer possible at that stage, taking into account the aforementioned principles. The tendering authority has a margin of discretion to decide whether changes are to be considered substantial.

During the competitive dialogue, the alternatives proposed by the candidates, on the basis of which the candidates chosen are invited to tender, can be amended as long as the tenderers do not deviate from the 'essential' elements mentioned in the contract notice and contract documents. The 'essential' elements of the final offers cannot be modified once these offers have been submitted. Once the most economically advantageous tender has been selected, only minor changes may be made to this offer.

## VI ELIGIBILITY

### i Qualification to bid

The Belgian legislature has faithfully reproduced the rules set in the 2014 European directives concerning the criteria for qualitative selection.

Note that grounds for exclusion from a tender have been added in the 2016 Act. They can be of an optional or obligatory nature. The 2016 Act allows bidders to make use of corrective measures in both cases in order to prove their reliability as to the execution of the tender. The tendering authority will have to decide afterwards whether it will readmit the bidder.

### ii ESPD

The European Single Procurement Document (ESPD) is a standard form issued by the European Commission, according to which candidates demonstrate that they do not present any grounds for exclusion and they meet the selection criteria established by the contracting

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<sup>22</sup> Council of State, 14 November 2017, No. 239.867, *SA CFE, SA Vinci Environnement and SA Cegelec*.

<sup>23</sup> With regard to e-tendering, the Council of State ruled that a contracting authority violates not only the contract documents themselves, but also the principle of equal treatment if it states, on the one hand, in the contract documents that signed offers must be submitted before a certain deadline and, on the other hand, allows a tenderer who merely submitted an unsigned offer and, therefore, strictly speaking missed the deadline, to 'regularise' the situation afterwards by submitting a signed copy so that he or she can still join the negotiated procedure (Council of State, 10 December 2013, No. 225.775, *NV Pit Antwerpen*).



authority. It may be necessary for the candidate to provide additional evidence. Being considered a common and preliminary proof of compliance, the ESPD largely facilitates the procedures and access to public procurements throughout Member States.

### **iii Conflicts of interest**

The Act of 2016 contains a general prohibition for any person involved in public purchasing to be involved in the award or the supervision of a public contract if he or she has interests in the tendering company. Any infringement of this rule may be sanctioned by criminal sentences. A federal government recommendation of 5 May 2014 gives specific guidelines in cases where conflicts of interest could arise following 'revolving door' situations. Further, the Royal Decree of 18 April 2017 states that a conflict of interest must be presumed in the event that an individual is intervening in a tender procedure in favour of a tenderer if he or she used to work for the involved contracting authority in the past.

In accordance with the case law of the Court of Justice, a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services can only be excluded from a tender if he or she has been given the opportunity to prove that, in the circumstances of the case, the experience that he or she has acquired in the course of the research, experiments or studies does not give rise to a distortion of competition.

### **iv Foreign suppliers**

Foreign suppliers do not have to set up a local branch or subsidiary, or have local tax residence to do business with public authorities in Belgium.

## **VII AWARD**

### **i Evaluating tenders**

The contracting authority must award the contract to the most economically advantageous tender. The contracting authority has large discretionary power to determine the economic and quality criteria for awarding the contract, insofar as these criteria relate to the object of the contract and enable tenders to be compared and assessed objectively. Under the 2016 provisions, the contracting authority is allowed to make use of a cost criterion as well as a life-cycle cost criterion when choosing the most economically advantageous tender. In the case of a life-cycle cost criterion, the tendering authority will require useful data from bidders to assess the life-cycle cost. Equally, the tendering authority can require experience, qualification and organisation from the bidder as a criterion to award the public contract, provided that such criterion is justified in respect of the object of the contract.

These award criteria must be notified in advance.

As far as assessing the award criteria is concerned, Belgian legislation follows the rules set in the 2014 European directives.

In restricted procedures, the selection criteria must be notified to the candidates before the contracting authority selects who is to be invited to tender. However, no assessment of these criteria is required, and there is no general obligation to provide information on the principles on which the criteria will be applied, such as the minimum turnover required.

According to the established case law of the Council of State, contracting authorities are not supposed to disclose information about the evaluation methodology.<sup>24</sup> This was recently confirmed by a preliminary ruling of the European Court of Justice, as long as the determination of the method of evaluation by the contracting authority is not possible for demonstrable reasons before the opening of the tenders.<sup>25</sup>

Unsuccessful tenderers will be able to assess the evaluation by the contracting authority, because decisions on the selection of tenderers and on the award of the contract should contain adequate reasons to allow tenderers to decide whether to start legal proceedings.

## ii National interest and public policy considerations

In principle, domestic suppliers may not be favoured for reasons of public interest. However, until recently, in defence procurement, offsets could (under strict conditions) be an evaluation criterion. It remains unclear whether this practice will persist under the new Belgian defence and security public procurement Act of 13 August 2011.

Reference to national quality marks is only possible if products of 'equivalent quality' are also accepted. Moreover, any reference to specific (quality) marks is prohibited, unless this reference is necessary to define the subject matter of the contract.

Social and environmental considerations can be taken into account under strict conditions. Environmental considerations can in principle only be applied as award criteria insofar as they are related to the subject matter of the contract. The Brussels-Capital Region has adopted a Regional Act<sup>26</sup> in this field. This example was followed by the federal government in 2014, that adopted a recommendation on 16 May 2014, containing very specific guidelines for federal authorities on how to implement social and environmental considerations. A similar recommendation has been adopted for the Walloon region.

## VIII INFORMATION FLOW

During the procurement process, tenderers may ask the contracting authority for clarification on the information provided in the tender documents, or to request additional information. The contracting authority can decide whether it will provide this information. However, the principle of equal treatment should be respected at all times. Information provided to one tenderer shall also be provided to the others. In open procedures, this would normally require an additional publication.

The principle of equal treatment implies that tenderers may at no stage before the award decision have access to (information on) other offers, even in a negotiated procedure.

Immediately after the award decision, the contracting authority must notify:

- a* every non-selected candidate about the reasons for the non-selection, by sending a copy of the relevant part of the motivated decision;
- b* every tenderer with an irregular or unacceptable tender about the reasons for the exclusion of their offer, by sending a copy of the relevant part of the motivated decision; and

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24 Council of State, 23 November 2017, No. 239.937, *Dimarso*.

25 Court of Justice, 14 July 2016, No. C-6/15, *Dimarso*.

26 Regional Act of 8 May 2014 concerning the use of social considerations in public procurement.

c every selected tenderer whose offer is regular but has not been chosen, by sending a full copy of the motivated decision.

For contracts meeting the European threshold levels and for works contracts of half this estimated value, a standstill period of 15 calendar days is to be granted to unsuccessful bidders. During this period, which starts the day of the above-mentioned notification, a suspending procedure of extreme urgency before the Council of State or a summary procedure before the civil courts can be introduced (see further below). If the contracting authority were to conclude the contract before the end of this period, proceedings before a civil judge may be instituted to declare the contract ineffective.

The Public Procurement Act prohibits contracting authorities from divulging information that would violate the public interest, legitimate commercial interests or the principle of fair competition. This provision is open to interpretation.

In practice, contracting authorities rarely provide a full copy of the bids of other tenderers to their competitors. Especially for works contracts, tendering authorities are generally very reluctant to divulge any unit prices. To date, the Council of State has never forced a contracting authority to provide a copy of these bids or specific information in these bids during summary proceedings (the suspending procedure of extreme urgency). However, it has regularly awarded injunctions against contracting authorities to provide detailed information about the prices in proceedings on the merits of the case (annulment procedure) for instance, when an unsuccessful bidder has criticised the possibly 'abnormal' prices of its competitor.

## IX CHALLENGING AWARDS

Challenging award decisions, especially by applying the suspending procedure of extreme urgency, occurs frequently.

Before the Council of State, a summary procedure will take between three and nine weeks, and an annulment procedure between 18 and 36 months. Before the civil courts, the duration of procedures is harder to forecast.

The successful party can obtain compensation for procedural charges of up to €2,800 before the Council of State, and €1,440 before the civil courts (in presence of particular circumstances, the compensation before the civil courts can be reduced to €90 or increased to €12,000).

### i Procedures

In Belgium, there is no mechanism for review by an enforcement body.

Legal proceedings may be initiated by 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.

Belgian legislation does not oblige such a person to notify the contracting authority of the alleged infringement and of his or her intention to seek review. In practice, before starting legal proceedings, the contracting authority is often requested to voluntarily withdraw its decision, but this request is not mandatory.

The following legal proceedings are possible.

### ***Suspension and annulment procedure***

In accordance with Directive 2007/66/EC, the concerned person may start proceedings to suspend the implementation of any decision taken by the contracting authority. If the tendering authority is an administrative authority, these proceedings have to be brought before the Council of State in a procedure 'in extreme urgency'. In other cases (e.g., if the tendering authority is a private hospital or a private university), the suspending proceeding has to be started before the civil courts and takes the form of a summary procedure.

For contracts meeting the European thresholds and for works contracts of half this estimated value,<sup>27</sup> Belgian legislation imposes a standstill period of 15 calendar days, starting the day of the notification of the award decision. During this period, the contracting authority is not allowed to conclude the contract. For other contracts, namely, those which do not meet the above-mentioned thresholds, the tendering authority may voluntarily apply this standstill period.

If a suspension request has been started within the standstill period, the contract can only be concluded after the rejection of such request by the competent judge or, in any case, after the expiry of a period of 45 days following the notification of the decision.<sup>28</sup>

A judiciary decision suspending the effects of a decision can only be temporary. It will only be applicable until the competent judge renders its decision on the annulment request. Such annulment procedure has to be introduced within a period of 60 days following the day of the notification of the decision. In practice, tendering authorities will often withdraw the tender decision after it has been suspended, in order for the annulment procedure to lose its purpose.

### ***Claim for damages***

Belgian legislation does not require that a decision is set aside by the competent legal body before damages can be claimed. Thus, the fact that no suspension or annulment request has been filed does not prevent the judge from awarding damages.

Damages can be claimed before the civil courts. This has to be done within a time limit of five years from the unlawful decision.

To obtain damages, the harmed party has to prove that, if there had been no illegality, he or she would have at least had a realistic chance of obtaining the contract.

Damages can be claimed to compensate for all (tendering) costs that have been made and for the expected economic profit lost. The burden of proof lies with the claimant. However, judges often estimate the damages *ex aequo et bono* at 10 per cent of the amount of the tender. Sometimes a judicial expertise is ordered to determine the amount of the damages.

When the most economically advantageous offer was determined only on the basis of the price, the legislation stipulates that the bidder with the lowest regular tender is allowed to receive a compensation equivalent to 10 per cent of the amount of the tender.

The Council of State is also competent to give 'fair compensation' instead of the damages to be claimed before the civil courts. This compensation should be claimed within a time limit of 60 days from the annulment decision.

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27 For contracts within the scope of the Defence Directive, the standstill period only applies to European contracts.

28 If the competent judge is a civil judge, the standstill period is limited to proceedings in the first instance.

## ii Grounds for challenge

Challenges may be based on an infringement of the following legal grounds:

- a* the Public Procurement Act, the Defence Procurement Act and their implementing decrees;
- b* the European Procurement Directives;
- c* the principles of the TFEU (principles of transparency, non-discrimination, equal treatment, free competition and proportionality);
- d* the principles of general Belgian constitutional and administrative law; and
- e* the tender documents.

Companies of all economic sectors have become increasingly aware of the public procurement rules and the opportunities of legal proceedings. The number of cases brought before both the Council of State and the civil courts has increased dramatically over the past 10 to 15 years. Currently, the Council of State has to decide every month on some 20 summary cases, fewer than a third of which are successful.

Although, statistically, the majority of the challenges related to the suspension and annulment of decisions in matters of public procurement is rejected, and although it is generally accepted that tendering authorities have broad discretionary power, courts in general do not hesitate to ensure an effective implementation of the law.

## iii Remedies

If the contracting authority has awarded a contract without the obligatory prior publication of the contract notice in the Official Journal, or if it has not respected the obligatory standstill period, an unsuccessful bidder may start proceedings before a civil judge to obtain the ineffectiveness of the contract.

This judge may stipulate the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations that still have to be performed.

In accordance with Directive 2007/66/EC, the judge may also decide to reject the request if he or she decides, after having examined all relevant aspects, that overriding reasons relating to a general interest require the effects of the contract to be maintained. In the latter case, the judge may impose other penalties. In accordance with the Directive, these alternative penalties consist either in the imposition of fines on the contracting entity, or in the shortening of the duration of the contract. The fine is limited to 10 per cent of the contract value (VAT excluded).<sup>29</sup>

## X OUTLOOK

As expected, the years following the implementation of the 2014 Directives seem to be rich in terms of case law. The number of cases dealt with by the Council of State is certainly not decreasing, which indicates that the application of the new public procurement legislation raises particular and new questions. In general, the fundamental principles in this case law, however, remain unaltered.

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<sup>29</sup> This amount is reduced to 5 per cent of the contract value in case of a concession (VAT excluded).

In this regard, certain novelties that were implemented by the new legislation, such as life-cycle costing and the self-cleaning mechanism, still raise a number of questions that have not yet been answered by the Council of State (or the Court of Justice). Consequently, in the forthcoming years, the case law will probably continue to be particularly interesting and relevant for practice.

# BRAZIL

*Teresa Arruda Alvim and David Pereira Cardoso*<sup>1</sup>

## I INTRODUCTION

The procedure Brazilian public authorities must observe while purchasing goods and services is mainly governed by the Brazilian Constitution, and by Federal Statute 8,666 of 1993.

The Brazilian Constitution sets forth the framework of government procurement, providing that all public entities, as a rule, must acquire goods and services by means of a public bid proceeding that ensures equal conditions to all bidders (Article 37, XXI). The Constitution also sets upon the Federal Union the power to pass general rules about public bidding. Individual states and municipalities may also pass their own regulations, so long as they do not conflict with federal law (Article 22, XXVII).

Statute No. 8,666 of 1993 lays down the general rules about public bids and contracts. According to its Article 3, bidding procedures have three main objectives: (1) to guarantee isonomic treatment to the interested parties; (2) to select the most advantageous proposal to the public administration; and (3) to promote sustainable national developments.

Bidding procedures must, furthermore, observe the following basic principles:

- a* legality: the interested parties must be equally subject to all rules, procedures and terms applicable to bidding proceedings;
- b* impersonality: favouring of a personal nature is disallowed;
- c* morality: the interested parties must follow ethical good-faith and fairness standards throughout the course of the procedure;
- d* equality of conditions: the public administration is barred from setting forth requisites that may compromise the competitive nature of the procedure, especially if they are impertinent or irrelevant to the contract;
- e* publicity: all actions pertaining to the procedure must be made public and accessible;
- f* administrative probity: imposing administrative, civil and criminal repressive sanctions to all actions capable of generating damages to the treasury, or causing unjust enrichment of any of the players, or of the public agent;
- g* attachment to the bid announcement notice: meaning that the rules laid down in the announcement notice bind not only the bidding parties, but also to the public administration; and
- h* objective analysis of the proposals: the proposals must be analysed based on precise criteria priorly set forth by the bid announcement notice.

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## II YEAR IN REVIEW

One of the most relevant legal innovations of 2019 was Federal Statute 13,874, which was labelled the Economic Freedom Act. Its main purpose is to set forth free market guarantees and limit the state's intervention in the economy. Despite bringing forth some vague statements, the Statute establishes some concrete obligations, which may have an impact on the rules of government procurement.

To mention the main ones: (1) the requirement that the administration perform regulatory impact analysis for public actions that affect the interests of economic agents; (2) the attribution of juridical effects to the silence by the public administration: requests are deemed as having been tacitly approved, once their analysis term expires; and (3) the creation of the 'regulatory power abuse' figure, forbidding, for example, actions taken by the public administration that may create market reserve, favour economic agents to the detriment of other competitors, require technical skills that are unnecessary to attain the desired end, increase the costs of the transactions without further demonstrating their benefits, or which may create an artificial compulsory demand of products, services or professional activities.

Another relevant innovation is the passing of Federal Statute 13,848, which governs the regulatory agencies. The Statute lays down rules to strengthen the independency of the agencies, both in relation to the government, as to economic agents. Furthermore, it (1) reaffirms the requirement that the regulatory agencies must perform regulatory impact analysis before they propose general interest normative rules, and (2) makes the performance of prior public consultation mandatory.

The most important court decision relating to government procurement in 2019 arose from Direct Unconstitutionality Action No. 5,624. In this lawsuit, the Federal Supreme Court concluded that the privatisation of companies that are subsidiaries of, or controlled by the state, does not depend on legislative authorisation, nor does it depend on public bidding, so long as the competitiveness between the potentially interested parties is guaranteed, and provided that the general principles applicable to the public administration are observed.

## III SCOPE OF PROCUREMENT REGULATION

### i Regulated authorities

According to Brazilian law, all public entities must go through bidding procedures to procure goods and services. Brazil is a federative republic composed of 26 states, one federal district, and 5,565 municipalities. All three levels of government (federal, state and municipal) can create new legal entities, in the form of public foundations, regulatory agencies, state-owned companies and mixed-capital companies, all of them with administrative and financial autonomy.

Each one of these units can define their own budgets and proceed with the acquisition of whichever goods and services are necessary to achieve their ends. They are, as a rule, subject to the rules of public procurement. Although Federal Statute 8,666 of 1993 contains the main guidelines for public procurement, the states and municipalities may also pass their own rules, so long as they do not conflict with federal rules.



## ii Regulated contracts

Pursuant to Federal Statute 8,666 of 1993, the acquisition of construction works, leases, goods and services, as well as the disposal of assets, concessions and permissions by the public administration must necessarily be preceded by a bidding proceeding, by means of processes that guarantee equality of conditions to the interested parties.

However, there are exceptions to the public administration's obligation to promote a bidding procedure.

Public entities may directly procure assets produced and services rendered by other organisations or entities that are part of the public administration, regardless of bidding procedures. In special situations, that may also be the case for assets produced and services rendered by public services concessionaires, or by non-profit associations owned by the physically disabled.

The public administration may also directly procure low-value goods and services. Currently, Federal Decree No. 9,412 of 2018 lays down the limit of 33,000 reais for construction and engineering services, and of 17,600 reais for other assets and services.

Bidding proceedings may also be dispensable: (1) if there is no competition in the market, such as for procuring exclusive products of highly specialised professionals; (2) in emergency situations, such as, for example, in cases of public calamity, grave disturbance of the order, national defence or war; or (3) to intervene in the economy, regulating prices or normalising the supply of goods and assets.

## IV SPECIAL CONTRACTUAL FORMS

Federal Statute 8,666 of 1993 has been criticised due to the excess of formalism and the ample alternatives the interested parties have to challenge awards, which increase litigiousness, tardiness and the costs of bidding procedures. Several special statutes were enacted in attempts to remedy these problems, simplifying the procedure, or adapting it to better serve some types of procurement.

In 2002, the National Congress passed Federal Statute 10,520, which allows procurement of 'ordinary' assets and services (those whose quality standards can be objectively defined), by means of reverse auctions. In this method of bidding, the procedure is simplified, and the suppliers may offer their tenders in public sessions, whether physically or electronically.

In 2011, due to the urgency to complete the infrastructure constructions to host the 2014 World Cup and the 2016 Olympic Games in Rio de Janeiro, the National Congress passed Federal Statute 12,462, which created the 'differentiated government procurement regime' (RDC), with the purpose of making bidding procedures less bureaucratic. Initially, the RDC was to be applied solely to the procurement of constructions and services necessary for sporting events, and it would expire in 2016. However, the law was repeatedly amended to apply the RDC to engineering work related to public healthcare, construction and reform of criminal facilities, urban mobility and logistics infrastructure and entities dedicated to the sciences, technology and innovation.

On the other hand, there are special contracts that follow different bidding procedures. For ordinary public service concessions, under which customers pay the administration directly to render services, the bidding procedure and the possibilities to procure are set forth by Federal Statute 8,987 of 1995. For public service concessions paid, partially or wholly, by the state (also called public-private partnerships under Brazilian law), the bidding procedure is regulated by Federal Statute 11,079 of 2004.

Procurement of publicity services rendered by advertising agencies is governed by Federal Statute 12,232 of 2010. Contracts involving defence goods and services follow a special procedure, with the purpose of protecting national interests, as provided by Federal Statute 112,589 of 2012. Furthermore, purchases undertaken by public and mixed-capital companies follow a simplified procedure, laid down by Federal Statute 13,303 of 2016.

### **i Framework agreements and central purchasing**

The Brazilian public administration traditionally procures goods and services in a decentralised manner. In 2014, nonetheless, the federal government created the Central Purchasing and Procurement Department for the acquisition of standardised items ordinarily used by the public administration's agencies and entities. Centralised procurement, however, is not customary and has been used especially for the purchase of airline tickets, procuring travel agencies, and telephony and IT services.

### **ii Joint ventures**

Public and mixed-capital companies are also subject to government procurement rules and regulations. According to Brazilian law, a public company is defined as a company whose share capital is fully owned by the Federal Union, by the state or by the municipalities (the capital share is exclusively public).

A mixed-capital company is a corporation in which the majority of the voting shares belong to the Federal Union, the states, the Federal District or the municipalities, with the admission, however, of private shareholding interest (public and private capital share).

According to Federal Statute 13,303 of 2016, public and mixed-capital companies shall preferentially adopt the reverse auction procedure to procure ordinary goods and services. Bidding procedures are unnecessary when the procured amount is less than 100,000 reais for engineering work and services, or 50,000 reais for all other purchases and services.

Private companies with minority shares owned by the state do not have to go through bidding procedures to procure goods and services, but they may not be directly hired by public entities either. Even if such companies intend to render services to the public entity that holds interest in it, the bidding procedure is still mandatory.<sup>2</sup>

## **V THE BIDDING PROCESS**

### **i Notice**

The bidding announcement notice is the most essential instrument of a bidding procedure. It lays down: (1) the object of the procurement; (2) the time frame and the conditions to execute the contract; (3) the sanctions applicable in cases of breach; (4) information about the basic project; (5) the conditions to participate; (6) the way the proposals shall be presented; (7) the criteria to analyse the proposals; (8) the price admissibility criteria; (9) the criteria for adjustment of prices; (10) payment conditions; and (11) the rules and instructions to challenge awards. The announcement notice is the law applicable to the procedure and must be strictly complied with by the administration and by the interested parties.

According to Federal Statute 8,666 of 1993, announcements containing the summaries of public notices, as a rule, must be published in advance in the Official Gazette and in a

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<sup>2</sup> Federal Court of Auditors, Lawsuit No. 003.330/2015-0, 11 May 2016.

newspaper of wide circulation within the location where the bidding proceeding will take place. The published announcement must indicate the place where the interested parties can read and obtain the full text of the public notice and all information about the bid.

From 2011 on, with Federal Statute 12,527 – also called the Information Access Statute – the dissemination of bidding public notices through the internet became mandatory, with the purpose of ensuring greater publicity and competitiveness to the procedure.

## **ii Procedures**

Federal Statute 8,666 of 1993 sets forth five models for public bidding, each one bearing its own procedure: invitation to bid; price quotations; competitive bidding; auctions; and bidding contests. Special laws also allow for different models of bids: reverse auctions, as provided by Federal Statute 10,520 of 2002; and the Differentiated Government Procurement Regime, regulated by Federal Statute 12,462 of 2014.

### ***Invitation to bid***

Invitation to bid is the model used for low-value acquisitions, which currently comprise goods and services of up to 176,000 reais, or constructions and engineering services of up to 330,000 reais. Under this model, goods and services suppliers are chosen and directly invited by the administration to present their proposals. To guarantee isonomy, the invitation must be addressed to at least three suppliers. Furthermore, the administration must publish a copy of the invitation in the public body's bulletin board, to allow other interested parties to file their proposals if they wish to. It is unnecessary to publish the announcement notice in the Official Gazette, or in newspapers with a large circulation.

### ***Price quotation***

Price quotation is the bidding model used for procurement of goods and services of up to 1.43 million reais, or constructions and engineering services of up to 3.3 million reais. Once the announcement notice is published in the Official Gazette and in a large-circulation newspaper, suppliers previously enrolled with the public entity, or who meet all the conditions required for the enrolment, may be part of the bidding procedure. The 'enrolment' corresponds to a pre-examination of legal, technical and economic qualifications of the company.

### ***Competitive bidding***

Competitive bidding is the procedure that allows the largest number of participants. It is mandatory for procuring goods and services in amounts over 1.43 million reais, or constructions and engineering services in amounts over 3.3 million reais. It is also mandatory, whichever amount involved, for: (1) purchase or disposal of real estate; (2) granting of *in rem* rights; and (3) for international bidding. Exceptionally, international bidding can also admit the modalities of price quotations, when the public entity has an international enrolment list of suppliers, or invitation, when there is no supplier of the goods or services within the country.

The competitive bidding procedure encompasses a qualification phase that precedes the analysis of the proposals, which consists in verifying the legal, technical and economic aptitude of the interested parties. Following that, the administration will open the qualified suppliers' proposals, which are presented in sealed envelopes. The dispute method is, thus,

sealed, considering all proposals are secret, up to the day of the award decision. The proposals are classified according to the criteria set forth by the public notice, and the award goes to the best proposal.

### ***Auction***

Auctions are used exclusively to sell assets that are unserviceable for the administration or to sell apprehended or pledged goods. In an auction, anyone may bid, and the award winner is the one who offers the highest amount, so long as it is equal or superior to its evaluation by the administration.

### ***Contests***

Bidding contests are used to choose technical, scientific or artistic services, awarding prizes or paying remuneration to the winners, according to the criteria exposed in the public announcement notice, published in the Official Gazette with a minimum 45-day advance announcement.

### ***Reverse auction***

The reverse auction is set forth by Federal Statute 10,520 of 2002. It allows the public administration to acquire goods and services by means of a dispute in which the suppliers offer their proposals in a public session, which can take place physically or electronically. Reverse auctions do not bear any amount limitation and may substitute the invitation, price quotation and competitive bidding, so long as it is used to acquire goods and services 'ordinarily' used, namely those whose quality standards can be defined objectively.

Once a reverse auction session starts, the auctioneer discloses the proposals filed by the interested parties. Both the supplier with the lowest offer, and the suppliers with prices of up to 10 per cent above this offer, may proceed with further verbal and successive bids, until a winner is declared. The dispute method is, thus, open, considering the interested parties are aware of the offers presented by their competitors, and may present new offers by means of new public bids.

The validation of the technical and legal qualification of the suppliers only takes place at the end and is applicable only to the winner. In the event the winner is deemed unqualified, the second-place contestant will be validated on its technical and legal qualification, and so forth. The reverse auction is, currently, the most used method of bidding for public purchases, due to the transparency and simplicity of the procedure.

### ***Differentiated government procurement regime***

The RDC, as provided by Federal Statute 12,462 of 2011, was originally conceived to expedite procedures for infrastructure work and services relating to the 2014 World Cup and the 2016 Olympic Games in Rio de Janeiro. Nevertheless, and considering the regime was well received, the law was amended and the RDC started being applied for other infrastructure works, unrelated to sports events.

In the RDC regime, bidding will preferentially take place electronically. The dispute may be open (while the parties present public offers and bids) or sealed (by means of confidential offers), as laid down by the respective public announcement notice. As in the reverse auction method, the validation of legal and technical qualifications will only take place at the end and is only applied to the award winner.

Other distinctions in the RDC regime are that (1) the public administration may choose to indicate the brand or model of a product that is about to be procured, so long as this choice is duly justified, and (2) the remuneration for this procurement may vary, bound to the supplier's performance, based on goals and time frames pre-set by the respective public announcement notice.

## **VI ELIGIBILITY**

### **i Qualification to bid**

The administration must require that the parties interested in a bidding proceeding present documents showing they are capable and competent to follow through with the intended contract. If the interested party does not meet the requirements set forth by public notice, it will not be declared the winner, even if it has the best offer. Brazilian public authorities are customarily rigid in the analysis of qualification documents and, consequently, a formal defect may lead to the disqualification of the bidding party.

According to Federal Statute 8,666 of 1993, the documentation necessary to qualify an interested party relates to the suppliers' legal, technical and economic aptitudes. The administration may require, for example: (1) copies of the company's commercial registration and articles of incorporation; (2) documents that corroborate the election of its officers; (3) proof of registration within the applicable professional class association, if necessary; (4) the authorising decree to operate in Brazil, when the party is a foreign company; (5) acquittance with labour and tax obligations; (6) proof of technical qualification of the professionals in charge; (7) financial statements and balance sheets of the last fiscal year; and (8) bankruptcy and judicial rehabilitation good standing certificates.

The supplier may also be disqualified due to its disreputability. There are illegal actions in Brazil that are punishable with the party's temporary prohibition from entering into agreements with the public administration. That can be the case, for instance, in the event a party breached a prior agreement entered into with the administration (Article 87 of Federal Statute 8,666 of 1993), or when there is an administrative misconduct (Article 12 of Federal Statute 8,429 of 1992).

According to Federal Statute 13,303 of 2016, public and mixed-capital companies may create a list of pre-screened suppliers, which will be automatically qualified to execute agreements with the public administration. They may also restrict the participation of pre-qualified suppliers in bidding procedures.

### **ii Conflicts of interest**

Federal Statute 8,666 of 1993 prevents government officials who are members of the procuring public administration from participating in a bidding procedure, due to the understanding that their participation could compromise the procedure's isonomy. This prohibition is amply interpreted by the precedents of the Court of Auditors, in the sense that companies whose shareholders or officers have family ties to court officials involved in the bidding procedure may be prevented from entering it.<sup>3</sup>

As a rule, bidding procedures presuppose the existence of basic and executive projects, and the authors of such projects are usually forbidden from bidding because they could, in

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3 Lawsuit No. 018.102/2005-1, 18 June 2008.

theory, develop the projects in a way as to hinder access to other contestants. However, there are exceptions: the RDC permits 'integrated hiring', allowing one supplier to go through with all stages of the project, from the drafting of the basic project, through to the execution of the construction work.

### **iii Foreign suppliers**

Any person or company who meets the requirements set forth by the public announcement notice may participate in the bidding procedure. Thus, in principle, it is illegal to veto the participation of foreigners, or to lay down discriminating requirements that may hinder their participation in the procedure. However, to be part of the bidding proceeding, a foreign company must meet the requirements set forth in Brazilian civil law and, additionally, may be subject to differentiated restrictions and conditions, as may be required by national interests.

For companies set up outside Brazil, which operate within the borders of the country, it is necessary to present the authorising decree required by Article 1,134 of the Brazilian Civil Code (a foreign company may not operate in Brazil, even by means of subordinated establishments, without the authorisation of the Brazilian Executive Branch).

Foreign companies that do not operate within the country must present, whenever possible, documents equivalent to those issued by Brazilian authorities, authenticated by the respective consulates and translated into Portuguese by a sworn translator. These companies must also have a legal representative in the country, with express powers to be served with process and to answer administratively and judicially on the company's behalf.

Some activities, nevertheless, are exclusively reserved for Brazilians or companies set up in Brazil, as it is the example of broadcasting activities (Article 222 of the Brazilian Federal Constitution). Others, as is the case for defence products, services and systems, impose a different treatment for foreigners (Federal Statute No. 12,598/2012).

## **VII AWARD**

Award granting in bidding procedures is objective, and the public administration must analyse the proposals in exclusive obedience with the criteria set forth by the applicable announcement notice.

### **i Evaluating tenders**

Pursuant to Federal Statute 8,666 of 1993 the criteria to adjudicate awards to the most advantageous proposal may be based on three aspects: (1) the lowest price; (2) the best technique, when the most relevant factor is the quality of the goods or services; or (3) a combination of the two, conjugating elements of both of the aforementioned criteria.

For purchases made under the RDC, the adjudicating criteria may be: (1) the lowest price or the highest discount; (2) the best technique and price; (3) the best technique or artistic content; (4) the largest price offer; or (5) the most advantageous economic return.

Public and mixed-capital companies that are subject to the regime set forth by Federal Statute 13,303 of 2016 may adopt the following adjudicating criteria: (1) the lowest price; (2) the largest discount; (3) the best combination of price and technique; (4) the best technique; (5) the best artistic content; (6) the largest price offer; (7) the most advantageous economic return; and (8) the best destination given to sold goods.

## **ii National interest and public policy considerations**

There are situations in which the duty towards isonomy is mitigated. As criteria to untie the adjudication of an award, preference will be given to the goods and services produced: (1) in Brazil; (2) by Brazilian companies; (3) by companies that invest in technology research and development in the country; (4) by companies that meet quota requirements, hiring disabled personnel, or employees rehabilitated by the social security system and that comply with the accessibility rules laid down by law; (5) by micro-enterprises and small businesses, defined according to the criteria provided by Complementary Statute No. 123 of 2016; and (6) by private individuals or families who are rural producers.

The administration may also establish a margin of preference to goods and services that meet Brazilian technical regulations, and to companies that prove to have complied with the quota reservation for disabled people or those rehabilitated by the social security system. The preference margin, however, may not supersede 25 per cent of the price of foreign goods and services.

## **VIII INFORMATION FLOW**

Bidding procedures are guided by the publicity principle, to guarantee the participation of the society and the supervision of controlling organisations. There is no secret bidding procedure in Brazilian law. The only secrecy the system allows regards the content of the proposal, in the event of biddings under the sealed method – and that goes only as far as the time when the envelopes are opened.

Federal Statute 8,666 of 1993 guarantees to any party to the procedure access to all its stages. Furthermore, Federal Statute 12,527 (the Information Access Statute) compels public entities to disclose collective interest information, especially information regarding bidding procedures, including the announcement notice, the awards and the agreements executed.

## **IX CHALLENGING AWARDS**

Decisions made by the authorities in charge of bidding procedures may be challenged, both administratively and judicially. The broad alternatives to appeal undoubtedly contribute to the tardiness of bidding procedures in the country.

In Brazil, where litigation levels are high, it is not uncommon for the bidding procedure to end up being challenged by the contestants, by the controlling bodies, by the Public Prosecutor's Office or by the Court of Auditors (administrative courts responsible for accounting, financial, budgetary, and assets supervision of the administration entities), or even by common citizens.

Administrative challenges, as a rule, are cost-free and do not depend on the participation of an attorney. They may be decided over the course of a few weeks or months, depending on the complexity of the matter. Court challenges, on the other hand, depend on payment of costs (based on the amount under discussion) and demand the participation of an attorney. They may be decided over the course of a few months or in years, depending on the complexity of the case.

## **i Procedures**

The administration's actions may be challenged internally (by means of an appeal to the administration itself), or externally (by means of lawsuits, or representations before the Court of Audits).

### ***Internal control***

The bidding announcement notice may be challenged administratively by the bidder or by any citizen. The challenge's purpose is to show the administration there are legal defects, or inconsistencies in the requirements made by the bidding notice, to enable the administration to remedy them. All other phases of the bidding procedure, such as the qualification, non-qualification, adjudication and classification of the proposals may be challenged by the interested parties by means of a hierarchic appeal, to be filed within five business days. The filing of the appeal must be communicated to the other participants, who can file their answers within five business days.

### ***External control***

Any damage, or threat of a damage, to the interest of the participating parties may be taken to the appreciation of the courts, which will analyse the legality of the administrative action and the compliance with the bidding notice regulations. In addition, the Court of Auditors, due to its institutional purpose, may supervise the legality and the cost-effectiveness of the procedure, by means of representations by any of the interested parties.

## **ii Grounds for challenge**

The actions by the administration and by private parties may be administratively or judicially challenged by the interested parties, based on the law, or on the regulations of the bidding notice. The Public Prosecutor's Office can also file a lawsuit defending the principles that govern public law, or in the event of administrative misconducts.

Furthermore, according to Brazilian law, any citizen is permitted to judicially request the annulment of a bidding procedure that may be potentially harmful to the Public Treasury, in the form of a 'popular lawsuit' (a modality of lawsuit in which any citizen may require the annulment of administrative actions that may be harmful to public property).

## **iii Remedies**

Brazilian courts may impose a variety of measures to forbid or correct illegality or vices in a bidding procedure. It may, for example, suspend the proceeding, allow the participation of a bidder unfairly excluded from participating, declare the nullity of the bidding notice or of the agreement and, additionally, impose the payment of a damages penalty on the party responsible for causing losses to a third party.

If administrative misconduct is configured (such as kickback payments, personal favouring, or undue waiver to bid in a procurement) the public entity or the Public Prosecutor's Office may request the courts to apply civil and administrative penalties to the responsible parties, such as payment for damages, fines or the temporary suspension of the right to enter into agreements with the public administration.



## **X OUTLOOK**

Currently, the government procurement regime in Brazil is complex, due to the broad quantity of exceptions and specific regulations. It may also be time-consuming, considering how simple it is to appeal, and due to Brazil's litigious culture.

Nevertheless, there are bills undergoing Congress analysis that attempt to correct the main flaws of bidding proceedings. In 2018, the main bills (Bills 1,292/1995 and 6,814/2017) were gathered into one, and on 17 September 2019, a substituting text was passed by the House of Representatives. Because Brazil has a bicameral system, the bill currently awaits the Senate's analysis.

Some of the main changes provided by the bill are: (1) the creation of a Public Procurement National Portal online, to ensure transparency in all contracts executed with the administration; (2) the obligation, for public authorities, to perform long-term planning for their procurements, which must be disseminated publicly; (3) the creation of pre-qualified supplier lists, which must be permanently open; and (4) the simplification of administrative appeals.

# CANADA

*Theo Ling, Karina Kudinova and Nadia Rauf*<sup>1</sup>

## I INTRODUCTION

Canada's legal framework for government procurement is based on a number of bodies of rules, including trade agreements, statutes, regulations, case law, policies and custom. The legal framework does not apply uniformly across Canada. As a federation, Canada has two distinct jurisdictions of political authority: the nationwide federal government, and 10 provincial governments. Canada also has three territories, Yukon, Northwest Territories and Nunavut, which are not discussed in this chapter. The legal rules that apply to government procurement at the federal level are different from those that apply to the provinces, and the rules that apply to public bodies at the provincial level differ from province to province.

At the federal level, the central piece of legislation regulating government procurement is the Government Contracts Regulations (GCRs)<sup>2</sup> issued pursuant to the Financial Administration Act (FAA).<sup>3</sup> The FAA contains general provisions applicable to federal government procurement, while the GCRs contain more detailed provisions. The federal government is also subject to binding and enforceable commitments made pursuant to trade agreements with other nations, such as the World Trade Organization's Agreement on Government Procurement (GPA), the North American Free Trade Agreement (NAFTA), the Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which are discussed in greater detail below. There are also numerous policies and directives that apply to federal government procurement. Public Services and Procurement Canada (PSPC), which is the department responsible for the federal government's internal servicing and administration, develops, implements and maintains the Supply Manual,<sup>4</sup> which specifies the procedures of procurement and includes standard clauses for the procurement process. The Supply Manual does not have the force of law, and procuring authorities have no legal obligation to include the standard clauses contained therein. In addition to these and other statutes, policies and trade agreements, there is a compendious volume of case law that serves to define the rules and principles applicable to federal government procurement.

Different provinces have taken alternative approaches to procurement. Most provinces have enacted little legislation respecting government procurement and leave it largely up to

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2 SOR/87-402.

3 RSC 1985, c F-11.

4 Public Works and Government Services Canada, 'Supply Manual': <https://buyandsell.gc.ca/policy-and-guidelines/Supply-Manual> (last updated 12 December 2012; last accessed 16 March 2020).

public agencies to develop internal policies by which public purchasing will take place. Some provinces have enacted more comprehensive legislation. For instance, Quebec has enacted an Act respecting contracting by public bodies<sup>5</sup> that, along with its regulations, prescribes specific rules that apply to public purchasing by all public agencies in Quebec. In the same vein but to a lesser extent, Nova Scotia, New Brunswick, Saskatchewan, and Newfoundland and Labrador have enacted government procurement legislation of broad provincial application. Ontario has taken something of a hybrid approach. The Broader Public Sector Accountability Act 2010<sup>6</sup> authorises an executive committee of Ontario to issue directives governing public procurement, which resulted in the Broader Public Sector Procurement Directive being issued in 2011. The Directive does not have the force of law, but nevertheless applies as a general best practice to all designated public agencies in Ontario. The international trade agreements to which Canada is a signatory do not have the force of law in the provinces. That said, the provinces have entered into domestic treaties among themselves; these treaties are binding and subject to dispute resolution processes. As is the case federally, each province has its own body of case law regarding government procurement.

One of the most significant contributions that the judiciary has made to the procurement framework for tenders in Canada relates to what is generally referred to as ‘Contract A/ Contract B’.<sup>7</sup> Under this analytical framework, which applies to competitive procurement for tenders throughout Canada, a bidder enters into ‘Contract A’ with the procuring authority when it has submitted a compliant bid in response to a request for bids (or similar document) as part of a legal tender process. ‘Contract B’ refers to the contract to be awarded to the successful bidder. Public agencies enjoy a significant amount of freedom to establish criteria that bidders must satisfy to be eligible to bid on a contract, which correspond roughly with the ‘terms and conditions’ of Contract A. By the same token, pursuant to the tender process, public agencies are bound to the terms of Contract A and are therefore generally prohibited from, *inter alia*, awarding the contract to a non-compliant bidder, awarding a contract that differs materially from the one offered through Contract A and evaluating bidders based on criteria that differ from those set out in Contract A. These obligations, which will be discussed in further detail below, flow from the fundamental principle that government procurement in Canada is to be open, fair and transparent, which is generally considered to support the principle of value for money. Accordingly, while other means of procurement are technically open and available to the government, the tender process, which supports transparency and fairness, is the means by which the government most typically undertakes procurement.

## II YEAR IN REVIEW

### i CPTPP

On 8 March 2018, Canada and 10 other nations in the Asia-Pacific region signed the CPTPP, a free trade agreement intended to supersede the Trans-Pacific Partnership (TPP), which was signed in 2016.<sup>8</sup> On 25 October 2018, legislation to implement the CPTPP in Canada

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5 CQLR c C-65.1.

6 SO 2010, c 25.

7 *R. (Ont.) v. Ron Engineering and Construction (Eastern) Ltd.* [1981] 1 S.C.R. 111.

8 Global Affairs Canada, ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)’: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgg/>

was granted royal assent.<sup>9</sup> On 30 December 2018, the CPTPP entered into force among the first six nations to ratify the CPTPP (Canada, Australia, Japan, Mexico, New Zealand and Singapore), and on 14 January 2019, the CPTPP entered into force for Vietnam.<sup>10</sup> The CPTPP incorporates the provisions of the TPP, with the exception of a number of provisions that have been suspended.<sup>11</sup> The government procurement provisions of the TPP remain largely unchanged in the CPTPP; therefore, the CPTPP provides parties with improved access to each other's government procurement markets. The government procurement provisions of the CPTPP are largely based on the GPA and include core commitments relating to national treatment and non-discrimination, access to information about procurement opportunities and fair and transparent procurement procedures. During the first year of the CPTPP implementation in Canada, there was approximately 3 per cent growth in bilateral merchandise trade between Canada and its new free trade partners.<sup>12</sup> On 14 January 2019, the CPTPP entered into force between Canada and Vietnam. Both countries matched tariff cuts, which resulted in Canadian exporters immediately benefiting from these tariff cuts. Similarly, Canada made two tariff cuts for imports from Vietnam, matching the tariff cuts already provided to Australia, Japan, Mexico, New Zealand and Singapore.<sup>13</sup>

## ii CUSMA

On 30 November 2018, Canada, the United States and Mexico signed the Canada–United States–Mexico Agreement (CUSMA), a free trade agreement intended to supersede the NAFTA, which has governed trade between the three nations since 1994.<sup>14</sup> On 10 December 2019, the Protocol of Amendment to CUSMA effectively amended certain provisions of CUSMA regarding the environment, intellectual property rights, labour rights,

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text-texte/cptpp-ptpgp.aspx?lang=eng (last updated 21 February 2018; last accessed 16 March 2020). The 11 parties to the CPTPP are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

- 9 Government of Canada, 'Timeline of the CPTPP': [https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/timeline\\_negotiations-chronologie\\_negociations.aspx?lang=eng](https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/timeline_negotiations-chronologie_negociations.aspx?lang=eng) (last updated 17 December 2018; last accessed 16 March 2020).
- 10 *ibid.*
- 11 Government of Canada, 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – Frequently asked questions': <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/faq.aspx?lang=eng> (last updated 7 January 2019; last accessed 16 March 2020).
- 12 Global Affairs Canada, 'Statement from Minister Ng on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, one year later': <https://www.canada.ca/en/global-affairs/news/2019/12/statement-from-minister-ng-on-the-comprehensive-and-progressive-agreement-for-trans-pacific-partnership-one-year-later.html> (last updated 30 December 2019; last accessed 16 March 2020).
- 13 Government of Canada, 'About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership': [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgroundunder-document\\_information.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgroundunder-document_information.aspx?lang=eng) (last updated 16 July 2019; last accessed 17 March 2020).
- 14 Global Affairs Canada, 'Canada-United States-Mexico Agreement (CUSMA)': <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> (last updated 21 February 2020; last accessed 16 March 2020). In the United States, CUSMA is referred to as the United States-Mexico-Canada Agreement (USMCA). In Mexico, CUSMA is referred to as El Tratado entre México, Estados Unidos y Canadá (T-MEC).

dispute settlement and more.<sup>15</sup> CUSMA will enter into force once it has been ratified and implemented by each nation domestically; until such time, NAFTA remains in force.<sup>16</sup> On 13 March 2020, legislation to implement CUSMA in Canada, An Act to implement the Agreement between Canada, the United States of America and the United Mexican States (Bill C-4), received royal assent. Canada is not a named party in CUSMA's chapter concerning government procurement, which applies only between the United States and Mexico.<sup>17</sup> However, Canada and the United States retain access to each other's procurement markets through the binding commitments that they have made under the GPA.<sup>18</sup> Canada and Mexico retain access to each other's procurement markets through the binding commitments that they have made under the CPTPP (as discussed above).<sup>19</sup>

### iii CFTA

On 1 July 2017, the Canadian Free Trade Agreement (CFTA) entered into force.<sup>20</sup> The CFTA is a result of lengthy negotiations between federal, provincial and territorial governments (Parties), which commenced in December 2014, with an aim to promote regional cooperation, expand procurement coverage, remove technical barriers to trade, and to strengthen and modernise the Agreement on Internal Trade (AIT). On 10 December 2019, amendments to CFTA entered into force, allowing Parties to remove or narrow their own specific exceptions with expediency and efficiency. Parties will now be able to remove their exceptions without requiring the approval of all other Parties, with access to a more streamlined process for narrowing their exceptions.<sup>21</sup>

### iv Provincial government procurement legislation

On 6 November 2019, the Ontario government introduced Bill 138, which contains the Supply Chain Management Act (Government, Broader Public Sector and Health Sector Entities).<sup>22</sup> The stated purpose of the Act, which received royal assent on 10 December 2019,

15 Global Affairs Canada, 'Protocol of Amendment to the CUSMA': <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> (last updated 21 February 2020; last accessed 16 March 2020).

16 Government of Canada, 'Canada–United States–Mexico Agreement (CUSMA)': <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> (last updated 26 February 2020; last accessed 16 March 2020). Canada is the final member state to complete the ratification process for the CUSMA. Upon entry into force of Canada's Act to implement the Agreement between Canada, the United States of America and the United Mexican States, CUSMA will enter into force, as all member states will have completed the ratification process.

17 Global Affairs Canada, 'CUSMA - Chapter 13: Government Procurement': (last updated 21 February 2020; last accessed 16 March 2020).

18 Global Affairs Canada, 'Summary Background: Canada-United States-Mexico Agreement (CUSMA)': <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary-sommaire.aspx?lang=eng> (last updated 28 January 2020; last accessed 16 March 2020).

19 *ibid.*

20 Canadian Free Trade Agreement, 'Canadian Free Trade Agreement (CFTA)': [https://www.cfta-alec.ca/canadian-free-trade-agreement/?sm\\_au\\_=iVVvn7RSdW60nBVQKkM6NKsW8f6TG](https://www.cfta-alec.ca/canadian-free-trade-agreement/?sm_au_=iVVvn7RSdW60nBVQKkM6NKsW8f6TG) (last accessed 16 March 2020).

21 Canadian Free Trade Agreement, 'First Protocol of Amendment (December 10, 2019)': [https://www.cfta-alec.ca/canadian-free-trade-agreement/?sm\\_au\\_=iVVvn7RSdW60nBVQKkM6NKsW8f6TG](https://www.cfta-alec.ca/canadian-free-trade-agreement/?sm_au_=iVVvn7RSdW60nBVQKkM6NKsW8f6TG) (last accessed 16 March 2020).

22 S.O. 2019, c. 15, Sched. 37.

is to (1) enhance supply chain management in respect of government entities, broader public sector entities and health sector entities; (2) establish a framework for regulating supply chain management, including procurement, in respect of such entities; (3) leverage the buying power of such entities; and (4) set out roles and responsibilities for supply chain management, including procurement. Entities covered within this legislation will also be required to comply with any future regulations passed under the Act.

**v British Columbia vendor tax verification requirement**

The government of British Columbia has instituted a new requirement for vendors to obtain a tax verification letter. Effective 1 January 2020, unless certain exceptions apply, in order to be awarded a contract with the province valued at C\$100,000 or greater, vendors must confirm that they are compliant with their BC corporate income tax filing obligations and provincial sales tax filing and payment obligations by providing a tax verification letter. This change was implemented 'to ensure that awarding contracts is done in a fair manner and demonstrates good stewardship of taxpayer dollars'.<sup>23</sup>

**vi Better Buying programme**

On 5 March 2019, PSPC announced a comprehensive plan intended to improve the federal procurement process. The programme, titled 'Better Buying', endeavours to modernise PSPC's procurement processes by building a modern procurement foundation, delivering a simpler, responsive and accessible procurement system and advancing socioeconomic goals, increasing competition and fostering innovation. Key features of the programme include the deployment of an electronic procurement solution to replace the current paper-based system, the development of novel tools to track and manage vendor performance and the simplification and streamlining of PSPC contracting documents to make procurement less burdensome for suppliers.<sup>24</sup> The electronic procurement solution is expected to be gradually implemented with PSPC.

### **III SCOPE OF PROCUREMENT REGULATION**

**i Regulated authorities**

At the federal level, government procurement rules generally apply to procurements by federal government departments; corporations that were incorporated under a federal statute; corporations that receive the majority of their funding from the federal government; and their agents. However, federal government entities that are creatures of statute and that are mandated to compete with the private sector are not generally subject to the public procurement laws.

Government procurement rules likewise apply in general to all public bodies at the provincial level. Although the details may differ from province to province, the procurement rules that have been developed by the Supreme Court of Canada apply generally to all public

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23 British Columbia, 'Vendor Information Tax Verification Letter': <https://www2.gov.bc.ca/gov/content/employment-business/business/business-government/contract-award/contract-negotiations-finalization/tax-verification-letter?keyword=tax&keyword=verification> (last accessed 28 February 2020).

24 Public Services and Procurement Canada, 'Better Buying': <https://www.tpsgc-pwgsc.gc.ca/app-acq/ma-bb-eng.html> (last updated 5 March 2019; last accessed 14 March 2019).

bodies in Canada. This includes the Contract A/Contract B framework described above for tenders, and the corresponding duties that are incumbent upon the purchaser, such as the duty to conduct fair competition.

In addition, certain legislative instruments prescribing procurement rules specify the entities to which they apply. For instance, Quebec's Act respecting contracting by public bodies applies to, among other entities, municipalities, government departments, entities like universities, health institutions and social services agencies that are part of a group commonly referred to as the MASH sector, and bodies that are wholly or partly funded by the National Assembly of Quebec. Similarly, Ontario's Broader Public Sector Procurement Directive applies to most entities in the MASH sector as well as publicly funded organisations that received funds of C\$10 million or more in the previous fiscal year from the government of Ontario. Markedly, municipalities are not covered by the Directive. In provinces where no public procurement legislation has been enacted, courts have stepped in to develop a regulatory public procurement framework that generally applies to all public entities.

## **ii Regulated contracts**

All contracts for the supply of goods, services or works with the above-described public bodies are regulated by government procurement rules. The question of which rules apply depends on the contracting public body at issue and the type of contract at issue. For example, the GCRs apply to federal government entities and set out certain requirements that apply to all federal procurement contracts. However, some contracts, such as National Film Board contracts, Veterans' Land Act construction contracts and legal services contracts, are exempt from the bulk of the requirements in the GCRs.<sup>25</sup> These exempt contracts are nevertheless subject to certain core requirements, such as the contractor warranting that it has not been convicted without pardon of prescribed offences that would put into question the integrity of the contractor. Prescribed monetary thresholds respecting the value of the public contract may also determine the extent to which the government procurement rules apply, as will be touched upon below.

The procurement rules applicable to utilities are generally the same as for other procurement processes. Defence contracting, which is the realm of the federal government, is also generally subject to the same rules as those for other procurement processes, although exemptions to the duty of non-discrimination imposed by international trade agreements may apply where issues of national security are at stake. As many as three federal departments will be involved in major procurements of military services and equipment: Innovation, Science and Economic Development Canada (formerly Industry Canada), which is responsible for industrial and regional benefits (also known as offsets); the Department of National Defence, which defines the requirements of the acquisition; and PSPC, which manages the procurement process, negotiates the contract and then manages the contract once signed.

Major military procurements may be subject to the Industrial and Regional Benefits Programme, which requires successful bidders to make investments in advanced technology in certain sectors and areas of Canada in amounts sometimes equal to the value of the specific contract. Where procurement is deemed to be subject to the federal Defence Production

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25 GCRs, Section 3.

Act,<sup>26</sup> the underlying documents will be exempt from the rigorous disclosure requirements applicable under federal laws, which helps to ensure that sensitive technology and information are appropriately protected.

There are no financial thresholds below which public contracts are completely free from regulation. However, there are financial thresholds below which certain free trade obligations do not apply to federal government entities, as explained below.

At the federal level, the GCRs generally require bids to be publicly solicited for all contracts and thereby subject to full competitive public tendering where anyone who complies with the applicable requirements can bid. The exceptions to this are when:

- a* the need is one of pressing emergency in which delay would be injurious to the public interest;
- b* the estimated expenditure in the case of a goods contract does not exceed C\$25,000 (and it would not be cost-effective to solicit bids), C\$100,000 for specific types of contracts, such as architectural or engineering services, or C\$40,000 in the case of any other contract;
- c* the nature of the work is such that it would not be in the public interest to solicit bids; or
- d* only one person is capable of performing the contract.<sup>27</sup>

The rules are generally more flexible on the provincial level, where the circumstances in which public entities are not required to hold a competitive procedure will be governed by applicable trade agreements, legislation and, to a lesser degree, policies and directives.

Any changes to or transfer of the awarded contract must be conducted in accordance with the rules and procedures that the procuring authority established in the rules of the procurement. Generally, bona fide changes to the contract are permitted where the contracting parties mutually agree to them. The policies of public entities usually include rules that restrict the transfer of public contracts. For instance, the PSPC Supply Manual contains clauses that impose limitations on a contractor's capacity to assign contracts without the consent of the purchaser.<sup>28</sup> The Canadian International Trade Tribunal, which adjudicates certain complaints with regard to the procurement process, has suggested that it does not object to contracts being assumed by a third party.<sup>29</sup>

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

Framework agreements and central purchasing on behalf of other public authorities are viable and in some cases encouraged methods of procurement in Canada. In practice, government entities in Canada employ procurement practices that run the gamut between centralisation and decentralisation. For example, New Brunswick's Procurement Act requires all provincial government departments and various other public bodies to purchase services and supplies

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26 RSC 1985, c D-1.

27 GCRs, Section 6.

28 'Standard Acquisition Clauses and Conditions (SACC) Manual', PSPC, General Conditions, Standard Clauses and Conditions, 2010A, 2010B, 2010C, 2029, 2030, 2035 and 2040 under 'Assignment'.

29 *Re IBM Canada Ltd* (2003).



through the Ministry of Government Services unless certain narrow exceptions apply.<sup>30</sup> On the other hand, public procurement at the federal level is conducted in a relatively decentralised manner. As long as the procurement processes conducted through such arrangements comply with the obligations referred to in this chapter, such as the duty to conduct a fair competition, the duty to disclose all material evaluation criteria and the duty to reject non-compliant tenders, as well as all applicable international trade obligations, procuring authorities and teams are free to establish framework and central purchasing agreements among themselves.

## ii Joint ventures

Structural and cooperative or contractual public–public joint ventures (JVs) are both viable vehicles for procuring goods and services in Canada. Public bodies entering JVs may be found to be in a fiduciary relationship, which involves legal duties of fidelity and good faith. Public bodies seeking to avoid these duties may seek to structure their relationship as a ‘buying group’ instead. The common thread among these arrangements is that there are typically one or several parties who are responsible for procuring goods or services on behalf of the other participants. The precise obligations of the parties involved will depend on the form of legal vehicle assumed and the specific procurement framework in which the public bodies operate. Nevertheless, JVs, JV companies and buying groups are all bound by the rules on public contracting outlined in this chapter. Typically, all of the public bodies participating in a JV or buying group will be involved in the procurement process for which the JV or buying group was formed, obviating any concerns associated with one public body supplying another public body without a prior procurement process.

Public-private partnerships (PPPs) are subject to the procurement rules outlined in this chapter. Thus, the PPP generally must be competitively tendered by means of a procedure run in accordance with the rules and principles applicable to all public procurements.

Many levels of government in Canada have imposed rules that require procuring authorities to seriously consider PPPs as a delivery mode for a proposed project worth over certain monetary thresholds. For example, federal projects intended to develop an asset with a lifespan of at least 20 years and having capital costs of at least C\$100 million must be subject to a business case to determine whether a PPP may be a suitable procurement option.<sup>31</sup> P3 Canada is the public body responsible for advancing the use of PPPs on the federal level.

## V THE BIDDING PROCESS

### i Notice

Federal government entities advertise contract opportunities electronically on the Government Electronic Tendering System. Public provincial contract opportunities may be advertised electronically on the following websites:

*a* Alberta: Purchasing Connection and COOLNet;<sup>32</sup>

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30 SNB 2012, c 20, Section 2(1).

31 Treasury Board of Canada Secretariat, ‘Notice on Policy on the Management of Projects’, 12 November 2013: [www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=27421&section=text](http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=27421&section=text) (last accessed 28 February 2020).

32 Government of Alberta, ‘Alberta Purchasing Connection’: [www.purchasingconnection.ca](http://www.purchasingconnection.ca) (last accessed 28 February 2020); COOLNet Alberta, ‘Construction Opportunities Online Network’: [www.coolnetalberta.com](http://www.coolnetalberta.com) (last accessed 28 February 2020).

- b* British Columbia: e-Procurement in BC (BC Bid);<sup>33</sup>
- c* Manitoba: Government Tenders (MERX);<sup>34</sup>
- d* Newfoundland and Labrador: the Government Purchasing Agency;<sup>35</sup>
- e* New Brunswick: e-Procurement in NB (New Brunswick Opportunities Network);<sup>36</sup>
- f* Nova Scotia: Nova Scotia Tenders;<sup>37</sup>
- g* Ontario: Supply Chain Ontario;<sup>38</sup>
- h* Prince Edward Island: Tender Opportunities;<sup>39</sup>
- i* Quebec: Le système électronique d'appel d'offres;<sup>40</sup> and
- j* Saskatchewan: SaskTenders.<sup>41</sup>

## ii Procedures

Public agencies are generally permitted to use a broad range of approaches, provided they comply with the requirements of Canada's trade agreements, the common law, and the agency's own internal policies and procedures. Typically, a public agency will establish internal policies and procedures governing the circumstances in which procurement may be conducted and the manner in which such procurement is to be conducted. These policies and procedures often provide guidance on the procurement documents and procedures, including:

- a* a request for information, which is used as an information-gathering tool;
- b* a request for expressions of interest, which is commonly used to identify which participants in the market are able and willing to provide goods or services;
- c* a request for qualifications, which is used to pre-screen bidders based on a set of qualification criteria established by the public agency;
- d* a request for proposals (RFP), which typically prescribes the outcome desired but not how the successful bidder will deliver the goods or services. The terms and conditions of the RFP typically vary significantly, depending on the needs of the public agency. The proposals may be legally binding or non-binding, depending on the intent of the public agency; and

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33 Government of British Columbia, 'e-Procurement in B.C.: BC Bid': [www.bcbid.gov.bc.ca](http://www.bcbid.gov.bc.ca) (last accessed 28 February 2020).

34 Government of Manitoba, 'Government Tenders': [www.gov.mb.ca/tenders](http://www.gov.mb.ca/tenders) (last accessed 28 February 2020); Merx, [merx.com](http://merx.com) (last accessed 28 February 2020).

35 Government of Newfoundland and Labrador, 'Bidding Opportunities': <https://www.gov.nl.ca/ppa/bidding-opportunities/> (last accessed 28 February 2020).

36 Government of New Brunswick, 'eProcurement in NB: NBON (New Brunswick Opportunities Network)': <https://nbon-rpanb.gnb.ca> (last accessed 28 February 2020).

37 Government of Nova Scotia, 'Nova Scotia Tender Notices': <https://procurement.novascotia.ca/ns-tenders.aspx> (last accessed 28 February 2020).

38 Government of Ontario, 'Doing business with the Government of Ontario': <https://www.ontario.ca/page/doing-business-government-ontario> (last accessed 28 February 2020); Government of Ontario, 'Ontario Tenders Portal': <https://ontariotenders.app.jaggaer.com/esop/nac-host/public/web/login.html> (last accessed 28 February 2020).

39 Prince Edward Island, 'View PEI Tenders and Procurement': <https://www.princeedwardisland.ca/en/service/view-pei-tenders-and-procurement> (last accessed 28 February 2020).

40 Secretariat du Conseil du trésor Québec, 'Système électronique d'appel d'offres': <https://www.tresor.gouv.qc.ca/faire-affaire-avec-letat/systeme-electronique-dappel-doffres/> (last accessed 28 February 2020).

41 Government of Saskatchewan, 'SaskTenders': [www.sasktenders.ca](http://www.sasktenders.ca) (last accessed 28 February 2020).

- e tender, which is normally used when the acquired item is well defined (often a commodity product) and all that matters is price.

Electronic bidding is permissible and offered on selected tenders.

### **iii Amending bids**

As public entities enjoy a significant amount of freedom to define the rules of the bidding process, bidders should review the terms set out in the tender documents to determine whether there are any limits on amending submitted bids during the bidding process.

Purchasers are generally not permitted to allow a bidder to rectify deficiencies in a bid after the deadline for bid submissions has passed. This flows from the obligation of purchasers to reject non-compliant tenders, which flows from the duty to run a fair competition. Where the rules of the bidding procedure permit suppliers to clarify aspects of their bids, this right should only be used in limited circumstances for the bona fide clarification of a genuine ambiguity in a tender.

## **VI ELIGIBILITY**

### **i Qualification to bid**

Public entities enjoy a significant amount of freedom to stipulate any criteria that bidders must satisfy to be eligible to bid, and to define situations in which a bidder will be disqualified. This freedom is subject to certain restrictions. First, under the federal procurement framework and those of certain provinces, bidders are automatically liable to be disqualified if they have committed certain prescribed offences that would call into question their integrity (such offences will be listed in the tender documents). Some levels of government – notably the provincial government in Quebec – also implement a blacklist for suppliers with a track record of questionable conduct.

Second, where the bidder and purchaser have a conflict of interest, the bidder may be liable to be disqualified. Third, the eligibility criteria must comply with any applicable trade agreements. Fourth, purchasers have a duty to run a fair competition, and this duty may be breached where purchasers establish eligibility criteria that unduly favour one or more bidders. Finally, there may be additional restrictions specific to certain levels of government. For example, the procurement regime in Quebec generally requires purchasers to specify in their compliance requirements that the filing by a supplier of several bids for the same call for tenders entails automatic rejection of all of that supplier's tenders.<sup>42</sup>

Once public entities have established the requirements to which bidders must comply, they must only consider compliant bids. Any deviation from this principle creates a risk of the procurement process being declared unfair, although some leeway is permitted for bids that may not have strictly complied with all of the requirements but that have substantially complied with all material requirements of the tendering process.

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42 See Regulation respecting certain supply contracts of public bodies, CQLR c C-65.1, r 2, Section 7; and Regulation respecting service contracts of public bodies, CQLR c C-65.1, r 4, Section 7.

## ii Conflicts of interest

Purchasers are subject to a duty to avoid any conflict of interest that could compromise the integrity of the tendering process. This obligation flows from the duty of purchasers to conduct a fair competition when soliciting bids. Purchasers will typically specify in the tender materials any circumstances that constitute a conflict of interest sufficient to disqualify a potential supplier. Bidders should review the tender documents carefully to ensure that they do not meet any of these conflict of interest criteria. In addition, bidders may be subject to a positive duty to declare any actual, potential or perceived conflict of interest or else risk adverse consequences upon the discovery of the conflict of interest. Case law suggests that more than the simple appearance of a potential conflict is necessary to establish a conflict of interest at law.

## iii Foreign suppliers

Public bodies may open RFPs to foreign suppliers, and are required to do so under certain circumstances. The monetary thresholds referenced below are in effect during the period from 1 January 2020 to 31 December 2021 and revised periodically in accordance with their respective treaties.<sup>43</sup>

As a signatory to the GPA, Canada has agreed to provide suppliers of more than 40 trading partners in Europe, Asia and North America the right to bid without discrimination on a broad range of public sector tender calls by federal government entities. The GPA is not applicable to provincial or municipal governments, or to private industry or private individuals. The monetary thresholds applicable to procurements by federal government agencies, departments and enterprises are C\$238,000 for goods, services or any combination thereof, and C\$9.1 million for construction services contracts.<sup>44</sup>

As a signatory to CETA, Canada has agreed to provide suppliers of the European Union with equal opportunity to bid to provide goods and services to a wide range of Canadian government entities at the federal, provincial and municipal levels. In order for CETA to apply to a given government procurement, the procurement must have a value that is equal to or greater than a certain monetary threshold. With regard to procurements by federal government departments and agencies, the monetary thresholds are C\$238,000 for goods, services or any combination thereof and C\$9.1 million for construction services contracts. With regard to federal government enterprises, the monetary thresholds are C\$650,000 to C\$732,400 for goods, services or any combination thereof and C\$9.1 million for construction services contracts.<sup>45</sup>

As a signatory to the CPTPP, Canada has agreed to provide suppliers of Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam with

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43 Canada is a signatory to NAFTA, which is set to be replaced by CUSMA. CUSMA will enter into force upon ratification by all signatory nations. Canada is the final CUSMA member to complete ratification, with implementing legislation receiving royal assent on 13 March 2020. The Treasury Board of Canada Secretariat Contracting Policy Notice 2019-4 Trade Agreements: Thresholds Update covering the period of 1 January 2020 to 31 December 2021 does not include threshold values for NAFTA.

44 Treasury Board of Canada Secretariat, 'Contracting Policy Notice 2019-4 Trade Agreements: Thresholds Update': <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2019-4-trade-agreements-thresholds-update.html> (last updated 13 December 2019; last accessed 16 March 2020).

45 *ibid.*

eliminated or significantly reduced tariffs on imported goods.<sup>46</sup> With regard to procurements by federal government departments and agencies, the monetary thresholds are C\$238,000 for goods and services or any combination thereof and C\$9.1 million for construction services contracts. With regard to federal government enterprises, the monetary thresholds are C\$650,000 for goods, services or any combination thereof and C\$9.1 million for construction services contracts.<sup>47</sup>

International free trade agreements such as the Canada–Korea Free Trade Agreement and the Canada–Honduras Free Trade Agreement also prescribe monetary thresholds over which contracts must be offered to Canada’s trading partners.

Other agreements facilitate trade among governments in Canada and their corresponding public entities. These include:

- a* the Canadian Free Trade Agreement (CFTA), of which the federal and all provincial and territorial governments are signatories;
- b* the New West Partnership Trade Agreement, which applies to the British Columbia, Alberta and Saskatchewan governments;
- c* the Atlantic Procurement Agreement, which applies to the New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island governments;
- d* the Quebec–New Brunswick Trade Agreement; and
- e* the Ontario–Quebec Trade and Co-Operation Agreement.

There is no requirement that foreign suppliers set up a local branch or subsidiary, or have local tax residence to do business with public bodies. Nevertheless, public bodies may choose to establish such criteria during the procurement process if doing so would not breach their free trade obligations or other duties (e.g., duty to conduct a fair competition), if any.

## VII AWARD

### **i Evaluating tenders**

Public entities issuing a call for tenders must disclose all criteria by which the purchaser will evaluate bidders. Purchasers that use undisclosed criteria to evaluate bidders’ risk of being found liable for doing so. Although purchasers are allowed to include significant reservations in a call for bids, courts may not enforce such reservations if doing so would be at odds with the duty to run a fair competition. Changes made to evaluation criteria during the bidding process can likewise result in a breach of the purchaser’s legal duty to run a fair evaluation process.

Public entities are generally free to establish the terms by which they will evaluate bids. Where the estimated price of the contract is likely to be low, public entities typically evaluate

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46 Government of Canada, ‘How to read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)’: [https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/chapter\\_summaries-sommaires\\_chapitres.aspx?lang=eng](https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/chapter_summaries-sommaires_chapitres.aspx?lang=eng) (last updated 12 February 2020; last accessed 16 March 2020).

47 Treasury Board of Canada Secretariat, ‘Contracting Policy Notice 2019-4 Trade Agreements: Thresholds Update’: <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2019-4-trade-agreements-thresholds-update.html> (last updated 13 December 2019; last accessed 16 March 2020).

bidders based on the lowest-priced bid. Otherwise, public entities generally evaluate bidders based on, *inter alia*, the best value, which gives them more leeway in taking into account other attributes besides just the price of the bid.

It is up to public entities to establish the rules that govern the award of a contract to a selected supplier. Purchasers are under a general duty to award the contract as tendered. Suppliers may be found liable where the awarded contract deviates in a material respect from the contract terms contemplated by the call for tenders. Purchasers are also required to distinguish the selection of one or more preferred bidders from the actual award of the contract in question. If the purchaser stipulates that it will negotiate with a number of preferred bidders before awarding the contract, then it is entitled to do so as long as it also complies with its other obligations, such as its duty to be fair to all bidders.

## **ii National interest and public policy considerations**

As previously noted, procuring authorities enjoy significant freedom to determine which considerations they will take into account when deciding who will be awarded a contract. Procurement authorities have the duty to disclose these considerations in the tender documents and are generally not permitted to take any considerations that have not been disclosed into account when evaluating bids. This duty flows from the general duty of procuring entities to conduct a fair competition. Consequently, national interest, local, social and environmental considerations can be and often are taken into account by procuring authorities.

The main restrictions on favouring domestic suppliers during the procurement process are imposed by trade agreements. For example, the GPA, which binds the federal government, imposes an obligation of non-discrimination and transparency on government procurement. Nevertheless, exceptions exist with respect to, *inter alia*, national security and national defence. Likewise, Article 1018(1) of NAFTA exempts ‘protection of . . . essential security interests’ and procurements ‘indispensable for national security or for national defence purposes’.<sup>48</sup>

## **VIII INFORMATION FLOW**

Public entities holding a competitive bidding process are subject to a duty to disclose all material information about the contemplated contract to all bidders. In general, what is deemed material for the purposes of the disclosure duty is any information that could influence a bidder’s decision to bid or influence the price quoted by the bidder. As noted above, this also includes criteria that the purchaser will be relying on when evaluating bids.

Public entities often provide unsuccessful bidders with the opportunity to learn why they lost a contract and why another bidder won. Pursuant to freedom of information legislation, the federal, provincial and in some cases municipal governments and their agents are required to furnish certain information upon request to persons entitled to such information. In many cases, this includes information about why the public entity awarded public contracts to

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48 CUSMA will enter into force once it has been ratified and implemented by each nation (Canada, Mexico, United States), domestically and will supersede NAFTA. Canada is the final CUSMA member to complete the ratification process, and is close to completing the legislative process, with its CUSMA implementing legislation receiving royal assent on 13 March 2020.

certain parties and not to others. Debriefing unsuccessful bidders gives them an opportunity to improve their bids on future tenders and keeps purchasers accountable with regard to their obligations.

Subject to the specific rules of a particular procurement process, public entities are generally under no obligation to notify unsuccessful bidders of the outcome before signing a contract.

Public entities are required to balance their disclosure obligations with their confidentiality obligations. Bidders are entitled to privacy interests over information disclosed during the procurement process, with the strength of those interests intensifying in proportion to the sensitivity and confidentiality of the information at issue. Courts have recognised that releasing supplier information may impair the willingness of others to participate in public procurement processes. Courts have ordered the disclosure of documents with confidential information redacted from them. Confidentiality obligations are stricter during the bidding process, but a more balanced approach to confidentiality and transparency is taken after the contract has been awarded.

## **IX CHALLENGING AWARDS**

### **i Procedures**

A supplier that seeks to complain about a federal government procurement process has a number of choices, which can be taken simultaneously, serially or individually. To begin with, it can sue under the common law of Canada (typically for breach of contract and any applicable tort grounds). The supplier can also sue for breach of the GCRs. The supplier can also complain to the Canadian International Trade Tribunal (CITT) for a breach of Canada's obligations under applicable trade agreements such as NAFTA, the GPA, CETA, the CPTPP and the CFTA.<sup>49</sup> Under the CFTA, Canadian provinces and territories must also establish or designate an independent administrative or judicial authority to receive and review challenges by suppliers.

The GCRs and Canada's trade agreements all contain different language, meaning that the federal government is subject to a host of obligations that may look similar in substance but that diverge in nuanced ways. Further, the CITT's procedural approach to complaints is significantly less formal than that of the courts. A dissatisfied supplier suing the federal government has at its disposal a range of choices with regard to complaint procedures.

A supplier that seeks to complain about a provincial government procurement process is generally limited to suing under the common law of Canada and pursuant to any specific provincial public contracting regulations. Suppliers looking for redress for a breach of the CFTA may avail themselves of protest procedures set out in provincial regulations, any applicable dispute resolution process that has been established by the particular public body at issue and the courts. Public bodies' internal policies do not have the force of law, and so breaches of these policies cannot found a lawsuit. Nevertheless, breaches of policies can be

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49 Global Affairs Canada, Information Note on Recourse Mechanisms For Contracting In Support of International Development Assistance: [https://www.international.gc.ca/development-developpement/partners-partenaires/bt-oa/recourse\\_mechanisms-mecanismes\\_recoures.aspx?lang=eng](https://www.international.gc.ca/development-developpement/partners-partenaires/bt-oa/recourse_mechanisms-mecanismes_recoures.aspx?lang=eng) (last updated August 2018; last accessed 28 February 2020).

relevant to determining whether some wrongdoing occurred. The rules of the procurement process may also include a dispute resolution process. Awards are challenged primarily by parties who bid on the contract at issue.

The CITT hears complaints respecting procurement involving the federal government covered by NAFTA, the GPA, CETA, the CFTA and certain other international trade agreements. Section 6 of the Canadian International Trade Tribunal Procurement Inquiry Regulations<sup>50</sup> provides that a complaint must be filed with the CITT within 10 working days of the date on which the potential supplier first became aware, or reasonably should have become aware, of its ground of complaint to either object to the contracting authority or file a complaint with the CITT. The CITT provides quick remedies, usually issuing its decision within 90 days of the complaint having been made. Costs vary depending on the complexity of the matter.

Besides communicating directly with the contracting authority, courts are the preferred forum for all other procurement-related complaints. Limitation periods on judicial proceedings differ depending on the court and jurisdiction. The Limitations Act (Ontario) assigns a basic limitation period of two years.<sup>51</sup> Costs vary depending on the complexity of the matter.

## **ii Grounds for challenge**

Challenges may be brought on the grounds of a breach of one or more applicable international trade agreements, statutes, regulations and contracts. Breach of contract encompasses a number of grounds that are unique to the procurement framework, such as breach of the purchaser's duty to conduct a fair competition, to make full disclosure of, *inter alia*, evaluation criteria and to reject non-compliant bids. A purchaser's failure to disclose material information and honour the representations made in its tender call can also give rise to concurrent tort claims.

## **iii Remedies**

The CITT has the power to postpone the award of a contract, to order a procurement to be undertaken again or to award damages to a complainant. Courts have more sweeping powers that include the granting of injunctions, setting aside contracts, ordering procurements to be undertaken again and awarding damages to the complainant.

Apart from civil liability for breaching government procurement rules, bid rigging is a criminal offence under Canada's Competition Act.<sup>52</sup> Bid rigging occurs when two or more persons agree that, in response to a call for bids, one or more will not submit a bid, withdraw a bid or submit a bid arrived at by agreement, and the person requesting the bids is not informed beforehand about the agreement made between the parties. Parties found guilty of bid rigging may be liable to a fine in the discretion of the court, imprisonment for a term of up to 14 years, or both.<sup>53</sup>

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50 SOR/93-602.

51 Limitations Act, 2002, SO 2002, c 24, Schedule B, Section 4.

52 RSC 1985, c C-34.

53 *ibid.*, Section 47.



## **X OUTLOOK**

This year has been marked by continued efforts to effect change to the public procurement landscape in Canada, and we can anticipate additional changes to follow. The impact of the international trade agreement, CPTPP, in Canada is gradual growth in bilateral trade between Member States and noticeable benefits from tariff cuts between Canada and Vietnam. The impact of the amended CUSMA remains to be seen, with Canada making significant progress in the ratification process for this international trade agreement. Recent amendments to the CFTA provide measures for federal, provincial and territorial governments to remove their own specific exceptions through a more streamlined process and without the constraints of burdensome approval requirements. These agreements are a signal of continued efforts by Canada and the international community to endorse and incentivise global trade in a manner that is more consistent, transparent and conducive to ensuring stakeholder accountability. Parallel efforts are also reflected in proposed additions to provincial procurement legislation, such as the proposed Supply Chain Management Act of Ontario.

# DOMINICAN REPUBLIC

*Luis Ernesto Peña Jiménez*<sup>1</sup>

## I INTRODUCTION

On 5 August 2004, the US signed the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) and the Dominican Republic, in which one of the main concerns was government procurement. In fact, a whole chapter was dedicated to the matter.<sup>2</sup>

Because of the DR-CAFTA, government procurement regulation in the Dominican Republic underwent a major modification in order to comply with the Free Trade Agreement's requirements. A new bill had to be enacted to comply with the requirements of Chapter 9 of the DR-CAFTA. This led to the enactment on 18 August 2006 of Law No. 340-06 on Government Procurement and Contracting of Goods, Services, Works and Concessions (the Government Procurement Law), which governs any purchase made with taxpayer money nationwide.

Furthermore, on 6 September 2012, the Dominican government issued Decree No. 543-12,<sup>3</sup> which constitutes a relatively new norm in government procurement. This Decree serves to develop in a more specific fashion the regulations of the Government Procurement Law. Besides managing everything related to the different procurement procedures, this norm incorporates a mechanism that is new for the Dominican legal framework, but well known in the government procurement world – a mechanism to fulfil collateral policies through state acquisitions.

Decree No. 543-12 establishes the obligation for every contracting agency to set aside 20 per cent of its purchases to be contracted from micro, small and medium-sized businesses, as long as the good or service to be acquired can be effectively delivered by a small business. In addition to the 20 per cent set-aside for every government procurement process, the Decree establishes the possibility of presenting partial offers within the remaining 80 per cent. As a result, since 2012 the Dominican Republic has been familiar with the notion of making the trade-off of 'full and open competition', which is one of the main desiderata in government procurement, in order to fulfil other high-priority social and economic goals, such as the growth of small business to create jobs.

EU directives and the Agreement on Government Procurement (GPA) do not apply in the Dominican Republic; however, Dominican procurement law was highly influenced

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1 Luis Ernesto Peña Jiménez is the managing partner at Martínez, Peña & Fernández.

2 DR-CAFTA (Dominican Republic-Central America FTA), Chapter 9, Government Procurement. Source: [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file766\\_3926.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file766_3926.pdf).

3 A decree in the Dominican Republic is the similar to an executive order in the US.

by US procurement regulation, most of the best practices recommended in both the GPA's and UNCITRAL's Model Law in government procurement are somewhat included in the Dominican Republic's procurement culture.

The main body with the faculty for setting government procurement policy and enforcing compliance, embodied also with the power to oversee the bidding process, is the General Directorate of Public Procurement, which depends of the Ministry of Finance, a part of the central government.

Dominican procurement law is founded on the core principle of full and open competition, as a corollary of equal access to government procurement contracts as a right. In addition, the law enshrines the principles of efficiency, transparency, flexibility, responsibility, participation, fairness and reciprocity, which allows equal treatment to foreign offerers and contractors. The whole system is designed around these objectives.

## **II YEAR IN REVIEW**

In the past year a new policy in government procurement was enacted with the issuance of Decree No. 168-19, which provides that the institutions in charge of poverty alleviation programmes must call for processes of purchase of agricultural products of a national nature directly to producers, without intermediaries. In addition, Decree No. 86-20 was issued, which instructs the institutions in charge of the execution of programmes aimed at poverty alleviation, food, school nutrition, protection of women, disabled, children and adolescents, when calling for purchase processes to acquire the necessary supplies for the operation of these programmes to make calls directed exclusively to the agribusiness and national industry.

However, the main legislative development in government procurement happened on 21 February 2020, with the approval of the Public Private Partnerships Law in the Dominican Republic. This law partially modifies the Procurement Law regarding concession contracts directly derogating the articles of the law that used to govern concession contracts and procedures. This law brings a completely new system for collaboration between the government and the private sector for big infrastructure projects and public service works. With a high need for these types of development contracts, the Dominican Republic will surely be benefiting from PPPs, which is also an appeal for foreign investors in health, communication, IT and road projects.

## **III SCOPE OF PROCUREMENT REGULATION**

### **i Regulated authorities**

The Government Procurement Law states that its provisions regulate the central government, decentralised and autonomous institutions, local and city governments and public enterprises, and provides a main principle that regulates any entity that contracts the acquisition of goods, services and works using public funding.

### **ii Regulated contracts**

All supply of goods, services, works, consulting and leasing for the government are regulated by procurement rules. Additionally, 'concession' contracts are now regulated by the Public Private Partnerships Law regarding infrastructure and development contracts. However, the law has a rule of thumb: the law covers any government contract that is not expressly excluded by the law, or is not subject to a special regime.

- The following are excluded from the application of the Government Procurement Law:
- a* loans or grant agreements with other states or entities of international public law, when stipulated in said agreements, in which case they will be governed by the agreed rules;
  - b* public credit operations and public employment contracting, which are governed by their respective norms and laws;
  - c* purchases with petty cash funds, which will be made in accordance with the corresponding regime;
  - d* any acquisition activity that is contracted between public sector entities;
  - e* those who, for reasons of security or national emergency, could affect the public interest, lives or the economy of the country, after declaration and support by decree;
  - f* the acquisition of scientific, technical and artistic, or restoration of historical, monuments, whose execution must be entrusted to companies, artists or specialists provided that they are the only ones who can carry this out;
  - g* the purchase and contracting of exclusive goods or services or those that can only be supplied by a certain supplier;
  - h* those that, due to emergency situations, do not allow the carrying out of another selection procedure in time (in all cases, this scenario must be based on objective reasons, prior qualification and support by resolution of the highest competent authority);
  - i* purchases and contracts made for the construction, installation or acquisition of offices for foreign diplomats;
  - j* rescinded contracts whose termination does not exceed 40 per cent of the total amount of the project, work or service;
  - k* purchases aimed at promoting the development of micro, small and medium-sized companies; and
  - l* the hiring of advertising through social media.

Contracts cannot be transferred to a different supplier; however, it is possible for contractors to subcontract to complete the awarded contract. In the case of contract modification or variation, the Government Procurement Law provides that work contracts can be modified to an extent of 25 per cent of the object contracted, and services contracts to an extent of 50 per cent of the contract without the need to tender the varied contract. However, contracts for the acquisition of goods cannot be varied at all.

There is a financial threshold below which contracts are not regulated, which is determined in accordance with the yearly government planned budget. The law contemplates a formula, and the exact amount is updated annually by the government procurement agency. The current threshold is approximately US\$3,000.

#### **IV SPECIAL CONTRACTUAL FORMS**

##### **i Framework agreements and central purchasing**

Framework agreements and central purchasing are not regulated in the Government Procurement Law. This type of contracting, such as indefinite delivery/indefinite quantity contracts, is not used.

**ii Joint ventures**

Joint ventures are admitted by Dominican procurement law in the bidding process. Foreign companies can team up with locals to create consortiums to present a joined offer in any tender procedure. The rule of thumb in this case is that the consortium can jointly meet the qualifications as if were one participant. Joint ventures can also work as a subcontracting relationship, where one company supplies the other company that won the award for the government contract.

Public-private partnerships are ruled by special legislation. The followed procedure is that first there has to be an initiative brought by the private (interested party) or the public sector (any government agency with a PPP initiative). The presentation, evaluation and selection of initiatives and winners of public-private alliances is held over the five next phases: presentation of the initiative; evaluation of the initiative by the National Council of Public Private Partnerships with the further declaration of public interest; a competitive selection process to determine the successful bidder; and finally the award of the public-private partnership.

**V THE BIDDING PROCESS**

**i Notice**

It is mandatory for every procurement procedure that a notice be published in a local newspaper. The notice is also published on the respective government agency's website, and on the General Directorate of Public Procurement's portal. There is no central journal for contract opportunities, although there are some companies that provide a service informing potential offerors of contract opportunities in their field. After someone registers as interested in a procedure, the government sends out direct emails of every update during the process, until the final notice award.

**ii Procedures**

There are six prescribed procedures that awarding authorities must follow for contractor selection. Depending on the type of contract and the amount involved, government agencies can choose between the following:

- a* National public tender: this is the main procedure and almost every procurement process is carried out using this procedure. Although it is meant only for big contracts, some contracting authorities prefer it because it guarantees high levels of competition and transparency.
- b* International public tender: this is for procedures that involve international and foreign offerors.
- c* Restricted tender: reserved for procedures where only a handful of potential offerors exist in the market. These possible interested parties are directly contacted to participate in the tender, and no one else can.
- d* Raffle of works: this is a very infrequently used procedure, where, haphazardly, offerors are awarded with a contract.
- e* Price comparison: this procedure is similar to what in US government procurement law is known as the 'lowest price technically acceptable' process. In this process, the contract should be awarded to the lowest price offer from among those that comply with the minimum technical requirements.

- f* Reverse auction: offerors bid for the prices at which they are willing to sell their goods to the government. This procedure is seldom used in the Dominican Republic.

All these procedures are conducted physically. Although there is a portal through which awarding authorities send out notices and information, the procurement process is not electronic.

### **iii Amending bids**

Limits to changes in offers during the procurement process are set out in the procedure specifications. Usually, there is a deadline before which the government can ask for corrections to the offer. However, there is no limit on the changes the contracting authority can make to the process. It is normal for several amendments to be made to conditions, among other things.

## **VI ELIGIBILITY**

### **i Qualification to bid**

Article 8 of the Government Procurement Law states that anyone who wishes to contract with the state shall demonstrate its capacity by satisfying the following requirements:

- a* they must possess the professional and technical qualifications that ensure capacity, financial resources, equipment, physical means, reliability, experience and staff are necessary to execute the contract;
- b* their commercial purposes and activity must be compatible with the contractual object;
- c* they must be solvent and not in a bankruptcy or liquidation process, or their commercial activities must not have been suspended; and
- d* they have complied with their tax and social security obligations.

These requirements are not restrictive, however, and the contracting authority can require any additional elements it deems necessary to ensure the contractor is responsive and able to properly carry out the awarded contract.

In addition, any contractor must be registered as a state provider in order to be able to participate.

### **ii Conflicts of interest**

Conflicts of interest are strictly regulated by the procurement law in the Dominican Republic. As a principle, government officials and their relatives cannot directly or indirectly participate in a procurement process. Also, some types of organisational conflicts of interest are in place.

Article 14 of the Government Procurement Law states that the following persons may not be bidders or contract with the state:

- a* the President and Vice President of the Republic; the Secretaries and Undersecretaries of State; the Senators and Deputies of the Congress of the Republic; the Supreme Magistrates of the Supreme Court of Justice, of the other courts of the judicial order, the Chamber of Accounts and the Central Electoral Board; the Trustees and Aldermen of the Municipalities and from the National District; the Comptroller General of the Republic and the Deputy Comptroller; the Budget Director and Deputy Director; the National Planning Director and the Deputy Director; the Attorney General of the

Republic and the other members of the Public Ministry; the National Treasurer and the Deputy Treasurer and other officials of the first and second level of hierarchy of the institutions included in Article 2, Numerals 1 to 5;

- b* the Chief and Deputy Chiefs of staff of the Armed Forces, as well as the Chief and Deputy Chiefs of the National Police;
- c* public officials with decision-making power at any stage of the administrative contracting procedure;
- d* all personnel of the contracting entity;
- e* relatives by blood relationship to the third degree or by affinity to the second degree, themselves included, of officials related to the procurement covered by the ban, as well as spouses, couples in free union, people linked with an analogous relationship of affective coexistence or with whom they have fathered children, and descendants of these persons;
- f* legal entities in which natural persons to those referred to in (a) to (d) have a participation greater than 10 per cent of the share capital, within six months prior to the date of the notice;
- g* any person or company who has intervened as an adviser at any stage of the recruitment procedure or has participated in the creation of the technical specifications or the respective designs, except in the case of supervision contracts;
- h* any person or company that has been convicted by means of a sentence that has acquired the authority of the thing irrevocably judged for crimes of falsehood or against property, or for bribery offences, public embezzlement, influence peddling, prevarication, disclosure of secrets, use of privileged information or crimes against public finances, until a period has elapsed equal to double the sentence (if the conviction was for a crime against public administration, the prohibition on hiring with the state will be perpetual);
- i* companies whose managers have been convicted of crimes against public administration, crimes against public faith or crimes covered by international conventions of which the country is a signatory;
- j* any person or company that is disabled under any legal system;
- k* people who supply false information or who engage in related illegal or fraudulent activities related to hiring;
- l* any person or company that has been sanctioned administratively with temporary or permanent disqualification from contracting with public sector entities, in accordance with the provisions of this law and its regulations; and
- m* natural or legal persons who are not up to date with their tax or social security obligations, in accordance with what is established by current regulations.

These conflicts of interest are screened during the first step of the evaluation process, which is the qualification of the offers.

### **iii Foreign suppliers**

Foreign suppliers can only bid in an international public tender. However, foreign suppliers can participate in any other procurement process if they set up a local branch or subsidiary, or have local tax residence through a mercantile registry.

## **VII AWARD**

### **i Evaluating tenders**

The criteria for evaluating tenders are left to contracting authorities to determine following the principles of best value and full and open competition guidelines established by the Government Procurement Law and depending on the type of procurement procedure selected. For example, public tender evaluation criteria will be based on best value while price comparison criteria will be the lowest priced bid.

To ensure certain uniformity in evaluation standards in contracting authorities, the Dominican Republic government, through its Decree No. 543-12, made it mandatory for government agencies to follow model specifications established by the General Directorate of Public Procurement. These specifications are sent out as soon as the procurement procedure is published and are very similar to what is known in the US as a request for proposal.

Nonetheless, evaluation guidelines will vary depending on the type of contract and the goods or services that are sought, which will directly influence the specifications and criteria for the award.

### **ii National interest and public policy considerations**

In Dominican procurement law there is no such thing as 'buy Dominican'. However, domestic suppliers are usually favoured when it comes to food production. The government gives preference to local producers instead of imported products. But authorities cannot specify that goods and services must have national quality marks and usually when they ask for certain quality specifications they accept those that are of equivalent or superior quality. Full and open competition is at the core of the Dominican Republic government procurement system.

Collateral policies in government procurement are highly sought after in the Dominican Republic. Environmental products and procedures, energy-efficient electronic products, women-owned businesses, small and medium-sized enterprises, depressed areas, etc. are elements taken into account at the evaluation procedure. In any case, if these considerations will be taken into account, they must be expressly stated in the procedure specifications.

## **VIII INFORMATION FLOW**

Disclosure obligations are limited to the information required to identify the offeror and its corporate structure as well as the representatives that will sign the contracts and so on. They will vary depending on the type of contract object. The information bidders have access to is limited to what is included in the procurement specifications.

There is a closed period of time where bidders can ask questions and request any information they require. The government is obligated to debrief bidders by responding to all of these questions within reason. After this period of time, no further questions or requests for information can be made.

For complicated procurements, some contracting authorities hold public debriefing hearings so interested parties can ask questions and request information, but this is not mandatory.

There is a general obligation of information and transparency of every stage and decision concerning procurement procedures. Changes, amendments, and unsuccessful and disqualified bidders must be properly notified.



Confidentiality is usually mandated in procedures where special and security items are procured; apart from that, all information must remain public.

## **IX CHALLENGING AWARDS**

Bid protests and award challenges are not very frequent mainly because of the low chance of success, which is influenced by the very low response rate. It is not costly, but time frames for award challenges in the administrative court and with the General Directorate of Public Procurement range from two to three years.

### **i Procedures**

Complaints procedures can be brought by disgruntled offerors to the contracting authority directly, appealed to the enforcement body and later challenged in court. One can also go directly to each of those stages without having to previously exhaust the other.

Limitation periods for challenges vary depending of the type of procedure. Court challenges must be brought within 30 days starting from the date of the act that is being challenged. Challenges brought to the contracting authority must be made within 10 days. The decision rendered by the awarding agency can be appealed within 10 days.

### **ii Grounds for challenge**

Challenges can be brought on almost any grounds of breach of the procurement law, whether a specific statute or a violation of a principle such as transparency or competition. It is possible to challenge the specifications, particular decisions taken by the contracting authority, the award and even the contract.

### **iii Remedies**

Courts have broad powers to grant relief in government procurement; however, they cannot rule on discretionary government faculties. They usually order new tenders and fines for breach of procurement procedures such as suspension and debarment sanctions, which are provided by the law.

## **X OUTLOOK**

There is a major modification of the Government Procurement Law in the works. The last stage of the project is still unknown at the time of writing. However, some key aspects have been discussed among government procurement scholars: automatic stay for bid protests, a reduced time frame for procurement processes, and an autonomous government procurement agency, among other things. It is highly possible that this modification of the law will be presented by the government to Congress in 2020.

# EUROPEAN UNION

*Bill Gilliam, Michael Rainey, Clare Dwyer and Alexandra Rose<sup>1</sup>*

## I INTRODUCTION

EU procurement law is set out in four principal directives, namely the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive, the 2014 Concession Contracts Directive (together ‘the 2014 Procurement Directives’) and the 2009 Defence and Security Procurement Directive.<sup>2</sup> Additionally, rules on remedies for breach of these four principal directives are set out, in respect of the 2014 Procurement Directives, in the Public Sector Remedies Directive and the Utilities Remedies Directive<sup>3</sup> and, for defence, are written into the Defence and Security Procurement Directive itself. In this chapter, ‘the Directives’ means all six of these procurement directives.

Member States were given until 18 April 2016 to transpose the 2014 Procurement Directives into national law.

Overriding principles of EU law, referred to as the ‘Treaty principles’, have been developed by the Court of Justice of the European Union (CJEU) on the basis of freedoms in the EU Treaties. These principles include free movement of goods and services within the EU, freedom of establishment, non-discrimination on grounds of nationality, equal treatment, transparency, proportionality (i.e., fairness) and mutual recognition.

In cases before the CJEU, the Court may decide that an official opinion from the Advocate General (AG) is necessary before the judges deliberate and give their verdict. The AG’s opinion is published and provides guidance on the law.

As with all EU Directives, the Directives require Member States to adopt national legislation transposing them into national law. Nevertheless, the national courts must interpret the relevant national legislation insofar as it is possible in accordance with the Directives.<sup>4</sup> If national rules do not properly implement the Directives, then certain provisions of the Directives may be relied upon directly against the state.<sup>5</sup>

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2 Directives 2014/24/EU, 2014/25/EU, 2014/23/EU and 2009/81/EC, respectively.

3 Directives 89/665/EEC (as amended by Directives 92/50/EEC and 2007/66/EC) and 92/13/EEC (as amended by Directives 2006/97/EC and 2007/66/EC), respectively.

4 C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.

5 C-8/81 *Becker v. Finanzamt Münster-Imenstadt*.

The EU is a signatory to the Agreement on Government Procurement (GPA) adopted under the auspices of the World Trade Organization. As such, economic operators from GPA states benefit from most of the provisions set out in the Directives (and, therefore, national laws derived from them).<sup>6</sup>

Additionally, the EU has entered into various free trade agreements, so economic operators from certain other countries also benefit from the Directives.

The European Commission is the ‘guardian of the Treaties’. As such, it adopts guidance on procurement law (often by way of non-binding communications or notices). It initiates changes to the Directives. It can also take enforcement action against Member States that are in breach of the Directives or Treaty principles.<sup>7</sup>

Rules similar to the Directives apply to purchasing by the institutions of the EU such as the Commission, the Council and the CJEU. This chapter does not further consider those special rules.

## II YEAR IN REVIEW

The past year has seen more development of procurement case law, with the position of subcontractors featuring particularly prominently.

The CJEU has considered the legislative grounds for exclusion of bidders in a number of cases. This has included: extending the basis for exclusion to a bidder whose proposed subcontractor triggers the relevant grounds;<sup>8</sup> the interplay with behaviours constituting a violation of the competition (antitrust) rules (which should be treated as grave professional misconduct constituting a potential reason for exclusion);<sup>9</sup> and the status of a bidder who has filed an application seeking an arrangement with creditors but not yet committed to a plan to continue its business as a going concern.<sup>10</sup>

Also in the context of bidder exclusion, the CJEU has considered the circumstances in which the early termination of a regulated contract constitutes a significant or persistent deficiency shown in the performance of a substantive requirement under that contract, leading to potential exclusion from a subsequent procurement process.<sup>11</sup> This ground can include termination for subcontracting without the authority’s authorisation if, in the subsequent process, the relevant authority running that process considers that such behaviour entails breaking the relationship of trust, and provided the bidder has the opportunity to demonstrate that any corrective action taken by it is sufficient to ensure that the behaviour will not reoccur. The CJEU has also confirmed that the fact a bidder has appealed against the termination of a prior public contract should not prevent an authority from taking account of the relevant deficiencies when applying the exclusion grounds in a subsequent procurement process.<sup>12</sup>

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6 With the exception of the Defence and Security Procurement Directive.

7 Articles 258 and 260 of the Treaty on the Functioning of the European Union and the Remedies Directives (e.g., Public Sector Remedies Directive, Article 3).

8 C-395/18 *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SA*.

9 C-425/18 *Consorzio Nazionale Servizi Società Cooperativa*.

10 C-101/18 *Idi Srl v. Agenzia Regionale Campana Difesa Suolo*.

11 C-267/18 *Delta Antrepriză de Construcții și Montaj v. Compania Națională de Administrare a Infrastructurii Rutiere SA*.

12 C-41/18 *Meca Srl v. Comune di Napoli*.

The CJEU has reiterated that EU law prohibits fixed percentage limits on subcontracting that are stated in abstract terms (such as 30 per cent of the contract value) and, in the relevant cases, also confirmed that EU law prohibits a limit on the amount by which the prices of subcontracted services can be reduced compared to the main contractor's prices,<sup>13</sup> and that while combating infiltration of regulated contracts by organised crime through the mechanism of subcontracting constitutes a legitimate objective capable of justifying a restriction, a fixed percentage limit was a disproportionate means of achieving that objective.<sup>14</sup>

The Commission has published new guidance on the participation of third country bidders in the EU procurement market,<sup>15</sup> including clarifying that only companies from third countries with relevant binding agreements with the EU have secured access to the EU procurement market and companies from other countries can be excluded.

The Commission has also published guidance on the covid-19 crisis.<sup>16</sup> This guidance explains the flexibility available to authorities to procure goods, services and works in circumstances of urgency and extreme urgency. This includes the ability to negotiate contracts with economic operators without prior advertisement where there are reasons of extreme urgency brought about by events unforeseeable by (and not attributable to) the authority.<sup>17</sup>

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The Directives regulate most public sector entities as well as a significant number of privately owned utility companies. For convenience, we refer to all such entities as 'authorities'.

The 2014 Public Contracts Directive applies to most public law bodies, including 'bodies governed by public law': that have a separate legal personality; are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and are more than 50 per cent funded, managed or controlled by other public sector authorities.<sup>18</sup>

Private operators may, in limited circumstances, have to procure in accordance with the 2014 Public Contracts Directive; for example, where they award certain works contracts that are more than 50 per cent subsidised by authorities,<sup>19</sup> in which case the authorities are obliged to secure compliance.

The 2014 Utilities Contracts Directive applies to contracts for utility activities awarded by the following entities (when pursuing a utility activity): contracting authorities regulated

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13 C-402/18 *Tedeschi Srl, Consorzio Stabile Istant Service v. C. M. Service Srl, Università degli Studi di Roma La Sapienza*.

14 C-63/18 *Vitali SpA v. Autostrade per l'Italia SpA*.

15 Communication from the Commission: Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 final. (24 July 2019).

16 Communication from the Commission: Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 1/01 (1 April 2020).

17 For example, 2014 Public Contracts Directive, Article 32(2)(c).

18 Article 2(1)(4).

19 Article 13.

by the 2014 Public Contracts Directive, undertakings subject to control by those authorities (public undertakings) and entities operating in a relevant utility sector on the basis of special or exclusive rights.<sup>20</sup>

Where a utilities market is directly exposed to competition and access to the market is not restricted, Member States may apply to the Commission for a derogation from the 2014 Utilities Contracts Directive for contracts in pursuit of activities in that market.<sup>21</sup> Derogations have been granted to a number of Member States in respect of, for example, postal services, electricity, and oil and gas.

The 2014 Concession Contracts Directive applies to the award of works and services concessions by contracting authorities that are caught by the 2014 Public Contracts Directive and the entities caught by the 2014 Utilities Contracts Directive (when pursuing a utility activity).<sup>22</sup> A contract becomes a concession where the consideration includes the right to exploit works or services, and the operating risk (demand, supply or both) in such exploitation is transferred to the concessionaire.<sup>23</sup>

The Defence and Security Procurement Directive applies to defence and security contracts awarded by authorities governed by the 2014 Public Contracts Directive and the entities covered by the 2014 Utilities Contracts Directive.

**ii Regulated contracts**

Generally, contracts for construction of works, supply of goods and provision of services, and services and works concessions, awarded by authorities are subject to the Directives if they meet<sup>24</sup> the specified minimum financial thresholds:

<b>Goods and services contracts, design contests</b>	2014 Public Contracts Directive	€139,000 (central government authorities listed in Annex I) or €214,000 (all other authorities)
<b>Goods and services contracts, design contests</b>	2014 Utilities Contracts Directive	€428,000
<b>Goods and services contracts</b>	Defence and Security Procurement Directive	€428,000
<b>Social and other specific services contracts</b>	2014 Public Contracts Directive	€750,000
<b>Social and other specific services contracts</b>	2014 Utilities Contracts Directive	€1 million
<b>Works contracts</b>	2014 Public Contracts Directive, 2014 Utilities Contracts Directive and Defence and Security Procurement Directive	€5.350 million
<b>Services and works concession contracts</b>	2014 Concession Contracts Directive	€5.350 million

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20 Article 4.

21 Article 34.

22 Article 1(2).

23 Article 5(1).

24 See Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU (2014 Public Contracts Directive), Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 amending Directive 2014/25/EU (2014 Utilities Contracts Directive), Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 amending Directive 2014/23/EU (2014 Concession Contracts Directive) and Commission Regulation (EU) 2017/2367 of 18 December 2017 amending Directive 2009/81/EC (Defence and Security Procurement Directive).

Anti-avoidance rules prevent artificial splitting of contracts to bypass the Directives.<sup>25</sup>

Contracts for certain social and other specific services are regulated to a limited 'light touch' extent.<sup>26</sup> In particular, there is no obligation to follow one of the specified procedures, although one of the principal changes from the predecessor directives is that, above the thresholds, advertising and competition is required. These services include health, social, educational, social security and community services. Any service that is not expressly listed as being subject to the 'light touch' regime is fully regulated.

Some types of contract are not regulated by the Directives, such as contracts for:

- a the acquisition or rental of land;<sup>27</sup>
- b employment;<sup>28</sup>
- c certain research and development services;<sup>29</sup> and
- d certain financial services.<sup>30</sup>

There have been a number of CJEU cases deciding whether a transaction was properly classified as an (unregulated) land agreement or a (regulated) works contract.<sup>31</sup> Often, the distinction turns on whether the economic operator is obliged to undertake the works<sup>32</sup> or whether, while the parties envisage certain works being carried out, the economic operator is at liberty to construct something different or to leave the land undeveloped.

In some exceptional cases, authorities may negotiate contracts with economic operators without prior advertisement,<sup>33</sup> for example, in the case of extreme urgency following a failed procurement process or where, for technical reasons, the contract may be awarded only to a particular economic operator. These exceptions are narrowly construed.

Where a public contract is substantially modified, this may amount to a completely new contract, which the authority must competitively tender under the Directives.<sup>34</sup>

Where the Directives do not apply, some form of advertisement is generally required if there is certain cross-border interest in the resulting contract.<sup>35</sup>

The 2014 Utilities Contracts Directive applies to the regulated activities listed in Articles 8 to 14 in the fields of gas, heat and electricity, water, transport, post, exploration for or extraction of coal and other solid fuels, and extraction of (but not exploration for) oil and gas (although the 2014 Concession Contracts Directive applies to the award of works and services concession contracts for those regulated activities). A utility's other activities are

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25 For example, 2014 Public Contracts Directive, Article 5.

26 2014 Public Contracts Directive, Article 74 and Annex XIV, 2014 Utilities Contracts Directive, Article 91 and Annex XVII. Some (but not all) of these services are also subject to lighter regulation under the Defence and Security Procurement Directive, Article 16 and Annex II.

27 For example, 2014 Public Contracts Directive, Article 10(a).

28 For example, 2014 Public Contracts Directive, Article 10(g).

29 For example, 2014 Public Contracts Directive, Article 14.

30 For example, 2014 Public Contracts Directive, Article 10(e).

31 For example, C-220/05 *Jean Auroux and others v. Commune de Roanne*.

32 C-451/08 *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*.

33 For example, 2014 Public Contracts Directive, Article 32.

34 C-454/06 *presstext Nachrichtenagentur GmbH v. Republic of Austria and others*. The 2014 Procurement Directives codify and amplify the case law (e.g., the 2014 Public Contracts Directive, Article 72).

35 See C-324/98 *Telaustria Verlags GmbH and another v. Telekom Austria AG*, Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJEU 2006/C 179/02 (1 August 2006), and T-258/06 *Germany v. Commission*.

unregulated unless the utility is also a contracting authority for the purposes of the 2014 Public Contracts Directive, in which case those other activities are subject to the procedures in that Directive.<sup>36</sup>

The Defence and Security Procurement Directive applies to contracts for the supply of military equipment, for works and services for military purposes and for the supply of equipment, works and services involving, requiring or containing classified information. Where the Defence and Security Procurement Directive applies, neither the 2014 Utilities Contracts Directive nor the 2014 Public Contracts Directive apply. Works and services concession contracts in these fields are covered by the 2014 Concession Contracts Directive. The most sensitive defence contracts may still be awarded outside the scope of the Defence and Security Procurement Directive.

#### IV SPECIAL CONTRACTUAL FORMS

##### **i Framework agreements and central purchasing**

The Directives permit (but do not require) Member States to adopt certain rules aimed at reducing the burden on entities when awarding contracts. These include permitting:

- a* framework agreements (the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive and the Defence and Security Procurement Directive);<sup>37</sup>
- b* purchasing through or from central purchasing bodies (the 2014 Public Contracts Directive; the Utilities Contracts Directive; and the Defence and Security Procurement Directive);<sup>38</sup>
- c* dynamic purchasing systems (DPS) (the 2014 Public Contracts Directive and the 2014 Utilities Contracts Directive);<sup>39</sup> and
- d* qualification systems (the 2014 Utilities Contracts Directive).<sup>40</sup>

These concepts are generally not relevant to the award of works and services concessions, and are not dealt with explicitly in the 2014 Concession Contracts Directive.

Authorities must not use framework agreements or DPS improperly to prevent, restrict or distort competition. Framework agreements may not generally last longer than four years (public sector), seven years (defence) or eight years (utilities).

Framework agreements may be concluded with a single supplier or with multiple suppliers. When calling off from a multi-supplier framework, the authority either runs a 'mini-competition' to award each call-off contract or awards a call-off contract directly based on the terms of the framework agreement.

Central purchasing bodies must be contracting authorities as defined by the 2014 Public Contracts Directive.

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36 C-393/06 *Ing Aigner, Wasser-Wärme-Umwelt GmbH v. Fernwärme Wien GmbH*.

37 Respectively, Articles 33, 51 and 29.

38 Respectively, Articles 37, 55 and 10.

39 Respectively, Articles 52 and 34.

40 Article 77.

## ii Joint ventures

In principle, the Directives do not apply to the setting up of a joint venture by one or more authorities (whether public-public or public-private), but they are relevant to any subsequent supply of goods, works or services by the joint venture to the authority or authorities (or to other authorities).

A Commission Interpretative Communication<sup>41</sup> on institutionalised public-private partnerships recommends that authorities should simultaneously advertise the selection of the joint venture partner and the award of a contract to the joint venture.

Contracts between authorities are in principle subject to the Directives. There are certain exceptions, although these all prohibit private participation or shareholdings.<sup>42</sup>

The 2014 Utilities Contracts Directive has separate rules on joint ventures between utilities and on intra-group supplies.<sup>43</sup>

## V THE BIDDING PROCESS

### i Notice

Most procurement processes are formally commenced by publication of a contract notice.

All official notices under the Directives, such as prior information notices, contract notices and contract award notices, must be submitted electronically for publication in the Official Journal of the European Union (OJEU), which is accessible free of charge at Tenders Electronic Daily (TED).<sup>44</sup>

### ii Procedures

The Directives envisage various contract award procedures:

- a* open procedure: a one-stage process where bidders must show their good standing and their tender proposals in a single bidding round;<sup>45</sup>
- b* restricted procedure: a two-stage process where, based on financial standing, qualification and past experience, at least five bidders are shortlisted to tender;<sup>46</sup>
- c* competitive dialogue procedure: a process generally used for complex procurements where the authority knows only the output that it requires and has not yet identified a solution;<sup>47</sup>
- d* competitive procedure with negotiation<sup>48</sup> or negotiated procedure with advertisement:<sup>49</sup> a process generally used for procurements where the authority knows both the output and the likely solution, but wishes to negotiate the terms with bidders;

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41 Commission interpretative communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C (2007) 6661 (5 February 2008).

42 C-107/98 *Teckal Srl v. Comune di Viano and another*; C-324/07 *Coditel Brabant SA v. Commune d'Uccle and another*; *Hamburg Waste (C-480/06 Commission v. Germany)*. This case law is codified and amplified under the 2014 Procurement Directives, e.g., 2014 Public Contracts Directive, Article 12.

43 Articles 29 and 30.

44 <http://ted.europa.eu>.

45 For example, 2014 Public Contracts Directive, Article 27.

46 For example, 2014 Public Contracts Directive, Article 28.

47 For example, 2014 Public Contracts Directive, Article 30.

48 2014 Public Contracts Directive, Article 29.

49 For example, 2014 Utilities Contracts Directive, Article 47.



- e* innovation partnership for the development of innovative products;<sup>50</sup> and
- f* exceptionally, negotiated procedure without advertisement.<sup>51</sup>

For the procurement of social and other specific services under the ‘light touch’ regime, and where the 2014 Concession Contracts Directive applies, no procedure is specified.

There are minimum timescales for key stages in most procedures, particularly as regards the minimum period between the contract notice and bidders’ initial expressions of interest. These time periods may be shortened in some specified cases, and vary depending on the procedure adopted and which Directive applies.<sup>52</sup>

### **iii Amending bids**

Once bids have been submitted, equal treatment and fairness significantly limit the scope for bid amendments.

Authorities may in certain cases seek clarification or allow bidders to correct obvious errors.<sup>53</sup> However, in the case of bids in the open procedure or restricted procedure, or final tenders in the competitive procedure with negotiation or negotiated procedure with advertisement, this does not allow negotiation or the submission of what should be viewed as a new tender.

The competitive dialogue procedure is slightly more flexible: the authority may, before tender evaluation, request that bids be clarified, specified and optimised. However, this must not involve changes to the essential aspects of the tender or the procedure that are likely to distort competition or have a discriminatory effect.<sup>54</sup> After selection of the winning bid, negotiations are permitted to confirm aspects of the tender and finalise the contract terms, provided the essential aspects are not materially modified and, again, that there is no risk of distortion or discrimination.<sup>55</sup>

## **VI ELIGIBILITY**

### **i Qualification to bid**

Authorities may reject bidders at the selection stage where they do not meet certain objectively evaluated minimum standards. They may also restrict the number of bidders invited to the next stage of competition under restricted, competitive dialogue, competitive with negotiation and negotiated procedures. These standards may relate to the bidder’s:

- a* personal standing (e.g., whether the bidder has been declared insolvent or convicted of money laundering or corruption offences);<sup>56</sup>

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50 For example, 2014 Public Contracts Directive, Article 31.

51 For example, 2014 Public Contracts Directive, Article 32.

52 For example, 2014 Public Contracts Directive, Articles 27 to 31 and 47.

53 2014 Public Contracts Directive, Article 56(3) and 2014 Utilities Contracts Directive, Article 76(4).

While there is no explicit provision in the 2014 Concession Contracts Directive or in the Defence and Security Procurement Directive the same rules would be expected to apply under the Treaty principles to amendments during procedures governed by those Directives.

54 For example, 2014 Public Contracts Directive, Article 30(6).

55 For example, 2014 Public Contracts Directive, Article 30(7).

56 For example, 2014 Public Contracts Directive, Article 57.

- b* enrolment on a professional or trade register as required in the bidder's state of establishment;<sup>57</sup>
- c* financial standing;<sup>58</sup> and
- d* technical and professional ability.<sup>59</sup>

A bidder may rely upon the technical and professional ability or financial standing of other entities, which could include other members of a bidding consortium or nominated subcontractors.<sup>60</sup>

## ii Conflicts of interest

The 2014 Procurement Directives contain express provisions on conflicts of interest. Authorities must investigate possible conflicts of interest where a member of the authority's award panel is connected with a bidder, although they have some discretion as to how to deal with such conflicts.<sup>61</sup> Although the Defence and Security Procurement Directive does not contain an express provision, the obligation of non-discrimination imposes the same requirements in respect of procurements conducted under it.<sup>62</sup>

Where an economic operator was involved in design work before the start of the award process and then wishes to bid for the contract, it could have a knowledge advantage from having prepared the designs and it could, even without intending to, have influenced the design of the specification or procurement process in such a way as to favour itself. Authorities must consider these issues case by case and permit the economic operator the opportunity to explain why there is no conflict of interest in a given case;<sup>63</sup> a blanket ban on involvement of those with prior knowledge has been held to be disproportionate and in breach of the equal treatment principle.<sup>64</sup>

## iii Foreign suppliers

The Directives do not prohibit non-EU suppliers from bidding for public contracts. The GPA requires providers from GPA states<sup>65</sup> to be given the same treatment as is afforded to national providers. Certain types of contracts are outside the GPA, including contracts for health services and defence contracts. Except for central government procurement, which is open to all GPA businesses, other procurements are only open to the extent that the bidder's home state allows EU undertakings access to government procurement.

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57 For example, 2014 Public Contracts Directive, Article 58(2).

58 For example, 2014 Public Contracts Directive, Article 58(3).

59 For example, 2014 Public Contracts Directive, Article 58(4).

60 For example, 2014 Public Contracts Directive, Article 63.

61 For example, the 2014 Public Contracts Directive, Article 24.

62 See T-160/03 *AFCon Management Consultants and others v. Commission*, which was decided under internal Commission rules but the principles in the case are likely to apply to the Defence and Security Procurement Directive.

63 For example, the 2014 Public Contracts Directive, Articles 41 and 57(4)(f).

64 See joined cases C-21/03 and C-34/03 *Fabricom SA v. Belgium*, Paragraphs 25 to 36.

65 In addition to the 27 EU Member States and the UK during the transition period following its exit from the EU, the other GPA states are Armenia, Australia, Canada, Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Moldova, Montenegro, the Netherlands (with respect to Aruba), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States. A revised and expanded GPA, modernising certain aspects of its rules, entered into force on 6 April 2014.

Special rules apply to utilities for the supply of goods (but not works or services). Where more than half the products (including software in telecommunications network equipment) in a bid are from third countries with which the EU does not have reciprocal agreements and the bid is equivalent in price and quality to an EU bid, then the utility must favour the bid comprising EU products.<sup>66</sup>

EU rules do not currently prevent non-EU access to public procurement, but restrictions may occur at Member State level. In practice, third-country businesses may be able to overcome any protectionist national rules if they bid through a subsidiary established within the EU.

## VII AWARD

### i Evaluating tenders

Authorities may assess bids on the basis of price or cost alone, taking a cost-effectiveness approach, or the best price–quality ratio to determine which is the most economically advantageous tender.

Authorities must disclose, before receiving bids, the criteria that they will use for bid evaluation and the weightings of the criteria chosen.<sup>67</sup> In general, the criteria and weightings should not be changed during the process.

The authority must, if a tender appears to be abnormally low, request explanations from the bidder, and may then reject the abnormally low tender.<sup>68</sup>

### ii National interest and public policy considerations

Authorities must act in a non-discriminatory manner; therefore, any ‘buy local’ policy is unlawful.

Indirect means of discrimination are also prohibited. For example, if the specification is written in a particular way to favour national suppliers, this infringes the requirement of non-discrimination. Accordingly, an authority should normally use a national technical specification transposing European standards; it can only use other national standards if there is no European standard.<sup>69</sup>

The procurement may take account of social or environmental considerations, but this must be non-discriminatory and proportionate to the objectives being pursued.<sup>70</sup> Any requirements must be relevant to the contract.<sup>71</sup>

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66 2014 Utilities Contracts Directive, Article 85.

67 For example, 2014 Public Contracts Directive, Article 67; C-532/06 *Emm G Lianakis AE and others v. Dimos Alexandroupolis and others*, Paragraphs 36 to 38.

68 For example, 2014 Public Contracts Directive, Article 69.

69 For example, 2014 Public Contracts Directive, Article 42(3), (4) and (5).

70 This is codified in, for example, the 2014 Public Contracts Directive, Articles 18(2) and 56(1), which permit authorities to exclude bidders that do not comply with their obligations in the fields of environmental, social and labour law.

71 See C-448/01 *EVN AG and Wienstrom GmbH v. Austria*, where the bidder was required to show it supplied volumes of ‘green’ electricity that went far beyond the authority’s actual requirement. The CJEU held this was unlawful.

There are limited ‘national interest’ exceptions in the Directives. For example, the Defence and Security Procurement Directive does not apply to contracts for the purpose of intelligence activities or that would oblige the Member State to supply information contrary to the essential interests of its security.<sup>72</sup> These exceptions are narrowly construed.

## VIII INFORMATION FLOW

As a result of the principle of transparency, during the procurement process authorities must ensure that they give sufficient information to bidders to enable them properly to understand the authority’s requirements and to ensure a level playing field. They must also disclose the award criteria that they will use to mark bids.

Under the Directives, authorities are required to notify bidders of decisions and supply certain information. When they make an award decision, they must then ‘stand still’ for a minimum of 10 calendar days before signing the contract.<sup>73</sup> This period allows unsuccessful bidders time to bring a legal challenge to prevent contract signing if they consider that the award decision is unlawful. Notices of award decisions to bidders must include scores, and a narrative summary of the characteristics and relative advantages of the winning bid.

## IX CHALLENGING AWARDS

Challenges to procurement decisions may be brought in the national courts. The cost, complexity and duration of these processes vary considerably from Member State to Member State.

### i Procedures

Rules governing challenges under the 2014 Procurement Directives are dealt with in the Public Sector Remedies Directive and the Utilities Remedies Directive, with those governing defence in the Defence and Security Procurement Directive itself. The Commission has reviewed the operation of these directives and has concluded that they are generally working well, so they will be maintained in their present form without further change at this stage.<sup>74</sup> In this section, the general provisions common to all are considered and referred to as the ‘Remedies Provisions’, but references to article numbers are to articles of the Public Sector Remedies Directive.

Member States must ensure that decisions taken by authorities ‘may be reviewed effectively’,<sup>75</sup> and ‘as rapidly as possible’, in accordance with the Remedies Provisions.<sup>76</sup> ‘Decisions’ are construed broadly and can include a decision to admit a bidder.<sup>77</sup> Member

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72 Article 13(a) and (b). See also 2014 Public Contracts Directive, Article 15.

73 For example, Public Sector Remedies Directive, Article 2a.

74 European Commission: Report to the European Parliament and the Council on the effectiveness of Directives 89/665/EEC and 92/13/EEC as modified by Directive 2007/66/EC concerning review procedures in the area of public procurement (24 January 2017).

75 See C-440/13 *Croce Amica One Italia Srl v. Azienda Regionale Emergenza Urgenza (AREU)*. The purpose of the review is to ensure that the EU public procurement rules are complied with, so that a simple examination of whether the decision is arbitrary will not suffice.

76 Article 1(1).

77 C-391/15 *Marina del Mediterraneo, SL v. Consejería de Obras Públicas y Vivienda de la Junta de Andalucía*.

States may decide who is to carry out such reviews ('review body'). The nature of review bodies varies considerably between Member States, and no bidder should assume that the relevant review body will be the national court. Member States may require that a bidder first seek review with the authority, or that a bidder be required to notify the authority of its intention to seek review.

The review body must be independent of the authority, and the Member State must provide that its decisions can be effectively enforced. If the review body is not the national court, then written reasons for the decision of the review body must be given, and there must be a further right of review by a court that is independent of both the review body and the contracting authority.

The review procedures must be available as a minimum to any person 'having or having had an interest in obtaining a particular contract' (i.e., to bidders themselves) who can show that he or she has been or risks being harmed by an alleged infringement. This leaves scope for interpretation of what a risk of being harmed might mean; for example, must the bidder show that, but for the breach, it would have good prospects of being awarded the contract, or merely that it would have had a more than minimal prospect of being awarded the contract? The CJEU has clarified that a bidder who has been definitively excluded from a procedure by an authority (for failure to provide original documentation pertaining to financial standing) can be refused access to a review of the award decision in that procedure.<sup>78</sup> However, it is not necessary for a bidder to prove that the procurement would have had to be re-run.<sup>79</sup>

It is for the Member State to decide on the relevant limitation period within which any application for review must be made. However, the right to bring a challenge must remain open after the deadline, where a reasonably well informed and diligent bidder would only have understood the tender conditions after the authority had explained its decision.<sup>80</sup> Member States may set a limitation period for claiming the remedy of ineffectiveness of at least 30 days from publication of a contract award notice and at least six months from the contract being concluded.

Review procedures adopted by individual Member States have been challenged on occasion. This has led the CJEU to consider areas such as court fees, limitation periods and the availability of remedies.

If the Commission considers that a serious infringement of Community law has been committed during a contract award procedure, it will notify the Member State, giving reasons, prior to a contract being concluded.<sup>81</sup> The Member State must then either correct the infringement, give a reasoned submission as to why no correction has been made, or suspend the contract award procedure pending a decision as to whether to correct.

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78 C-355/15 *Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH v. Universität für Bodenkultur Wien, VAMED Management und Service GmbH & Co. KG in Wien.*

79 C-333/18 *Lombardi Srl v. Comune di Auletta.*

80 C-583/13 *eVigilo Ltd v. Priesgaisrines apsaugos ir gelbejimo departamentas prie Vidaus reikalų ministerijos.*

81 Article 3.

## ii Grounds for challenge

The Remedies Provisions say little about the grounds for challenge by bidders, providing simply that infringements of ‘Community law in the field of public procurement or national rules transposing that law’<sup>82</sup> can be challenged. This covers breaches of both national rules implementing the Directives and Treaty principles, such as equality, non-discrimination and transparency.

The number of challenges and prospects of success vary considerably from state to state.<sup>83</sup>

As noted above, the Commission may invoke a corrective mechanism when it ‘considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure’.<sup>84</sup>

## iii Remedies

There are four main types of remedies that must be available to the review body under the review procedures. The first three are:

- a interim suspension of the award of the contract pending review by the first instance review body, which must continue at least for the standstill period; the review body’s decision as to whether to uphold this interim suspension can take into account the consequences of the continued suspension for all interests likely to be affected, as well as any public interest;
- b set aside of an unlawful decision; this includes the power to amend the invitation to tender, the contract documents and other documents relating to the contract award procedure, to stop the procurement and to order a new procurement; and
- c the power to award damages (compensation) to a person harmed by the infringement.<sup>85</sup>

The fourth and arguably most powerful remedy is that of ineffectiveness. Ineffectiveness must be available in three situations:

- a if an authority has illegally awarded a contract without prior publication of a contract notice;
- b if an authority has awarded a contract in breach of the standstill period or suspension of contract award, and a bidder has thereby been deprived of the possibility to complain about some other infringement that has affected the bidder’s chance of obtaining the contract; and
- c where a Member State has permitted award of contracts without a standstill period under a framework or DPS.<sup>86</sup>

Where the ineffectiveness remedy is not available, Member States may provide that once the contract has been concluded the only remedy available is damages.

Member States can provide that the consequence of ineffectiveness is retroactive cancellation of all contractual obligations, or may limit cancellation to future obligations

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82 Article 1(1).

83 See national chapters for details of numbers and prospects for challenge.

84 Article 3(1).

85 Article 2(1).

86 Article 2d.

only. If the latter option is chosen, the Member State must provide for the application of alternative penalties. If the general interest is in upholding the contract, so that the review body decides not to declare a contract ineffective, it must provide for alternative penalties.

Alternative penalties have to be effective, proportionate and dissuasive, and must be either the imposition of a fine on the authority, or shortening of the duration of the contract.

## **X OUTLOOK**

The coming year is likely to be dominated by the ongoing covid-19 crisis. There are few aspects of life in the EU that will not be affected to some extent by the impact of that crisis and EU procurement law is no exception. For example, in many Member States hospitals are subject to procurement law. So far, the Commission has limited its communications to clarifying the current law. However, in due course, it is possible that there will be a relaxation of procurement law to enable authorities to respond more flexibly to the unprecedented challenges they are facing – and may face in the future.

# GERMANY

*Jan Bonhage and Simone Terbrack<sup>1</sup>*

## I INTRODUCTION

German public procurement law provides different requirements and review procedures for tenders above and below the EU thresholds.

At or above the EU thresholds, contracting authorities and entities must comply with public procurement provisions of the Act against Restraints to Competition (GWB) and several delegated acts. The GWB contains the procurement principles, provisions on scope of application and exemptions, definitions of contracting authorities and entities, covered contracts and concessions, as well as general rules on procedures, eligibility, exclusion, award criteria and review procedures. The delegated acts cover different contract types and areas of public procurement:

- a* The Ordinance on the Award of Public Contracts (VgV) generally applies to service and supply contracts.
- b* Public works contracts are subject to Section 2 of the German Construction Contract Procedures – Part A (VOB/A), and only certain provisions of the VgV apply.
- c* Concession awards are governed by the Ordinance on the Award of Concessions (KonzVgV).
- d* The Ordinance on the Award of Public Contracts by Entities operating in the Water, Energy and Transport Sectors (Utilities Ordinance, SektVO) covers public procurement in the utilities sectors.
- e* Defence and security contracts are governed by the Ordinance on the Award of Public Contracts by Contracting Authorities or Entities in the Field of Defence and Security (VSVgV).

Further, the award of concessions for public passenger services by rail and by road and the award of public service contracts for public passenger services by rail and by metro are subject to Article 5 of the Regulation (EC) No. 1370/2007, while the award of service contracts or public service contracts for public passenger transport services by bus or tram is subject to the general procurement rules,<sup>2</sup> supplemented by Section 131 GWB regarding trains and by Sections 8a and 8b of the German Public Transport Act (PBefG) regarding trams, trolleybuses and motor vehicles.

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2 See, e.g., the CJEU decision of 21 March 2019, C-266/17 and C-267/17, *Rhein-Sieg-Kreis et al. v. Verkehrsbetrieb Hüttebräucker GmbH et al.*



Below the EU thresholds, public tendering is in principal considered a matter of budgetary law.<sup>3</sup> The harmonised Rules on the Award of Public Supply and Service Contracts below the EU Thresholds (UVgO) were enacted at the federal level in 2017 as well as in most states except for Hesse, Rhineland-Palatinate, Saxony and Saxony-Anhalt. Pursuant to the federal and state (budgetary) laws, the first Chapter of the VOB/A remains applicable for public works contracts. While the UVgO and the first Chapter of the VOB/A generally mirror the provisions of the VgV and the second Chapter of the VOB/A, the contracting authorities have some more flexibility below the EU thresholds.

Contracts and concessions at, above and below the EU thresholds are also subject to the fundamental procurement principles of competition, transparency, cost effectiveness, equal treatment, non-discrimination and proportionality. Stricter than at the EU level, the interests of SMEs must be taken into account, and public contracts generally have to be divided into lots. Aspects of quality and innovation as well as social and environmental considerations shall be taken into account. In addition, most federal states enacted procurement laws requiring, in particular, adherence to tariffs, minimum wage levels and other social criteria.

Germany has not established a central body defining government purchasing or procurement policies or enforcing compliance. In particular at the federal level, several guidelines, for example, the Federal Procurement Handbook on works (VHB), have been published, and use of certain standard terms and conditions, for example, the standard terms and conditions for IT supplies and services (EVB-IT), is required. Further, inter alia, the federal competence centre on sustainable procurement offers assistance to federal, state and municipal authorities on these aspects of procurement.

Public procurement in Germany – as in other EU Member States – is also subject to the Agreement on Government Procurement (GPA).

## II YEAR IN REVIEW

After the comprehensive procurement law reforms in 2016 (transposition of the EU Procurement Directives into German law) and 2017/2018 (reform of framework for tenders below the EU thresholds), 2019 has seen only minor changes to the procurement regulations.

A revised version of in particular the first chapter of the VOB/A for works has been effective since 1 March 2019 at the federal level, followed by most states. It aligned the provisions below EU thresholds with the 2016 procurement reform and the UVgO, and in particular also introduced the free choice between open and restricted procedure. Further modifications of other chapters and parts of the VOB, especially the technical provisions in the VOB/C, have been effective since 1 October 2019, the date of the publication of the new complete ‘VOB 2019’. The general terms and conditions in the VOB/B have remain unchanged since 2016.

The CJEU ruled on 24 October 2018 on a GWB provision pursuant to which self-cleaning requires tenderers to actively collaborate not only with the investigating authorities, but – beyond the requirements of the 2014 Procurement Directives – also with the contracting authorities. Some German procurement chambers understand this – rather too broadly – to include the confidential long version of European Commission decisions on

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3 This chapter covers exclusively tenders above the EU thresholds, unless specifically indicated otherwise.

the infringements of competition law.<sup>4</sup> The CJEU held that requirements for collaboration with contracting authorities may not go beyond what is strictly necessary for the contracting authorities' effective assessment of the economic operator's reliability.<sup>5</sup>

On 4 April 2019, the CJEU ruled that the minimum and maximum tariffs of the binding German Fee Ordinance for Architects and Engineers (HOAI) infringe the freedom to provide services.<sup>6</sup> A reform of the HOAI to ensure conformity with the EU rules is currently under discussion. In the meantime, the Federal Ministry of the Interior, Building and Community has adopted guidelines on how to respect the invalidity of the minimum and maximum tariffs in new procurement procedures for architect and engineer services by, for example, allowing surcharges and discounts on the HOAI tariffs. The Federal Court of Justice will presumably rule in 2020 on how the invalidity of the minimum and maximum tariffs affects existing contracts.

The European Commission's request to Germany pursuant to Article 258 TFEU to rectify violations of EU rules regarding a provision for architectural planning services pursuant to which only lots for similar planning services have to be taken into account in the calculation of the contract value of the respective construction project<sup>7</sup> is still pending. German review bodies showed some cautiousness in applying the provision because of the alleged conflict with EU law.<sup>8</sup>

The Federal Court of Justice strengthened the principle of proportionality in procurement procedures in 2019<sup>9</sup> and emphasised that bidders should not automatically be excluded from public procurement procedures for any minor formal discrepancy (e.g., adding – potentially inadvertently – their own terms and conditions to their offer).

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

German procurement law implements the EU procurement definitions of contracting authorities and contracting entities, including in particular the common contracting authorities (i.e., federal, state, regional and municipal authorities and their respective special funds) and the bodies governed by public law (i.e., public and private legal entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, either publicly financed or majority controlled by the common contracting authorities, as well as their respective associations).<sup>10</sup> For example, the CJEU confirmed qualification of statutory health insurances and public broadcasting corporations as contracting authorities. Further, public and private entities qualify as contracting authority for certain projects that are more than 50 per cent state-funded.<sup>11</sup>

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4 VK Westfalen, decision of 25 April 2019, VK 2-41/18; VK Südbayern, decision of 11 December 2018, Z3-3-3194-1-45/11/16.

5 C-124/17 *Vossloh Laeis GmbH v. Stadtwerke München GmbH*.

6 C-377/17 *Commission v. Germany*.

7 Section 3 VII 2 VgV.

8 OLG München, decision of 13.3.2017, Verg 15/16; ECJ, C-574/10 *Commission v. Germany*.

9 Federal Court of Justices, decision of 18 June 2019, X ZR 86/17.

10 Section 99 No. 1-3 GWB.

11 Section 99 No. 4 GWB. Cf. Article 13 of the 2014 Public Contracts Directive, which does instead define regulated contracts, not authorities, in these cases.

Contracting entities in the utilities sector comprise all contracting authorities as well as any persons or companies that have a specific activity in the water, energy and transport sector, and either operate on the basis of special or exclusive rights granted by a competent authority or over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership, their financial participation, or the rules that govern it.<sup>12</sup> Unlike the 2014 Utilities Contracts Directive, postal services are not covered by the German Utilities regime. Production and wholesale of electricity from conventional sources, retail supply of electricity and gas<sup>13</sup> and, to a certain extent, exploration and extraction of petroleum, gas and coal<sup>14</sup> have been exempt based on their exposure to competition.

Below the EU thresholds, typically only the common contracting authorities are subject to public procurement requirements pursuant to the federal and state budgetary laws.

## ii Regulated contracts

Generally, public contracts on services or supply of goods (VgV) and works (VOB/A) as well as concessions (KonzVgV) are subject to public procurement requirements, each with specific provisions for utilities (SektVO) and defence and security (VSVgV). The VSVgV – with most recent changes in 2020 (see Section X) – covers contracts on the supply of military equipment or equipment awarded under a classified contract as well as other supplies, works and services directly connected to such equipment, and works and services specifically for military purposes or works and services awarded under a classified contract. The definition of works and service concessions of the 2014 Concession Contracts Directive has been exactly transposed into the KonzVgV. For public passenger transport services by rail and road, see Section I on the application of the Regulation (EC) 1370/2007.

Certain social, health, legal and other services are subject only to less restrictive public procurement requirements.<sup>15</sup>

The GWB – in accordance with the 2014 Procurement Directives – exempts certain contract matters from public procurement requirements<sup>16</sup> (e.g., the acquisition and lease of real estate, a necessity for the protection of the essential interests of the security of the Federal Republic of Germany within the meaning of Article 346 TFEU (see Section X), and certain financial instruments). Exempted contracts may still be subject to the procurement principles derived from the TFEU and federal or state budgetary laws. The CJEU has decided that the scope of the exemption for emergency services is not fully in accordance with EU law.<sup>17</sup>

Competitive procedures for concessions for the use of public roads for electricity and gas pipelines<sup>18</sup> and for telecommunication licences are governed by sector-specific regulation.<sup>19</sup>

Substantial modifications of public contracts or concessions generally require a (new) tender procedure.<sup>20</sup> Modifications are considered substantial in particular, if the modification extends the scope of the contract considerably or introduces conditions which would have

12 Sections 100, 102 GWB.

13 Section 140(1) GWB; Commission implementing decisions of 24 April 2012 (OJ L 114, p. 21) and of 15 September 2016 (OJ L 253, p. 6).

14 Section 143 GWB.

15 Sections 130, 153 GWB.

16 Sections 107, 116, 117, 137 to 140, 145, 149 to 150 GWB.

17 C-465/17 *Falck Rettungsdienste GmbH, Falck AIS v. Stadt Solingen*.

18 Section 46 EnWG.

19 Section 61 TKG.

20 Section 132 GWB.

allowed for the admission of other candidates or for the acceptance of other tenders, unless the modification has been provided for in a clear, precise and unequivocal review clause in the initial procurement documents. A transfer of the contract to another contractor generally requires a new procurement procedure, unless the transfer forms part of a corporate restructuring and the new contractor is eligible under the initial tender requirements.

## **IV SPECIAL CONTRACTUAL FORMS**

### **i Framework agreements and central purchasing**

Framework agreements can be awarded under the procurement schemes for both above and below EU thresholds. Frameworks agreements are defined as agreements 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 regard to price and, where appropriate, the quantity envisaged.<sup>21</sup> Framework agreements are generally subject to the same public procurement requirements – including public notice requirements – like other public contracts. Individual contract orders under a framework agreement are awarded pursuant to the rules of the framework agreement which can provide for mini-competition among the framework contractors. The maximum contract period of framework agreements is generally limited to four years (seven years for security and defence contracts and eight years in the utilities sector), in each case possibly longer under exceptional circumstances.

Central purchasing means that a contracting authority provides centralised purchasing activities and, possibly, ancillary purchasing activities for other contracting authorities. Central purchasing is an option,<sup>22</sup> but not that frequently used in Germany other than for standard products. At the federal level (e.g., the Federal Ministry of the Interior, Building and Community as well as the Federal Ministry of Defence) central purchasing bodies have been established (BeschA; BAAINBw), which, inter alia, set up a fully electronic ‘federal department store’ (KdB) to meet standard demand (e.g., office supplies) of all federal authorities.

Under the Utilities Ordinance, contracting entities can use qualification systems. The publication of the qualification system has the function of a call for competition. The contracting entities can use such systems to procure specific contracts exclusively among economic operators prequalified under the system.<sup>23</sup> Beyond the utilities, procurement laws provide for other prequalification procedures (especially for public works) which, however, only simplify the eligibility documentation and do not substitute a call for competition.

### **ii Joint ventures**

Germany has transposed the EU criteria for in-house procurement derived from CJEU case law, as specified in the 2014 Procurement Directives, in the GWB.<sup>24</sup> In-house procurement is exempt from public procurement requirements if the contracting authority exercises control over the contractor which is similar to its control over its own departments, provided that

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21 Section 103(5) GWB.

22 Section 120(4) GWB.

23 Sections 37, 48 SektVO.

24 Section 108 GWB.

the contractor provides more than 80 per cent of its services or supplies to the contracting authority or by other legal persons controlled by that contracting authority. The contractor may not have any private shareholders. The control may also be exercised jointly with other contracting authorities. The in-house exemption also applies in horizontal and inverse (bottom-up) control scenarios.

Further, contracts between contracting authorities are exempt from public procurement requirements if (1) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common; (2) the implementation is governed solely by public interest considerations; and (3) the market activities of the participating contracting authorities count for less than 20 per cent of their activities covered by the cooperation. This ‘inter-municipal’ cooperation has its roots in several German cases before the CJEU. It remains controversial whether it is sufficient for the cooperation if only one partner provides the services. The mere formation of a *Zweckverband* joint body, which is common in the transport sector or for waste management, is generally not subject to public procurement requirements.

Public-private partnerships can require a public tender in different respects. For example, selection of a private partner has to be tendered for an ‘encapsulated’ contract. If the private partner has not been selected by public tender, the later award of a contract to the PPP has to be tendered, unless an exemption (e.g., the in-house exemption) applies. The PPP itself is bound by procurement requirements, if it qualifies as a contracting authority (e.g., due to predominant financing or control by a contracting authority); see also Section III.i.

## V THE BIDDING PROCESS

### i Notice

Above the EU thresholds, all calls for competition in Germany have to be transmitted via electronic standard forms to the Publications Office of the European Union, which publishes the notices in the online version of the supplement of the OJEU, the platform ‘Tenders Electronic Daily’ (TED). The notice may not be published at the national level before it has been published by the Publications Office of the European Union or 48 hours after confirmation of the receipt of the notice. Apart from essential data on the contracting authority and the subject matter of the contract (including CPV-codes for the goods, services and works), in particular all eligibility criteria and their respective proof requirements have to be published in the notice. The notice must also include a link by which the procurement documents can be retrieved for free. While case law used to be very strict to include all eligibility criteria explicitly in the notice itself, more recent decisions allow contracting authorities to make a precise reference in the notice to the eligibility criteria in the online procurement documents, and to only provide certain parts of the procurement documents at publishing of the notice in a two-stage or multistage procedure.<sup>25</sup>

The mere intention to tender a public contract in the future can be published through an indicative notice, which decreases the minimum time frames for a subsequent tender.

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25 OLG Düsseldorf, decision of 17 October 2018, VII-Verg 26/18, and of 11 July 2018, VII-Verg 24/18. See also OLG München, decision of 13 March 2017, Verg 15/16.

The award of a contract has to be published within 30 days of the award of the contract; and within 48 days for the award of concessions and in the area of defence and security. The notice has to include the name of the successful tenderer.

A notice on TED is also required for certain exempt contracts. Apart from such explicit requirements, a transparency notice may be required in light of fundamental EU principles (not necessarily, but certainly sufficient in TED).

Below the EU thresholds, public notices of the tender in adequate federal, state, regional or local publications are common. Irrespective thereof, any notice subject to UVgO must be available online and via the federal platform [www.bund.de](http://www.bund.de).

## **ii Procedures**

The procurement laws generally provide for open, restricted and negotiated procedures (with or without a call for competition) as well as competitive dialogues and innovation partnerships.<sup>26</sup> Any interested party is invited to submit a bid in an open procedure. Tenderers first have to submit a request for participation (RfP) in a restricted or a negotiated procedure. Contracting authorities typically limit the number of tenderers for the bidding phase of such procedures based on evaluation of the eligibility of the RfPs. Different from an open or restricted procedure, a negotiated procedure allows for negotiation of the (initial) bids, provided that the substance of the tender is not modified. Competitive dialogues are rarely used in Germany. Innovation partnerships are still fairly new, but certainly an interesting option for contracting authorities and contractors.

Contracting authorities are generally free to choose an open or restricted procedure. A negotiated procedure is only available under limited circumstances, for example, if the procurement needs cannot be met by readily available solutions without adaption or if the contract includes innovative solutions.

Under the Utilities Ordinance, contracting entities are free to choose any procedures with a call for competition. Under the Security and Defence Procurement Ordinance, the open procedure is not available.

The procedures for tenders below the EU thresholds are similar to the procedures at or above the EU thresholds, but provide more flexibility.

## **iii Amending bids**

Before the end of the submission deadline, tenderers can typically withdraw their bid and also submit a new bid instead. Once the submission deadline expired, amendments to bids are not permissible and tenderers may only clarify their bids upon the contracting authority's request, unless the applied procurement procedure allows for negotiations (see Section V.ii). The contracting authority may subsequently request missing or incomplete information. Such information may not change the application or bid. The contracting authority has to further evaluate the pricing and underlying calculation if the price of the tender appears unusually low.

Amendments of or additions to the contracting authority's procurement documents by the tenderers are inadmissible. They qualify as mandatory ground for exclusion, if the procurement documents were clear and if they cannot be interpreted in a way that is in

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26 Section 119 GWB.

conformity with the procurement documents. The contracting authority may, however, explicitly permit variants if it sets up minimum requirements for the variants and the award criteria apply to both the main tender and the variants.

## VI ELIGIBILITY

### i Qualification to bid

Contracting authorities typically define selection criteria for the tenderers' eligibility.<sup>27</sup> These criteria may concern the tenderers' suitability to pursue their professional activity, their economic and financial standing and their technical and professional ability. The criteria must be adequate and proportionate for the subject matter of the contract and be published in the contract notice. They regularly include a request for references on past comparable contracts. Any minimum eligibility requirements have to be stipulated clearly. Self-declarations are sufficient, unless the contracting authority requests particular documents for proof.

A tenderer can rely on the capacity of other economic operators, provided that the tenderer can prove that he or she will have at his or her disposal the other operators' capacities necessary for the contract (i.e., 'capacity loan'). The availability of the capacities can be proven through a declaration of commitment signed by the respective capacity lending operator. A joint liability can be required in case of a capacity loan for economic and financial ability. Actual performance shall be required in case of a capacity loan for technical and professional ability.

Contracting authorities may have to exclude economic operators from a particular tender. They are generally obligated to exclude economic operators (mandatory grounds for exclusion) *inter alia* in case of criminal convictions or administrative fines for bribery or money laundering.<sup>28</sup> Convictions can – in the German implementation of the directive – be imputable to a tenderer, if the convicted person has acted as the responsible person for the management of the undertaking, including supervision of management or the exercise in another manner of control in a managerial position. Contracting authorities discretionarily decide on exclusion of an economic operator (facultative grounds for exclusion) *inter alia* for having provided false information to influence the contracting authority's decision, having violated a major requirement under a former public contract, or indications for anti-competitive behaviour.<sup>29</sup> Economic operators shall not be excluded based on convictions or past major failures if they can prove self-cleaning (see Section II) or if specific time periods have lapsed.<sup>30</sup> The envisaged federal competition register has not been activated yet (see Section X).

The Utilities Ordinance provides for some more leeway of the contracting entity. The eligibility criteria are not enumeratively restricted, but essentially have to be adequate, objective, transparent and non-discriminatory. Further, any exclusion – even if based on grounds that are mandatory grounds for exclusion in the general procurement regime – is at the discretion of the contracting entities.

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27 Section 122 GWB.

28 Section 123 GWB.

29 Section 124 GWB.

30 Section 125, 126 GWB.

## ii Conflicts of interest

Representatives of a contracting authority exposed to a conflict of interest may not participate in a tender procedure.<sup>31</sup> A conflict of interest exists if the representative is on the one hand involved in the conduct of the procurement procedure or may influence the outcome of that procedure, and if the representative – or his or her close relative – on the other hand has a direct or indirect financial, economic or personal interest which might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure. This conflict is assumed for persons that are tenderers, that advise, support or represent a tenderer, are employed or work for a tenderer or for a company that has business relationships both for the contracting authority and the tenderer. In principle, any violation may be challenged by tenderers and may require repetition of the steps in question without the conflicted person. As *ultima ratio*, a violation may lead to the suspension of the procurement process, if necessary.

The principle of secrecy of competition requires that tenderers – as well as the contracting authority – keep generally confidential the tenderer's participation in a tender as well as information on his or her bid. A bid that has been prepared in knowledge of relevant details of another tenderer's bid generally has to be excluded from the procurement procedure.

Having been involved in the preparation of a procurement procedure does not automatically lead to exclusion.<sup>32</sup> The contracting authority has to take all necessary measures to ensure a level playing field for all bidders before considering exclusion as a last resort.<sup>33</sup>

## iii Foreign suppliers

In accordance with the EU principle of non-discrimination, no difference shall be made directly or indirectly between tenderers from Germany or any other EU Member State.

The German procurement provisions further generally do not discriminate against non-EU tenderers – coming from GPA signatory states or even from countries without a multilateral bilateral procurement agreement. These third-state tenderers can generally resort to the same rights as tenderers from Germany and the EU. However, contracting entities in the utilities sector can reject bids for supply contracts where the proportion of the products originating in third countries exceeds 50 per cent. Third countries are countries other than members of the EU or EEA that have not signed an agreement on reciprocal access to markets.

The introduction of the International Procurement Instrument (IPI) proposed by the European Commission in 2016 to ensure more reciprocity in international public procurement markets, in particular with a view to state-subsidised tenders, is still pending. Further discussions in the European Council are expected for 2020, also in line with the industrial strategy of the European Commission, including tightening of rules for foreign direct investments in the EU.

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31 Section 6 I VgV; 6 I SektVO; 5 I KonzVgV.

32 C-21/03 and C-34/03 – *Fabricom*.

33 Section 7 VgV; Section 7 SektVO.



## VII AWARD

### i Evaluating tenders

The contract has to be awarded to the most economically advantageous tender.<sup>34</sup> This can be the best price or a combination of the price and qualitative criteria adequately linked to the subject matter of the contract. In the field of security and defence, three specific quality criteria are explicitly mentioned: interoperability, operating capability and supply reliability. The award criteria and their relative weight have to be published in the notice or in the procurement documents.

The award criteria must be comprehensible and concrete to allow all bidders to prepare their bids accordingly. The Federal Court of Justice has clarified after years of a more restrictive understanding of some Higher Regional Courts that ‘school grades’ or other point scales for evaluating qualitative criteria can generally be used with certain specifications.

For the award of concessions, the authority may *inter alia* subsequently change the weighted order of the criteria in cases of bids with an unpredictable, innovative solution.<sup>35</sup> In that case, the authority has to inform the bidders of the modification and issue a new invitation to submit tenders.

### ii National interest and public policy considerations

Considerations of national interest cannot be used as award criteria. The principles of non-discrimination and equal treatment generally prohibit preference of domestic suppliers (see Section VI.iii). However, particular considerations of national interest may exceptionally lead to the exemption from public procurement requirements where it is necessary for the protection of the essential interests of the security of the Federal Republic of Germany (cf. Section III.ii) or may imply strict requirements of handling sensitive or classified information pursuant in particular to the VSVgV.

Among other criteria, public policy considerations can generally be included in procurement proceedings if they are related to the subject matter of a contract. Social and environmental criteria can in particular be used as award criteria (e.g., life-cycle costs), and tenderers may have to be excluded for violations of environmental or social law. Further, contracting authorities can require certain social or environmental conditions for contract implementation (e.g., adherence to tariffs or energy consumption limits).

If the contracting authority requires certain quality labels for the offered product or service, these quality labels must be based on objective, reviewable and non-discriminatory criteria and have been designed in an open and transparent procedure involving all interested parties. Comparable quality labels must be accepted.

## VIII INFORMATION FLOW

The notice and in particular the procurement documents must contain all information relevant for an economic operator to decide whether to participate in the procurement proceedings and to prepare his or her bid. Tenderers may ask questions about the tender documents or the performance specifications. To ensure equal treatment and a competitive tender process, the answers to these questions have to be made available to all tenderers.

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34 Section 127 GWB.

35 Section 31 II 1 KonzVgV.

The contracting authority has to inform the tenderers whose bids have not been successful prior to the contract award. This information has to include the name of the successful tenderer, the reasons for the rejection of the tenderer's tender and the earliest date the contract can be awarded.<sup>36</sup> The contracting authority may award the contract at the earliest 10 calendar days after the information has been sent out electronically or via fax (15 calendar days after dispatch in case of a postal information letter). Contracting authorities can restrict the information to unsuccessful bidders in the field of security and defence, *inter alia* if the information would be contrary to the public interest, or if it would prejudice the legitimate commercial interests of a particular economic operator. So far, information to unsuccessful bidders with a stand-still period is not required<sup>37</sup> for contracts below the EU thresholds (except in few federal states).

During and after the procurement procedure, the contracting authority has to protect confidentiality of the tenders submitted. Equally, tenderers may not disclose confidential information received from the contracting authority.

## IX CHALLENGING AWARDS

### i Procedures

A tenderer can file an application for review to the respective *Vergabekammer*, the competent procurement chamber, based on alleged violations of procurement law above the EU thresholds,<sup>38</sup> provided that he or she has previously raised an objection against the alleged violation *vis-à-vis* the contracting authority within 10 days of positive knowledge of the potential infringement or, as applicable, prior to the end of the respective RfP or bid deadline. Procurement chambers are part of the federal or state administration, but the proceedings are quasi-judicial. Each state has one to three regional procurement chambers and, at the federal level, two procurement chambers have been set up at the Federal Competition Authority.

Review procedures are only admissible if the applicant can show an interest in the public contract (usually indicated by its participation in the procurement procedure) and is potentially harmed by the alleged procurement law violation. Not more than 15 calendar days may have passed since a denial decision of the contracting authority on the alleged violation.

Review procedures should generally be concluded within five weeks with a potential two-week extension; however, these are further extended on several occasions. The decision of the procurement chamber can be appealed to the competent Higher Regional Court. The Federal Court of Justice only decides on deviation referrals by a Higher Regional Court to ensure harmonized application of procurement law in Germany. Procurement chambers can, and Higher Regional Courts have to, refer a question on the interpretation of the procurement directives and regulations or the EU treaties to the CJEU if they consider that a decision on the question is necessary to enable them to give judgment.

More than 700 applications for review have been filed to the procurement chambers in 2018. Approximately 7.5 per cent of the applications have not been submitted to the

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36 Section 134 GWB.

37 OLG Celle, decision of 9 January 2020, 13 W 56/19, KG, decision of 7 January 2020, 9 U 79/19. Tending towards a general stand-still period below the EU-thresholds: *obiter dictum* of OLG Düsseldorf, decision of 13 December 2017, I-27 U 25/17.

38 Section 155 et seq. GWB.

contracting authority because they were considered obviously inadmissible or without merits (see Section IX.iii). The applicants have been successful in approximately 13 per cent of the procurement chamber decisions. In approximately 170 cases, the unsuccessful party appealed to a Higher Regional Court. The appellant was successful in approximately 23 per cent of the appeal decisions.

Only Hesse, Saxony, Saxony-Anhalt and Thuringia provide for particular review proceedings for tenders below the EU thresholds. Apart thereof, the civil or administrative courts – depending on the subject matter of the envisaged contract – have jurisdiction.

## ii Grounds for challenge

The review body assesses whether the contracting authority has violated the applicant's rights under procurement law, namely any provision that shall protect the tenderers or competition among tenderers, which is essentially almost all public procurement provisions (apart from, in particular, the obligation of contracting authorities to consider the energy efficiency of products or to limit the contract award to bidders with a tariff conformity declaration).

Infringements of other requirements beyond public procurement laws are only reviewable if they are referred to in the procurement provisions and have a close link to the procurement or procurement procedures, namely in particular certain aspects of competition, state aid law and the provisions on the economic activity of municipal undertakings. Due to the limited scope of procurement review procedures, potential non-compliance of contractual provisions with, for example, requirements for standard terms and conditions do not have to be raised in procurement review procedures to be considered in later civil court proceedings.<sup>39</sup>

## iii Remedies

Unless the procurement chamber considers the application obviously inadmissible or without merits, it forwards the application to the contracting authority which is then barred to award the contract (at least) until two weeks from the procurement chamber's decision in the review proceedings.<sup>40</sup> In the event of an appeal to the Higher Regional Court, the appellant can apply for, and is typically granted, an extension of the suspensory effect of the review proceedings until the court's decision.

In its decision, the procurement chamber has to require from the contracting authority to take the appropriate measures to redress the violation of the applicant's rights and to prevent damages to the applicant's interests. The procurement chambers have broad discretion, but may only define suitable and proportional actions necessary to remedy the infringement. They typically require repeating the deficient procurement steps taking into account the legal consideration of the review body, if the contracting authority still intends to proceed on the procurement.

After an award of the contract, a procurement chamber can declare a contract ineffective only if the contracting authority did not adhere to the prior award notice and stand-still period or if the contracting authority has not published a required contract notice or not

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39 OLG Koblenz, decision of 21 November 2019, 1 U 298/19; OLG Celle, decision of 19 March 2019, 13 Verg 7/18. Against: OLG Celle, decision of 18 January 2018, 11 U 121/17.

40 Section 169(1) GWB.

conducted a required public tender (de facto procurement).<sup>41</sup> The complaint must be filed within 30 days of the bidder information letters or award notice, absent this information or notice not later than 6 months from conclusion of the contract.

The review bodies cannot impose administrative fines for breach of procurement law. Procurement procedures may though be subject to administrative supervision and review by audit offices.

Bidders can claim compensation for costs of bid preparation and participation, if they would have had a reasonable chance to be awarded the contract absent the infringement of procurement law.<sup>42</sup> Other grounds for compensation remain applicable; however, a claim for compensation of expected profits (i.e., the positive interest in the contract) is rarely founded. Compensation claims generally have to be filed to the civil law courts (seldom to the administrative law courts). Compensation due to infringements in public procurement procedures is not necessarily excluded if a remedy was not sought in a previous procurement review procedure.<sup>43</sup>

## X OUTLOOK

Germany, like other states, has been immensely effected by the covid-19 pandemic in 2020. The federal ministries, as well as most states, swiftly published interpretative guidelines on how to use exemptions for urgent procurements in particular to curb and fight the outbreak of covid-19 (e.g., for medical equipment) and to ensure the functioning of the public administration during essential lockdown (e.g., IT equipment for remote work). Regarding procurement below the EU thresholds, several states further adopted, inter alia, new or raised value limits for negotiated procurements or direct procurements. The effects of the pandemic on ongoing public works have also been addressed by administrative guidelines. Still, the coming months will show how the pandemic will further affect procurement procedures, for example regarding extensions of deadlines for bid submissions, negotiations via video conferences, but also potential initiatives to strengthen the economy by facilitating public spending.

On 2 April 2020, legislative changes to expedite procurement in the areas of defence and security came into force. They define, inter alia, which key technologies in the security and defence sector shall be qualified as exempt from the procurement rules based on Article 346 TFEU. Also, additional circumstances that are considered to allow a negotiated procedure without a call for competition in urgent military or security procurements have been defined. The changes shall foster the German security and defence capabilities and industry within a broader framework of federal initiatives in this regard.

The law on expediting procurement in the areas of defence and security also included several changes to the 2016 rules on implementing a procurement statistic. This data shall allow for a more reliable overview on public procurement in Germany to be obtained and shall, in the long run, also allow a more strategic focus for public procurement. The electronic procurement statistic was expected to become operational in the second half of 2020.

The Competition Register Act on protection of competition for public contracts and concessions providing information on exclusion grounds to contracting authorities and

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41 Section 135 GWB.

42 Section 181 GWB.

43 Federal Court of Justice, decision of 17 September 2019, X ZR 124/18.

entities has been in force since 29 July 2017, with the technical implementation still in preparation. A start of the federal register is not expected before late 2020 or 2021. Until then, the state competition and (anti-)corruption registers remain in place.

# GREECE

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## I INTRODUCTION

Since Greece is a Member State of the European Union, the relevant directives on public procurement do apply. Thus, the Greek Law for Public Procurement evolves following any developments in the European legislation. The Greek legislator has opted for a gold-plating method of transferring the directives to domestic law (i.e., he repeats the terms and exact content of said directives, instead of rephrasing or exploring the margins for adaptation or derogation). Greece is a contracting party, as a Member State of the EU, to the Agreement on Government Procurement of the World Trade Organization (WTO GPA).

Nowadays, the legislation concerning public procurement is mainly contained in Law 4412/2016, which was published in the Government Gazette on 8 August 2016. With this Law, the 2014 Public Contracts Directive and 2014 Utilities Contracts Directive were transposed into national legislation after the expiry of the period for implementation. The conduct of procurement procedures below the threshold is regulated in detail and unified. For procurements both under the threshold and with an estimated value of over €60,000 fundamentally similar rules typically apply.

The special rules set out in Law 3978/2011 concerning contracts in the field of defence and security still apply. The 2014 Utilities Contracts Directive is transposed into Book II of Law 4412/2016, where special rules are set wherever necessary, all the while maintaining extensive references in Book I, where general rules are contained.

In relation to the rules under 2014 Concession Contracts Directive, Law 4413/2016 was also published at the same time. The latter sets the relevant rules that apply on the award and execution of concession contracts.

In the Greek public procurement system there is a plethora of statutory bodies that are involved in controlling and guiding the contracting authorities. Law 4013/2011 established the Hellenic Single Public Procurement Authority (HSPPA), which exercises both advisory and auditing powers. Its most notable powers include giving assent to negotiated procedures with a budgeted expenditure above the thresholds, as well as issuing templates for bid documents and guidelines. Law 4412/2016 established, as an independent authority, the Authority for the Examination of Preliminary Recourses (Remedies Review Body) (AEPP), with the responsibility of examining preliminary recourses filed against acts of the contracting authorities and entities, which were issued in the context of award procedures with an estimated value of more than €60,000. In addition, there is also judicial review, which

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is now performed on the decisions of the AEPP either by the Council of State (Supreme Administrative Court) or by the administrative courts of appeal, depending on the case. Finally, the Court of Auditors, the Supreme Financial Court, performs the pre-contractual audit, before the signing of public contracts with a value exceeding €1 million. Bodies of centralisation of the procurement procedure are, in the case of public procurements, the General Secretariat of Commerce of the Ministry of Economy, which executes the public procurement programme, as well as the National Central Authority for Health Procurements, which executes central hospital procurement programmes for all of the country's hospitals, especially in the form of framework agreements.

Finally, Article 18 of Law 4412/2018 reiterates and introduces the respective provisions of European law as to the applicable general principles: the principle of equality (equal footing of the economic operators), the principle of transparency, the principle of proportionality and the principle of mutual recognition. The principle concerning the freedom of competition in the field of public procurements is further established and a rule, according to which procurement procedures must not be designed with the purpose of excluding from the rules of public procurements or to artificially restrict competition, is introduced. Furthermore, the rules of protection of the public interest, along with the principle of sound financial management, the protection of individual rights, which aims at avoiding arbitrary interferences on the contractual balance, as well as the principles of environmental protection and sustainable development are introduced.

## II YEAR IN REVIEW

In 2019, there were two major legislative initiatives regarding public procurement issues and, in particular, an amendment to Law 4412/2016, which is now the codification of the relevant legislation. It is generally recognised that, due to the extensive amendment of the law on public contracts, which took place with Law 4412/2016, there was a serious difficulty in assimilating the new framework and implementing the public investment programme in an effective and timely manner. Meanwhile, the economic operators also seemed to face similar problems with adjusting. By Law 4605/2019, following the pieces of legislation that had been issued in the previous years, significant interventions were made. Law 4412/2016 sets a certain time limit for the completion of the award procedures by the bodies responsible for conducting them, while procedural regulations were introduced to address practical problems that had arisen during the implementation of the law. Finally, provisions on the procedure for examining recourses by the AEPP were introduced, in the direction of effective preliminary and judicial protection, as well as in the direction of delimitation of the authority's competence. Further parametric amendments were also introduced by Law 4609/2019.

With regard to case law developments, Decision No. 1081/2019 of the Plenary Session of the Council of State is of particular interest, according to which the rules for awarding public contracts do not apply to entities that have an exclusive right, granted to them directly or indirectly by the state, yet the majority of their shares have been transferred to a private individual following a competitive process.

The Legislative Acts of 23 February 2020, 11 March 2020 and 14 March 2020, which were issued for the purpose of dealing with emergencies and needs arising from the covid-19 pandemic, extensively allowed negotiated procedure for the supply of not only medical supplies but also other items necessary for the operation of many contracting authorities and entities to adapt to the new situation (e.g., IT equipment).

### III SCOPE OF PROCUREMENT REGULATION

For the provisions of Book I of Law 4412/2016 to apply, two conditions must be met. First, the contracting party is required to be a contracting authority (subjective condition), and second, the contract must have as its object the acquisition of works, goods or services, regardless of whether the works, goods or services are intended to serve the public interest. Especially in regard to the application of the provisions incorporated in compliance with EU law, it is required that the budgeted expenditure exceeds certain thresholds.

For the provisions of Book II of Law 4412/2016 to apply, it is required that the contracting party is a contracting entity (subjective condition), and that the contract has as its object the acquisition works, supplies or services, so long as these works, supplies and services are intended for the execution of activities of public interest. Relevant thresholds apply.

The thresholds – excluding VAT – for the implementation of the provisions of Book I are as follows:

- a* €5.35 million for public works contracts;
- b* €139,000 for public supply contracts, service contracts, and contracts for studies, awarded by central government authorities;
- c* €214,000 for public supply contracts, service contracts, and contracts for studies, awarded by non-central contracting authorities; and
- d* €750,000 for public service contracts relating to social and other special services.

The thresholds of budgeted expenditure – excluding VAT – for the application of the provisions of Book II (Utilities Contracts) are as follows:

- a* €428,000 for supplies and services, as well as for design competitions;
- b* €5.35 million for works; and
- c* €1 million for public service contracts relating to social and other special services.

Concerning the method for calculating the estimated value, rules familiar under the previous legal regime are reiterated: in the event that the contracting entity consists of separate business units, the total estimated value for all units is taken into account.

When a tender that may lead to the award of contracts in the form of separate sections is held, the total estimated value is taken into account. Special rules are introduced for periodic supplies or services, for special services, such as insurance or banking, as well as for indefinite contracts. Furthermore, the pre-existing exclusion of certain contracts, such as those related to the purchase or lease of land and existing buildings, arbitration services, legal services (albeit with a more precise definition), loans, etc. from the law, is reiterated.

The law clarifies and significantly expands, in the direction of simplification, the status of modification of contracts during their term, an issue for which there are even special provisions related to work contracts. Modification is allowed in the following cases:

- a* when the amendments, regardless of their monetary value, are provided for in clear, precise and unequivocal review clauses in the original bid documents. These clauses may also include price review clauses or options;
- b* for additional works or services or goods that became necessary with a limit of 50 per cent of the value of the original contract;
- c* when the following cumulative conditions are met: unforeseen events, lack of change of the nature of the contract, and price increase not exceeding 50 per cent;



- d* in the case of substitution of the initial contractor with a new one, as a consequence of an explicit review clause or universal or partial succession of the initial contractor due to corporate restructuring; or
- e* in the case of non-essential modifications.

It is not necessary for the aforementioned conditions for amendment to be fulfilled, if the amending contract has a value below the thresholds for application of EU law and below 10 per cent of the contract for service and supply contracts and 15 per cent for works.

In this context, the transfer of the contract to a different contractor is also addressed, without any further flexibility on this issue. In addition, Greek law remains strictly in accordance with the established jurisprudence that has been in place since the 1990s, which does not allow for changes of the bidder during the period between the submission of a tender and the award.

#### **IV SPECIAL CONTRACTUAL FORMS**

As special contractual forms, in the context of Law 4412/2016, we can cite the following.

The innovation partnership is a special form of award aiming at the award of an innovative product, service or work, as well as at their subsequent purchase by the contracting entity, provided that they meet the performance and maximum cost levels agreed between the contracting entities and the participants.

There are provisions that stipulate the use of dynamic purchasing systems for commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity.

Contracting authorities may resort to electronic auctions, in which new, reduced prices or new values, or both, are presented in relation to certain elements of the bids. The electronic auction is organised in the form of a repetitive electronic process, conducted after a preliminary full evaluation of the bids, allowing their classification on the basis of automatic evaluation methods.

With regard to subcontracting, it is expressly provided that the contracting entity shall ask the bidder to state in its bid the part of the contract that it intends to assign to third parties in the form of subcontracting, as well as the subcontractors it proposes.

Awarding a contract in the form of sections and limiting the sections for which a bid may be submitted or a contract may be awarded are both permissible. Contracting authorities shall specify on the contract notice or the invitation to confirm interest whether the bids are submitted for one, more or all sections. Contracting authorities may also limit the number of sections that can be awarded to one bidder, even if the bids may be submitted for many or all of the sections, on condition that the maximum number of sections per bidder is specified in the contract notice or the invitation to confirm interest.

With regard to public-private partnerships (PPPs), there is already a legal framework in Greece set out by Law 3389/2005, which determines the minimum content of PPP contracts. The applicable legal framework is clear and flexible, thus decreasing the need for aberrations and subsequently the need to appeal to Parliament for ratification (the partnerships are governed primarily by the provisions of the partnership contracts and in addition by the provisions of the Civil Code). A slew of problems, which in the past required special legal regulations (expropriations, issuance of permits, protection of the environment, etc.), are now dealt with by special provisions. However, no extensive recourse to the general rules on

PPPs was made. On the contrary, in any process of granting a public service or public work or infrastructure or privatisation, special regimes have been introduced, while in the vast majority of cases the process of selecting a partner or concessionaire from the private sector is followed by the legal ratification of the relevant contract.

The recent rulings of the Plenary Session of the Council of State (1077-82/2019) have given a significant indication concerning the status of the contracts of the companies in which an individual has entered with a majority shareholding. In this case, and provided that a tender has been held for the selection of the private partner, the procedures for awarding conducted by the entity are not subject to the rules on public procurement, nor to the competence of the relevant authorities and in particular the AEPP.

## **V THE BIDDING PROCESS**

### **i Notice**

Contract notices include the information provided for in the form of standard documents, which are transmitted to the EU Publications Office for publication. Publication at national level is achieved through the Central Electronic Public Procurement Registry (KIMDIS). All communications as well as all information exchanges between the contracting authority and the economic operators, particularly the electronic submission of tenders, are done through the National System for Online Public Contracts (ESIDIS). This rule applies to contracts with an estimated value of more than €60,000, excluding VAT.

### **ii Procedures**

The contracting entities may, for the purpose of selecting contractors, proceed with the following award procedures: open procedure, restricted procedure, competitive procedure with negotiation and previous tender notice, competitive dialogue, or innovation partnership. Contracting entities may engage in a procedure with negotiation, without prior publication, in certain, explicitly and exclusively prescribed, cases.

In the open procedure, any interested economic operator can submit a tender in the context of a contract notice. In the closed procedure, any economic operator may submit an application for participation in the context of a contract notice, providing information on the quality selection criteria. Only those economic operators invited by the contracting entity, after the evaluation of the information provided, may ultimately submit a bid. The contracting entities may limit the number of suitable bidders. In the competitive procedure with negotiation and previous tender notice, any economic operator may submit an application for participation in the context of a contract notice, providing information on the quality selection requested by the contracting entity. Only economic operators invited by the contracting entity are able to take part in the negotiations.

Negotiation without prior publication of a contract notice is allowed in the following cases:

- a* if a previous tender was fruitless;
- b* in the case of contracts aimed exclusively at research, testing, study or development and not seeking to make a profit;
- c* in the case of works, services and supplies that may be provided by a specific economic operator for the exclusively described reasons;
- d* in the case of an urgent need due to events unforeseen for the entity;

- e* for the purchase of goods or services on particularly favourable terms either from a supplier that permanently ceases its commercial activities or by the liquidator of an insolvency procedure, a court settlement or a similar procedure;
- f* when the products are manufactured solely for the purposes of research, experimentation, study or development (however the contracts that are awarded do not include quantity production to establish commercial viability or to recover research and development costs);
- g* for additional deliveries;
- h* for new works or services that involve the repetition of previous similar works or services; and
- i* for the purchase of goods from stock exchanges.

In the competitive dialogue, the process is similar to the procedure with negotiation, with prior contract notice, but at the end there is a dialogue that aims at expanding and identifying the most appropriate means to satisfy the needs of the contracting entity.

For public contracts below the threshold, the contracting authorities may resort to, *inter alia*, direct award procedures for an estimated value equal to or less than €20,000 and summary tenders for an estimated value equal to or less than €60,000.

### **iii Amending bids**

In the case of procedures for the award of public supply or service contracts, the competent advisory board may propose, following a reasoned recommendation, that the contract be awarded in full or in a larger or smaller quantity in proportion to the percentage specified in the contract documents. This percentage cannot exceed 30 per cent in the case of tenders with a budget up to €100,000 including VAT and 15 per cent in the case of calls for proposals amounting to €100,001 or higher including VAT. To award part of the quantity below the percentage specified in the contract documents, prior approval by the supplier is required.

The jurisprudence recognises to a limited extent the ability of the nominated bidder to offer a discount at the award stage, without affecting the competition.

## **VI ELIGIBILITY**

### **i Qualification to bid**

Contracting authorities may establish and manage a pre-selection system for economic operators. This is a system corresponding to the supplier table. It must be ensured that the economic operators can apply for pre-selection at any time. When a contract notice is announced through the pre-selection system, either a closed tender is held or exclusively the economic operators included in the pre-selection table participate.

Another issue is the one regarding the grounds for exclusion, that is, the reasons that impose or allow the exclusion from participating in further proceedings for the sake of protecting the moral and legal integrity of the award procedure. At this point, the provision of Article 73 of Law 4412/2016 is important. Article 73(1) provides for a known list of criminal offences justifying exclusion (e.g., participation in a criminal organisation, fraud, etc.) and states that a final (court) ruling, and not an irrevocable one, is required. According to the same article, grounds for exclusion may be sought for all members of the board of

directors of the bidder. Candidates who have not acquired a tax certificate or a certificate of insurance are also excluded in accordance with the provisions of the country of establishment or national law.

Optional grounds for exclusion are also provided. The contracting authority may exclude any economic operator from participating in a public procurement procedure:

- a* if it can prove breach of its current environmental, social security and labour legal obligations;
- b* if the economic operator is bankrupt or has been subjected to resolution proceedings or special liquidation, or its affairs and assets are under compulsory administration by a liquidator or by the court, or it has entered into an arrangement with creditors or has suspended its business activities, or if it is in any similar situation resulting from a similar procedure;
- c* if the contracting authority has sufficient evidence to suggest that the economic operator has entered into agreements with other economic operators in order to distort the competition;
- d* if a case of conflict of interest cannot be effectively resolved using other, less intrusive, means;
- e* if a situation concerning the distortion of competition by the previous participation of the economic operators in the preparation of the procurement process cannot be effectively treated using other, less intrusive, means;
- f* if the bidder has shown serious or recurring misconduct in the performance of a substantive requirement under a previous public contract resulting in an early termination of the previous contract, compensation or other similar penalties;
- g* if the economic operator has been found guilty of serious misinterpretation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld this information or is unable to provide the required supporting documents;
- h* if the economic operator attempts to unduly influence the decision-making process of the contracting authority in a fraudulent way, to obtain confidential information that may confer an unfair advantage or to negligently provide misleading information; and
- i* if the contracting authority can prove that the economic operator has been guilty of a grave professional misconduct, which compromises its integrity. A right to counter-evidence is granted to the bidder.

It is also possible to exclude an economic operator from the ongoing and future procurement procedures for a reasonable period of time.

## **ii Conflicts of interest**

When members of the staff of the contracting authority that are involved in the procedure for signing public contracts have a direct or indirect financial or other personal interest that could be perceived as an element affecting their impartiality and independence, a conflict of interest arises.

With regard to the tenders carried out on the basis of Law 4412/2016, 'interests' are considered, among other things, according to the law, to be the existence of a contract of employment, the execution of works, the rendering of services or the sale of products between

a member of the board of the contracting entity and an economic operator involved in the procurement process, for the duration of a period starting 12 months before the initiation of the procurement process and expiring on the date the contract is concluded.

The last resort in dealing with a conflict of interest is to exclude the participant associated with the person with whom the conflict of interest occurs. An exclusion issue would be raised if, on the one hand, the remaining procedural guarantees were not met, and on the other hand, it was proved that there was influence at any stage of the tender, including the formulation of the issues of the declaration.

### **iii Foreign suppliers**

Eligible to participate in procurement procedures regarding the contracts referred to in the WTO GPA Annexes are natural or legal persons established (1) in an EU Member State; (2) in an EEA Member State; or (3) in third countries that have signed and ratified the WTO GPA. Especially in the case under point (3), the contracting entities reserve to the economic operators of these countries treatment equally favourable to the treatment given to economic operators established in the EU and in third countries that do not fall under the aforementioned case but have concluded unilateral or multilateral agreements with the EU concerning public procurement procedures. This provision also defines the circle of economic operators who are entitled to participate in procurement procedures and, respectively, companies established in countries other than the aforementioned, are excluded. This refers, in practice, predominantly to the People's Republic of China.

One question that arises is whether contracting authorities can expand the circle of those eligible to participate. The AEPP ruled that such an extension, with reference to countries that are observers of the WTO GPA, such as China, is not prohibited. Of course, there has been no case law on the matter so far, nor has there been a case concerning the contracting authorities and the provisions of Book I, as in the case of the latter the use of templates is mandatory and deviation from the aforementioned rule is not allowed.

## **VII AWARD**

### **i Evaluating tenders**

The contracting authorities base the award of contracts on the most economically advantageous tender. The most economically advantageous tender is determined based on the price or the cost, using a cost-effectiveness approach method, and may include the optimal value for money. However, the award criteria do not result in the provision of unlimited freedom of choice to the contracting entities.

The award criteria are determined by the contract documents. The contracting entity specifies the relevant weighting, unless the criterion is solely the price. The grading of the criteria is fully and specifically justified and includes, in addition to the grading, the wording of this reasoning per criterion.

The process of concluding a contract (submission, opening, evaluation of bids and applications for participation, selection of participants, submission of tender documents and contract, and determination of time limits for the completion of all or individual procedures) shall be carried out in accordance with the provisions of the Articles 92 to 100, 103 and 104 of Law 4412/2016.

Moreover, the Law prescribes the possibility of clarification or completion of supporting (and other) documents submitted within a reasonable time limit that cannot be shorter than

seven days. The feature described above applies to both the supporting documents and the technical bid. This possibility is precisely defined by law. The provision of the possibility of clarification or supplementation is obligatory for the contracting entity, if the bidder is about to be excluded.

## **ii National interest and public policy considerations**

Considering that Greek public procurement law is mainly in line with European directives, there is little room for national or local preferences, while at the same time the social and environmental aspects are very important and particularly taken into account when determining or examining the grounds for exclusion.

The administration is, in principle, free to formulate at its discretion the terms of the declaration, determining specific technical characteristics from a quantitative and qualitative point of view on the basis of its respective needs, and the establishment of specifications that the contracting authority deems appropriate or necessary for the purpose of serving its needs cannot be construed as violating the provisions and fundamental principles of EU law, since by their very nature the specifications in question are supposed to limit the circle of the economic operators that are able to fulfil the necessary requirements and participate in the public tender.

The provisions of Law 4412/2016 now explicitly provide that the technical specifications established by the declaration are formulated not only with reference to European, international or national standards, pursuant to the specific distinctions of the above provisions, but also with reference to performances or operational requirements. Contracting authorities have the broad authority to formulate technical specifications with additional features regarding the goods to be procured, in addition to those required in order to obtain the CE mark, through a certificate issued by a certified body. This is also confirmed, from a legal point of view, by their power to set technical specifications by referring to performances and operational requirements and not just by referring to certification standards such as the CE mark.

In any case, the contracting authorities are required to both state in the declarations that it is permissible to accept products with equivalent characteristics, when there is a reference to a particular method or standard, and to accept such products that possess equivalent characteristics. However, the burden of proof lies with the economic operator.

## **VIII INFORMATION FLOW**

As almost all award procedures take place electronically, all bidders have access to the bids of the other participants, and can even download them in order to inspect them in detail. However, bidders are entitled to – and the tender system allows them to – have certain documents or items classified as confidential, provided that this is required for reasons of confidentiality protected by law, as is, for instance, trade secrecy in relation to certain cost components of the bid.

The obligation to provide information is also extensive, as it is necessary to notify the relevant acts by which the contracting authority promotes or completes the tender to those who have not been definitively excluded. On the same note, an exclusion is also definitive when the application for annulment of the act by which the economic operator was excluded is rejected.

## **IX CHALLENGING AWARDS**

The procedure of challenging and reviewing the acts (decisions) of the contracting authorities with which a particular bidder is harmed, either because it is excluded or because an offer that should have been rejected is instead accepted, is laid out in Book IV of Law 4412/2016. This Book is inspired by the rules that applied until then concerning the transposition of the Remedies Directives, yet it also includes some important innovations.

The provisions of Book IV shall apply to disputes arising in the legal process of awarding contracts with an estimated value exceeding €60,000, excluding VAT, regardless of their nature.

### **i Procedures**

The law provides for the lodging of recourse before the AEPP, from which the affected bidder is entitled to request interim protection, the annulment of an illegal act or omission on behalf of the contracting authority, or the annulment of a contract that has been illegally concluded.

The relevant time limits for the aforementioned recourse are as follows: in the case of recourse against an act of the contracting authority, (1) within 10 days from the date of notification of the contested act to the interested economic operator, if the act was notified by electronic means or facsimile, or (2) within 15 days from the date of notification of the contested act to the interested economic operator, if other means of communication were used; otherwise (3) within 10 days from the full actual or presumptive knowledge of the act that harms the interests of the economic operator. Especially in the case of recourse against an invitation to tender, full knowledge of the invitation is presumed after 15 days from its publication in KIMDIS. In the case of an omission, the time limit for lodging a preliminary recourse is 15 days from the day following the commitment of the contested omission.

Any interested party whose interests are affected is entitled to lodge an intervention before the AEPP, within a mandatory time limit of 10 days from the notification of the recourse, presenting the reasons why the recourse in question must be dismissed.

For the preliminary recourse to be admissible, a duty must be paid by the applicant to the state. The amount of the duty shall be at the rate of 0.5 per cent of the budgeted value (excluding VAT) of the relevant contract. The amount of the duty cannot be less than €600 or more than €15,000.

### **ii Grounds for challenge**

Any infringement of the European or national legal framework, as well as of the invitation to tender, could be grounds for recourse. Furthermore, it is required for the challenged infringement to be detrimental to the economic operator.

### **iii Remedies**

Both the application for suspension of execution and the application for annulment before the competent courts are considered as legal remedies against a decision issued on a preliminary recourse by the AEPP.

It follows from the above that in the case of contracts with an estimated value above €60,000, the lodging of a preliminary recourse constitutes a requirement for the admissibility of the legal remedies that may follow.

The administrative court of appeal corresponding to the seat of the contracting authority has (territorial) jurisdiction to hear and determine the application for suspension

and the application for annulment. The Council of State has exceptional jurisdiction in cases of (1) procedures governed by the 2014 Public Contracts Directive, which also have an estimated value above €15 million; and (2) procedures governed by the 2014 Utilities Contracts Directive and 2014 Concession Contracts Directive.

The law stipulates that claims for damages are heard and determined by the competent courts, depending on the nature of the contracting authority.

## **X OUTLOOK**

Law 4412/2016 has so far undergone a significant number of changes and amendments, which may be indicative of certain weaknesses in its initial processing, or even of a difficulty on behalf of the contracting authorities to meet such a detailed framework. As we mentioned in the introduction of this chapter, in the context of dealing with the pandemic caused by covid-19, the conclusion of public service contracts and public supply contracts by direct award or under a negotiated procedure was generally allowed (to a large extent), regardless of the conditions set by the European directives for the application of the negotiation process. A large number of contracting authorities are already concluding such contracts on a large scale, so that after the end of the state of emergency, the relevant needs for the conclusion of similar contracts will have already been met under the generally applicable regime.

Another issue, hints of which already existed, is the supply of products from third countries and especially from China, to which many European countries, including Greece, have massively resorted at this point. This necessary direction is contrary to the pre-existing one that leaned towards the restriction of such supplies, particularly through the Commission Communication of 13 August 2019 entitled 'Guidance on the participation of third country bidders and goods in the EU procurement market' (2019/C/271/02).



# ITALY

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## I INTRODUCTION

The main public procurement legislation applicable in Italy is laid down by the Public Contracts Code (the PCC),<sup>2</sup> as amended by Legislative Decree No. 56/2017 (the Corrective Decree), Law Decree No. 50/2017 and recently by Law Decree No. 32/2019 (the Sblocca Cantieri Decree) as converted, with amendments into Law No. 55/2019, published in the Italian Official Gazette No. 140 of 17 June 2019 (the Sblocca Cantieri Law).

The PCC came into force on 19 April 2016, implementing both the 2014 Public Contracts Directive and the 2014 Concession Contracts Directive, as well as the 2014 Utilities Contracts Directive, and replacing the previous Public Contracts Code.<sup>3</sup>

The relevant legal framework is completed by a number of secondary sources, which include ministerial decrees and guidelines issued by the National Anti-Corruption Authority (ANAC), aimed at providing detailed rules on specific matters.

The European Union (on behalf of its Member States, including Italy) is party to the World Trade Organization's Agreement on Government Procurement (GPA), which has been approved at the EU level by Council Decision 94/800/EC.

The national bodies responsible for setting up the public procurement policy are Parliament (legislative power), the government (executive power) and the ANAC, whose power has been consistently widened by the PCC.

The main principles underpinning public procurement policy in Italy are closely aligned to those that inspire the 2014 Procurement Directives: transparency and equal treatment of economic operators, effectiveness, impartiality, proportionality, environmental protection and energy efficiency.

In the context described above, it is worth highlighting that during the past few weeks, Italy has been facing a serious health emergency due to the spread of the coronavirus, affecting human health and causing major disruptions in markets, economy and businesses. The Italian government declared the 'state of emergency' and immediately adopted a number of urgent and extraordinary measures aimed at limiting the spread of covid-19 and mitigating its effects.

Moreover, on 17 March 2020, Law Decree No. 18 (the Cura-Italia Law Decree) has been issued and published in the Italian Official Gazette. The Cura-Italia Law Decree entered into force on 17 March 2020 and is aimed at providing for a consolidated package of structural measures to support the health system while helping Italian families and the

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2 Legislative Decree No. 50/2016.

3 Legislative Decree No. 163/2006.

economy. Specific measures have also been introduced in the public procurement sector with the aims of simplifying and accelerating public procurements in specific fields deemed essential during the emergency phase (health supplies and services, IT services and supplies, connectivity services, refurbishment works of prisons, contracts to support the foreign markets, etc.) and supporting the economic operators mostly affected by this health crisis.

The Cura-Italia Law Decree shall be converted into law by the Italian Parliament within 60 days following its publication. It cannot be excluded, therefore, that during the conversion process further amendments will be approved by the Parliament. In addition, given the unpredictable development of events during the covid-19 outbreak, it is further expected that further actions and measures will be adopted in the coming weeks which could potentially supersede in whole or in part the provisions of the Cura-Italia Law Decree.

## II YEAR IN REVIEW

In the past years, pivotal developments in public procurement legislation have been made: the PCC came into force implementing the 2014 Procurement Directives and a number of ANAC guidelines and ministerial decrees have been adopted.

ANAC guidelines already in force provide specific regulations about:

- a* architectural and engineering services tenders;<sup>4</sup>
- b* the 'most economically advantageous' tender criterion;<sup>5</sup>
- c* the role of the tender procedure manager;<sup>6</sup>
- d* below threshold contract tenders;<sup>7</sup>
- e* selection criteria of members of the tender committee;<sup>8</sup>
- f* exclusion of candidates due to material professional misconducts;<sup>9</sup>
- g* in-house providing;<sup>10</sup>

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4 ANAC Guidelines No. 1, adopted by Resolution No. 973 of 14 September 2016, then updated, following the Corrective Decree, by Resolution No. 138 of 21 February 2018, published in the Italian Official Gazette No. 69 of 23 March 2018 and by Resolution No. 417 of 15 May 2019, published in the Italian Official Gazette No. 137 of 13 June 2019.

5 ANAC Guidelines No. 2, adopted by Resolution No. 1005 of 21 September 2016, published in the Italian Official Gazette No. 238 of 11 October 2016.

6 ANAC Guidelines No. 3, adopted by Resolution No. 1096 of 26 October 2016, published in the Italian Official Gazette No. 1096 of 26 October 2016 and then updated by Resolution No. 1007 of 11 October 2017, published in the Official Gazette No. 260 of 7 November 2017.

7 ANAC Guidelines No. 4, adopted by Resolution No. 1097 of 26 October 2016, then updated, following the Corrective Decree, by Resolution No. 206 of 1 March 2018, published in the Italian Official Gazette No. 69 of 23 March 2018 and then by the Resolution No. 636 of 10 July 2019, published in the Italian Official Gazette No. 183 of 6 August 2019.

8 ANAC Guidelines No. 5, adopted by Resolution No. 1190 of 16 November 2016, then updated following the Corrective Decree by Resolution No. 4 of 10 January 2018, published in the Italian Official Gazette No. 28 of 3 February 2018.

9 ANAC Guidelines No. 6, adopted by Resolution No. 1293 of 16 November 2016, published in the Italian Official Gazette, General Series No. 2 of 3 January 2017 and then updated by Resolution No. 1008 of 11 October 2017, published in the Italian Official Gazette No. 260 of 7 November 2017.

10 ANAC Guidelines No. 7, adopted by Resolution No. 235 of 15 February 2017, published in the Italian Official Gazette, General Series No. 61 of 14 March 2017 and then updated by Resolution No. 951 of 20 September 2017, published in the Italian Official Gazette No. 236 of 9 October 2017.

- b* negotiated procedures without prior publication of the contract notice in case of non-fungible public supply and service contracts;<sup>11</sup>
- i* monitoring of contracting authorities on the activities of the economic operator in public-private partnership contracts;<sup>12</sup>
- j* awarding of the private security service;<sup>13</sup>
- k* indications for verifying compliance with the limit referred to in Article 177 of the PCC by public or private entities holding works, services or supply concessions already in existence at the date of entry into force of the PCC and not awarded through the project finance formula or public tendering procedures in accordance with European Union law;<sup>14</sup>
- l* awarding of legal services;<sup>15</sup>
- m* the regulation of social clauses;<sup>16</sup>
- n* preliminary market consultation guidelines;<sup>17</sup> and
- o* recognition and management of conflicts of interest in procedures for the award of public procurement contracts.<sup>18</sup>

Moreover, to date the following decrees have been adopted:

- a* Decree of the President of the Council of the Ministers, dated 10 August 2016, published in the Italian Official Gazette No. 203 of 31 August 2016 concerning the composition of the Control Centre (*Cabina di Regia*);
- b* Decree of the Ministry of Justice, dated 17 June 2016, published in the Italian Official Gazette No. 174 of 27 July 2016 concerning the approval of the schedules of the consideration based on quality for the design performances;
- c* Decree of the Ministry of Infrastructure and Transport No. 248, dated 10 November 2016, published in the Italian Official Gazette No. 3 of 4 January 2017 relating to specialist work categories;
- d* Decree of the Ministry of Infrastructure and Transport No. 263, dated 2 December 2016, published in the Italian Official Gazette No. 36 of 13 February 2017 regarding the requirements for the operators in architectural and engineering services;

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11 ANAC Guidelines No. 8, adopted by Resolution No. 950 of 13 September 2017, published in the Italian Official Gazette No. 248 of 23 October 2017.

12 ANAC Guidelines No. 9, adopted by Resolution No. 318 of 28 March 2018, published in the Italian Official Gazette No. 92 of 20 April 2018.

13 ANAC Guidelines No. 10 adopted by Resolution No. 462 of 23 May 2018, published in the Italian Official Gazette No. 138 of 16 June 2018.

14 ANAC Guidelines No. 11 adopted by Resolution No. 614 of 4 July 2018, published in the Italian Official Gazette No. 178 of 2 August 2018, updated by Resolution No. 570 of 26 June 2019 published in the Italian Official Gazette No. 182 of 5 July 2019.

15 ANAC Guidelines No. 12 adopted by Resolution No. 907 of 24 October 2018, published in the Italian Official Gazette No. 264 of 13 November 2018.

16 ANAC Guidelines No. 13 adopted by Resolution No. 114 of 13 February 2019, published in the Italian Official Gazette No. 50 of 28 February 2019.

17 ANAC Guidelines No. 14 adopted by Resolution No. 161 of 6 March 2019, published in the Italian Official Gazette No. 73 of 27 March 2019.

18 ANAC Guidelines No. 15 adopted by Resolution No. 494 of 5 June 2019. Published in the Italian Official Gazette No. 182 of 5 August 2019.

- e* Decree of the Ministry of Infrastructure and Transport, dated 2 December 2016, published in the Italian Official Gazette No. 20 of 25 January 2017 concerning the publication of the calls for tenders in the information technology sector;
- f* Decrees of Ministry of Environment concerning the minimum environmental criteria in the tenders, dated 11 January 2017, published in the Italian Official Gazette No. 23 of 28 January 2017 and subsequent amendments; and dated 27 September 2017, published in the Italian Official Gazette No. 244 of 18 October 2017;
- g* Decree of the Ministry of Interior, dated 21 March 2017, published in the Italian Official Gazette No. 81 of 6 April 2017 concerning the monitoring of relevant infrastructures and criminal infiltrations;
- h* Decree of the Ministry of Economic Development No. 122, dated 7 June 2017, published in the Italian Official Gazette No. 186 of 10 August 2017 concerning meal ticket services;
- i* Decree of the Ministry of National Heritage and Culture No. 154, dated 22 August 2017, published in the Italian Official Gazette No. 252 of 27 October 2017 concerning the public works regarding cultural heritage;
- j* Decree of the Ministry of Foreign Affairs No. 192, dated 2 November 2017, published in the Italian Official Gazette No. 296 of 20 December 2017, concerning foreign tender procedures;
- k* Decree of Ministry of Infrastructure and Transport No. 567, dated 7 December 2017, published in the Italian Official Gazette No. 12 of 16 January 2018, concerning the use of funds for major infrastructure projects awarded through a general contract;
- l* Decree of the Ministry of Infrastructure and Transport No. 14, dated 16 January 2018, published in the Italian Official Gazette No. 57 of 9 March 2018 concerning the planning of works, services and supplies of the Public Administration;
- m* Decree of the Ministry of Infrastructure and Transport No. 560, dated 1 December 2017, published on 16 January 2018, concerning the Building Information Modelling (BIM) platform for tenders and concessions of works;
- n* Decree of the President of the Council of the Ministers No. 76, dated 10 May 2018, published in the Italian Official Gazette No. 145 of 25 June 2018, concerning methods of execution, types and thresholds of the works subject to public debate;
- o* Decree of Ministry of Infrastructure and Transport, dated 12 February 2018, published in the Italian Official Gazette No. 88 of 16 April 2018, concerning the determination of the registration fee for registration in the register of members of the awarding committees and the related fees;
- p* Decree of Ministry of Infrastructure and Transport No. 31, dated 19 January 2018, published in the Italian Official Gazette No. 83 of 10 April 2018, concerning the standard contract forms for surety guarantees provided for in Articles 103, Paragraphs 9 and 104 of the PCC;
- q* Decree of Ministry of Infrastructure and Transport No. 49, dated 7 March 2018, published in the Italian Official Gazette No. 111 of 15 May 2018, concerning the guidelines on the methods of performing the functions of the Director of Works and the Director of Execution of the contract;
- r* Decree of Ministry of Infrastructure and Transport, dated 31 January 2018, published in the Italian Official Gazette No. 88 of 16 April 2018, concerning the determination of the limits of the remuneration of the Arbitration Board (*Collegio Arbitrale*);

- s Decrees concerning the minimum environmental criteria in different sector such as public lighting (supply, design and services) public green areas, planning of works, services and supplies of the Public Administration; and
- t Decree of the Ministry of Foreign Affairs No. 192, dated 2 November 2017, published in the Italian Official Gazette No. 296 of 20 December 2017, concerning the general directives governing the procedures for selecting the contractor and performing the contract abroad, pursuant to Article 1 Paragraph 7 of the PCC.

Additional ANAC guidelines, as well as a number of ministerial decrees, have not yet been issued.

Please note that pursuant to Article 216 Paragraph 27 *octies* of the Sblocca Cantieri Decree as amended by the Sblocca Cantieri Law, a number of ANAC guidelines (e.g., ANAC Guidelines No. 3 and 4) and ministerial decrees will be replaced by a new regulation implementing the PCC (the Single Regulation), which has not yet been issued. The Ministerial Committee in charge of drafting the text of the Single Regulation has recently stated that the release of the final text should take place within the next few weeks (although such release could be delayed by the covid-19 emergency).

Once issued, the Single Regulation shall replace a considerable number of ANAC guidelines and ministerial decrees already adopted to implement the PCC (that, until the adoption of the Single Regulation, shall remain in force to the extent that they are consistent with the PCC and the issues raised in the course of some EU infringement proceedings commenced against Italy) and shall contain, in particular, provisions concerning, among others:

- a appointment, role and tasks of the figure in charge of the tender procedure (the RUP);
- b design of works, services and supplies, and verification of the designs;
- c qualification system and requirements of the work contractors and general contractors;
- d procedures for the awarding and implementation of works, services and supply contracts below the EU thresholds;
- e work direction;
- f performance of works, services and supply contracts, accounting measures, suspension and liquidated damages;
- g testing and verification of conformity;
- h award of architecture and engineering services; and
- i works relating to cultural heritage.

Pending the entry into force of the Single Regulation, the Ministry of Infrastructure and Transport and ANAC are authorised to amend the relevant decrees and guidelines, respectively, for the purposes of closing off the above-mentioned infringement proceedings. Finally, following the entry into force of the Single Regulation, the ANAC Guidelines that concern aspects that will be regulated by or will be not consistent with provisions of the Single Regulation shall become ineffective.

Case law developments have spanned a wide range of issues, such as enforcement of the bid bond in favour of the contracting authority, should the bidder fail to sign the

contract;<sup>19</sup> contract award annulment;<sup>20</sup> bidders' ability to rectify documentation filed with the contracting authority;<sup>21</sup> and qualification requirements based on social security contributions.<sup>22</sup>

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The PCC is applicable to public entities encompassing the central government, any regional or local authority, and any association formed by such entities.

Additionally, the PCC's scope also includes the following entities:

- a* bodies governed by public law, that is, bodies in compliance with the following characteristics: 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 central government, 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 and at least half of the members are appointed by the central government, regional or local authorities, or by other bodies governed by public law;
- b* public undertakings over which a public entity exercises a dominant influence by virtue of its ownership thereof, its financial participation therein or the rules governing it;
- c* private entities acting on the basis of 'special or exclusive' rights, granted by a competent authority, in any of the utilities sectors provided for by Articles 115 to 121 of the PCC;
- d* works and services concessionaries; and
- e* private entities that hold building permits when such entities directly undertake the obligation to execute town planning works in lieu of payment of the relevant contribution.

#### ii Regulated contracts

The PCC applies to public works, supplies and services contracts, in the ordinary sectors and in the utilities sectors. The utilities sectors include: gas and heat; electricity; water; transport services; ports and airports; postal services; and extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

Public contracts in the defence and security sectors are awarded pursuant to the PCC and specific rules set forth by Legislative Decree No. 208/2011, implementing Directive No. 2009/81/EU.

The PCC also provides for an organic regulation of public-private partnership (PPP) contracts, including concession contracts.

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19 Council of State, Section III, Decision No. 3765/2016. Council of State, Section VI, Decision No. 4349/2017.

20 Council of State, Section III, Decision No. 5026/2016. Council of State, Section V, Decision No. 2181/2018.

21 Council of State, Section V, Decision No. 3667/2016. Council of State, Section V, Decision No. 4789/2017.

22 Council of State, Plenary Meeting No. 5/2016 and No. 10/2016. Council of State, Section V, Decision No. 2529/2017 and No. 673/2018.

PPPs are defined as contracts for pecuniary interest, concluded in writing, by means of which one or more contracting authorities entrust one or more economic operators with a set of activities including the execution, transformation, maintenance and operation of a work or service, the consideration for which consists in the availability or in the right to exploit the works or services or in the performance of a service connected to such works by undertaking the risk. The PPP contracts include, *inter alia*, work and service concessions, the project financing procedures, the availability contract and financial leasing.

Moreover, the definition of PPP expressly recalls the application of the Eurostat decisions under the public accounting aspects. As a general rule, the private sector partner has to be competitively tendered.

Concession contracts are defined as agreements for pecuniary interest concluded in writing by means of which one or more contracting entities entrust one or more economic operators with the execution of works or the provision and the management of services the consideration for which consists either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment.

The award of a concession, as well as any other PPP contract, shall involve the allocation to the concessionaire of an operating risk in exploiting the works or services, encompassing demand or supply risk or both. The concessionaire or private partner in a PPP contract shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services that are the subject matter of the contract. The part of the risk transferred to the concessionaire or private partner in a PPP contract shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire or private partner in a PPP contract shall not be merely nominal or negligible. Specific rules are provided in this respect by the PCC in relation to highway concessionaires for which the traffic risk is expressly included in the operational risk.

As far as PPP and concession contracts are concerned, the PCC also provides for a set of specific rules with regard to bidding process, duration of the contract, public contribution, early termination, and revision of the financial and economic plan. In this respect, it is worth mentioning that recently Article 35 of Law Decree No. 162/2019, as converted, with amendments, into Law No. 8/2020, introduced certain restrictive provisions concerning early termination of highway and motorway concessions that partially derogate from the PCC's provision.

The PPP regime has been strengthened further by the Corrective Decree. Among the main changes introduced by this, it is worth highlighting:

- a* the obligation of the contractor to prove the availability of financing and, accordingly, provision of a duration to be initially set depending on the amortisation period of the investment;
- b* the obligation of the contracting authority to provide for the termination of the PPP contract in the tender if the facilities agreement is not entered into within a fair term, namely within 18 months of the execution of the contract;
- c* an increase from 30 to 49 per cent of the public contribution payable to the contractor to ensure the economic and financial balancing of the PPP contract; and
- d* recognition of hedging costs among the indemnities due to the contractor in any case of early termination of the PPP contract due to default of the contracting authorities

or revocation for public reasons and the provision of specific indemnities due to the contractor in case of withdrawal caused by the lack of an agreement on the rebalancing of the financial plan.

Moreover, the Corrective Decree has strengthened the power and role of the ANAC in the PPP and concessions sector. Particularly, the ANAC is entitled to adopt guidelines on the monitoring of PPP contracts conducted by the contracting authorities to ensure the correct allocation of the operational risk on the PPP contractor over the duration of the contracts. These guidelines are currently under discussion and expected imminently.

Article 211, Paragraphs 1 *bis*, 1 *ter* and 1 *quater* of the PCC (as recently introduced by Article 52 *ter* of Law Decree No. 50/2017 converted, with amendments, by Law No. 96 of 24 June 2017) enabled the ANAC to appeal any call for tender, acts and measures relating to significant contracts (e.g., PPP contracts) before the administrative courts if it considers that they violate the rules on public contracts relating to works, services and supplies. A specific ANAC regulation to govern in detail such powers has been recently adopted by ANAC.

Specific financial thresholds for determining individual contract coverage are set forth by the PCC. The PCC applies to both above-threshold and below-threshold contracts, although such contracts are treated differently in terms of the procurement procedures to be applied.

In this respect, it is worth highlighting that the Sblocca Cantieri Law has amended Article 36 of the PCC, providing specific rules for the award of contracts below the EU threshold. In particular, without prejudice to the possibility of launching ordinary tender procedures, work, service and supply contracts may be awarded according to the following modalities:

- a* direct awarding in relation to contracts not exceeding €40,000;
- b* direct awarding:
  - prior to assessment of three estimates (if any) in relation to work contracts having a value between €40,000 and €149,999; or
  - prior to assessment of five estimates (if any) in relation to service and supply contracts having a value between €40,000 and the EU thresholds for supplies and services set for by Article 35 of the PCC;
- c* negotiated procedure prior to consultation of at least 10 economic operators (if any) in relation to work contracts having a value between €150,000 and €349,999;
- d* negotiated procedure prior to consultation of at least 15 economic operators (if any) in relation to work contracts having a value between €350,000 and €999.999; and
- e* open procedure in relation to work contracts having a value equal to or higher than €1 million up to the EU thresholds for works.<sup>23</sup>

Moreover, regarding below-threshold contracts, the Corrective Decree extended the scope of the principles applicable to such contracts, providing for the application of the provisions concerning the conflict of interest and environmental sustainability criteria, as well as the faculty of the contracting authorities to insert social clauses in the calls for tender.

As far as above-threshold contracts are concerned, contracting authorities may award public contracts by a negotiated procedure without prior publication under specific conditions laid down by the PCC, such as:

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23 Article 36 of the PCC as amended by the Sblocca Cantieri Law.



- a* failed procurement;
- b* works, supplies or services that can be supplied only by a particular economic operator;
- c* extreme urgency;
- d* supply contracts where the products involved are manufactured purely for the purpose of research, study or development;
- e* additional deliveries by the former supplier, intended as a partial replacement or extension of existing supplies where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in technical difficulties in operation and maintenance;
- f* supplies quoted and purchased on a commodity market;
- g* 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; and
- h* new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract.<sup>24</sup>

As a general rule, variations to contracts are subject to authorisation of the contracting entity and must not alter the nature of the agreement. In particular, public contracts may be modified or transferred to a different supplier (as a consequence of a merger, demerger or transfer of a going concern) without competitively tendering the varied or transferred contract under specific conditions set forth by the PCC.

Certain contracts are excluded from the scope of the PCC due to their object. Examples include: concession contracts in water supply sector; certain financial or legal services; certain public transportation services, etc. Although the award of such contracts is not subject to the procedural rules laid down by the PCC, general principles governing public procurement (such as transparency, equal treatment, etc.) apply.

Without prejudice to the above, it must be underlined that due to the covid-19 pandemic, specific measures have been introduced by the Cura-Italia Law Decree in relation to the regulated contracts by the PCC, in order to support contractors affected by the crisis during the performance phase of the contracts. Among such measures, the following are worth mentioning:

- a* the compliance of the contractor with the covid-19 outbreak containment measures introduced by the government shall be always assessed pursuant to Articles 1218 and 1223 of Italian Civil Code in order to exclude liabilities of, liquidated damages to, breaches of the contractors in case of delayed performances, or failure to perform the contracts; and
- b* in order to ensure immediate cash flows, contractors are entitled to benefit from an advanced payment of 20 per cent of the contract amount pursuant to Article 35 of the PCC also in case of urgent delivery aimed at acceleration to the commencement of works, services and supplies.

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24 Article 63 of the PCC.

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

A framework agreement means a contract that is awarded in accordance with the procedures laid down by the PCC and concluded between one or more contracting authorities and one or more economic operators, aimed at establishing the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.<sup>25</sup>

The term of a framework agreement shall not exceed four years in the ordinary sectors and eight years in the special sectors, apart from exceptional cases duly justified, in particular by the subject of the framework agreement.

Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement. For the award of those contracts, contracting authorities may consult the economic operator that is party to the framework agreement in writing, requesting it to supplement its tender if necessary.

Where a framework agreement is concluded with more than one economic operator, contracts based on that agreement shall be awarded either with or without reopening competition among the economic operators parties to the framework agreement, depending on the conditions provided for by the PCC and on the basis of a reasoned decision of the contracting authority.

Contracting authorities may use a dynamic purchasing system for commonly used purchases.<sup>26</sup> Such procedure entails a completely electronic process, which follows the rules of a restricted procedure and is open throughout the period of its validity to any economic operator that satisfies the selection criteria.

Contracting authorities can launch autonomous tender procedures only under the condition that they are qualified to do so by the ANAC, in accordance with specific rules set forth by a governmental decree, which is still under discussion and expected to be adopted in the coming months.<sup>27</sup> According to recent case law,<sup>28</sup> until the Decree is approved, each local contracting authority is entitled to launch and manage any tender procedure.

Non-qualified contracting authorities shall necessarily purchase works, supplies or services from or through a central purchasing body (which can be used by qualified contracting authorities as well).

The role of central purchasing bodies has been strongly enhanced by recent legislation in the context of a national spending review programme. The main operating functions of central purchasing bodies are: to award supplies and services contracts as well as certain types of works contracts; to enter into framework agreements that can be used by qualified awarding authorities to award public tenders; and to manage dynamic purchasing systems and electronic markets.

The main central purchasing body is Consip SpA, a joint-stock company entirely held by the Ministry of Finance. Moreover, each region has its own central purchasing body,

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25 Article 54 of the PCC.

26 Article 55 of the PCC.

27 Article 38 of the PCC.

28 Administrative Court of Lombardy – Brescia, Section I, Decision No. 266/2019 (upheld on appeal by Council of State, Section III, Decision No. 1584/2020).

operating at a local level. Please note that the PCC provides for the use of a central purchasing body for those municipalities that are not provincial capitals,<sup>29</sup> but the Sblocca Cantieri Law has suspended such provision until 31 December 2020.

## **ii Joint ventures**

As a general principle, contracting authorities should always award public contracts pursuant to public procurement procedures, regardless of whether the counterparty is a private or public entity.

However, the PCC has introduced specific rules for in-house providing, pursuant to which the award of a public contract shall fall outside the scope of public procurement rules where all of the following conditions are met: (1) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (2) more than 80 per cent of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority; and (3) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person.

Pursuant to Article 192 of the PCC, a special register of the contracting authorities operating through in-house awards is held by the ANAC.

Further, in the utilities sectors, the PCC does not apply to contracts awarded by: a joint venture (JV) set up by public entities or public undertakings to an entity that is affiliated with a member of the JV; or a JV's member to the JV itself.

## **V THE BIDDING PROCESS**

### **i Notice**

As a general rule, contracting authorities comply with the general principle of transparency, according to which all their acts concerning public tenders must be formally published.<sup>30</sup>

Specific rules are laid down by the PCC with regard to publication of: contract notices, both at the EU level and at the national level, as well as on the buyer profile; prior information notices; and contract award notices on the results of the procurement procedure.

### **ii Procedures**

Contracting authorities may use the following tender procedures:

- a* open procedures, where any interested economic operator may submit a tender in response to a call for competition;<sup>31</sup>
- b* restricted procedures, where any economic operator may submit a request to participate in response to a call for competition, and only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender;<sup>32</sup>

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29 Article 37, Paragraph 4 of the PCC.

30 Article 29 of the PCC.

31 Article 60 of the PCC.

32 Article 61 of the PCC.

- c* competitive procedures with negotiation, where any economic operator may submit a request to participate in response to a call for competition. However, only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender, which shall be the basis for the subsequent negotiations. Afterwards, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them. The contracting authority then assesses the final tenders on the basis of the award criteria and awards the contract;<sup>33</sup>
- d* negotiated procedure without prior publication, which can be used by awarding authorities under specific circumstances set forth by the PCC;<sup>34</sup>
- e* competitive dialogues. In accordance with such procedural scheme, contracting authorities shall set out their needs and requirements in the contract notice and may also define them in a descriptive document. Any economic operator may submit a request to participate in response to a contract notice, but only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue. Contracting authorities then open a dialogue with the selected participants aimed at identifying and defining the means best suited to satisfying their needs. Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue;<sup>35</sup> and
- f* innovation partnership, introduced by the PCC implementing the 2014 Public Contracts Directive.<sup>36</sup>

Awarding authorities may also use electronic procurement or electronic auctions.

Following the Cura-Italia Law Decree, specific procedures derogating from the PCC and, specifically, from the requirements of the negotiated procedures described in Section III.ii, above) and mandatory checks on the operators, have been introduced to allow urgent supplies, services and works in fields deemed essential during the covid-19 emergency. In particular, until 31 December 2020, public authorities are authorised:

- a* to acquire IT services and supplies, preferably based on the cloud SaaS (software as a service), as well as connectivity services through negotiated procedures by selecting the best offeror among four economic operators, of which at least an innovative start-up or an innovative small and medium-sized enterprise. Also, simplification has been introduced with regard to the checks on the awardee and timing for the signature of the contracts. Indeed, contracts shall be immediately entered into between the parties (in derogation from the standstill period provided under Article 32 of the PCC) prior to a mere self-certification of the awardee attesting the absence of disqualification causes and the full compliance with general, financial and technical requirements provided by the tender and the anti-mafia legislation; and

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33 Article 62 of the PCC.

34 Article 63 of the PCC.

35 Article 64 of the PCC.

36 Article 65 of the PCC.

- b* to direct award public refurbishment works of prison buildings damaged during the covid-19 emergency for extreme urgency reasons, by derogating to the threshold of €200,000 set by Article 163 of the PCC, provided that the works amount does not exceed the EU thresholds.

Moreover, in order to ease contracts in the health or school sectors and support the business of Italian enterprises in the international context during the emergency state, without any time limitation:

- a* public authorities are authorised to award supplies, services and works contracts related to interventions provided by a specific fund named ‘Fondo per la Promozione Integrata’ (e.g., extraordinary campaigns to support exports and internationalisation of the sectors most strongly affected by the economic crisis, promotion initiatives of the country system on foreign markets, etc.), through negotiated procedures without prior publication of a call for tenders by selecting five operators on the market (if any) and regardless of the occurrence of the legal requirements that would justify the recourse to such procedure;
- b* entities of the National Health Service are authorised to direct award health supplies and services financed through donations of individuals and legal entities pursuant to Article 793 of the Italian Civil Code, provided that the EU thresholds provided under Article 35 of the PCC are not exceeded and the awarding complies with the donation reasons (Article 99 Paragraph 3 of the Cura-Italia Law Decree); and
- c* school entities are authorised to acquire digital platforms and devices for distance learning derogating from the PCC whenever it is not possible to recourse to framework agreements of purchase central bodies for contracts exceeding the EU thresholds or to the MEPA portal for contracts below the EU thresholds.

Before the Cura-Italia Law Decree, Article 34 of Law Decree No. 9/2020 also provided that until the end of the state of emergency, the Civil Protection Department and other entities identified by a specific order are entitled to acquire any personal protective equipment and other medical devices in derogation of the PCC.

### **iii Amending bids**

As a general principle, no material changes regarding either the conditions of the tendered contracts or the requirements for eligibility to bid are allowed.

When the evaluation criteria is the most economically advantageous tender, contracting authorities may authorise or require tenderers to submit variants, indicating such faculty in the contract notice. However, variants shall be linked to the subject matter of the contract, and only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

## **VI ELIGIBILITY**

### **i Qualification to bid**

In order to participate in tender procedures, bidders must comply with the following three main sets of requirements, pertaining to:

- a* general moral requisites, aimed at excluding from tenders entities falling into the following categories:

- those who have been convicted of certain types of crimes with an unappealable judgment (such as participation in a criminal organisation, corruption, bribery, fraud, terrorism, etc.);
  - those who have failed to pay social security contributions or taxes;
  - those who are facing bankruptcy proceedings (or entering a proceeding for the declaration of bankruptcy);
  - those who have been found guilty of material professional misconduct;
  - those who have made some misrepresentations;
  - those who have conflicts of interests in the tender, and
  - those who are subject to the sanctions disqualifying them from exercising certain activities provided by Legislative Decree No. 231/2001, etc.;<sup>37</sup>
- b* economic and financial capacity; and
- c* technical and professional capacity.

Economic operators may be excluded from the tender only in the event the above-mentioned requirements are not met, or should the bid not be compliant with mandatory requirements set forth by the procurement documents.

With regard to the moral requisites under (a), the Corrective Decree introduced changes concerning the general moral requirements provided by Article 80 of the PCC, widening the individuals obliged to personally declare the absence of the exclusion's causes from the tender, including the *institori* and general attorneys.

Moreover, the Sblocca Cantieri Law has increased the list of the grounds causing the exclusion of the tenderers, introducing the material defaults vis-à-vis subcontractors ascertained with a final judgment. Also, the Sblocca Cantieri Law has outlined the duration of the exclusion from the tender where the final judgment does not provide for a fixed duration of the ancillary penalties applied to the competitor. In particular, save for specific exceptions, such duration shall be: (1) permanent in the case of entities convicted of certain types of crimes providing for a permanent prohibition to contract with public administrations, as an ancillary penalty; (2) seven years in the case of entities convicted of certain types of crimes providing for a temporary prohibition to contract with public administrations, as an ancillary penalty; and (3) five years in cases other than those provided under (1) and (2).

In the cases in points (2) and (3), the duration of the exclusion shall be equal to the duration of the main penalty applied to the competitor if the latter is lower than the ancillary penalty.

Moreover, the Sblocca Cantieri Law clarifies that in the cases provided under Article 80, Paragraph 5 of the Code (i.e., the bullet points under (a) above, the duration of the exclusion from the tender shall be three years starting from the exclusion measure adopted by the contracting authority (or from the final judgment in the case of judicial challenges).

In specific cases, should a competitor make good any damage caused and adopt measures to prevent other crimes, it may be readmitted to the procedure.

In addition, the contracting authorities have been granted new powers in order to demonstrate, for the purposes of the exclusion, that the company was guilty of serious misconduct putting in doubt its integrity and reliability.

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37 Article 80, Paragraph 5 of the PCC.

In the case of missing or incomplete documentation filed by the operator participating in the tender procedure, the latter is entitled to regularise its position within 10 days from the relevant notice received from the contracting authority.

The requirements described under (b) and (c) must be drawn up by the awarding authorities as well as related and proportionate to the subject matter of the contract.

## **ii Conflicts of interest**

The PCC provides for a wide concept of conflicts of interest, which covers any situation where staff members of the contracting authority who are involved in the conduct of the procurement 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.

Contracting authorities 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.<sup>38</sup>

Personnel of contracting authorities that have a conflict of interest must give specific notice thereof to the contracting authority and must abstain from the procurement procedure.

## **iii Foreign suppliers**

Pursuant to Article 45 of the PCC, Italian contracting entities shall allow economic operators established in EU Member States to participate in national procurement procedures.

Insofar as they are covered by the GPA and by the other international agreements by which the EU is bound, contracting authorities shall accord to the economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators established in Italy.<sup>39</sup>

# **VII AWARD**

## **i Evaluating tenders**

As a general rule, contracting authorities may award public contracts either on the basis of the most economically advantageous tender criterion, which takes into account both the economical and technical aspects (e.g., quality, price, technical merit, aesthetic, functional and environmental characteristic), using a cost-effectiveness approach or on the basis of the lowest price criterion. Quality criteria may include: organisation, qualification and experience of staff assigned to performing the contract; after-sales service and technical assistance; and environmental or social aspects.

Following the amendments introduced by the Sblocca Cantieri Law, the freedom of the contracting authorities to choose the awarding tender criterion varies depending on whether the tender procedure is above or below the EU threshold.

As to the tender procedures above the EU threshold, the awarding criterion shall be the most economically advantageous tender.

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38 Article 42 of the PCC.

39 Article 49 of the PCC.

Particularly, the following contracts shall be awarded exclusively with the most economically advantageous tender criterion:

- a* service contracts relating to social services and catering services in hospitals, care facilities and schools, highly intensive manpower services, save for amounts below the threshold of €40,000;
- b* service contracts for the award of engineering, architectural and other technical and intellectual services for an amount equal to or higher than €40,000; and
- c* service and supply contracts characterised by significant technological content or which are innovative in nature having an amount equal to or higher than €40,000.<sup>40</sup>

Otherwise, services and supply contracts with standard features or whose terms are defined by the market, except for highly intensive manpower services, may be awarded with the lowest price criterion, but in such case, the contracting authority shall give evidence of the grounds of such choice in the tender documentation.<sup>41</sup>

As to the tender procedures below the EU threshold, the *Sblocca Cantieri* Law provides that, save for the cases under (a), (b) and (c) above where the choice of the most economically advantageous tender criterion is mandatory, the contracting authorities will be free to choose between the most economically advantageous tender criterion and the lowest price criterion.<sup>42</sup>

## **ii National interest and public policy considerations**

Specific regulations are laid down with regard to strategic infrastructures of national interest, aimed at: ensuring correct planning and priority in their execution; providing them with financial support through specific national funds; and providing the awarded contract with greater stability.

As far as public policy considerations are concerned, public contracts must be awarded in accordance with the principles of environmental protection and energy efficiency,<sup>43</sup> and may also consider social criteria.

Unless justified by the subject matter of the contract, technical specifications laying down the characteristics required for a work, service or supply shall not refer to a specific make or source, or a particular process that characterises the products or services provided by a specific economic operator, or to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.<sup>44</sup> Such reference shall be permitted only on an exceptional basis.

Where a contracting authority uses the option of referring to technical specifications, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

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40 Article 95, Paragraph 3 of the PCC.

41 Article 95, Paragraph 4 of the PCC.

42 Article 36, Paragraph 9 *bis* of the PCC.

43 Articles 4 and 30 of the PCC.

44 Article 68 of the PCC.



## VIII INFORMATION FLOW

On request from the tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days of receipt of a written request, inform:

- a* any unsuccessful tenderer of the reasons for the rejection of its tender;
- b* any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and
- c* any tenderer that has made an admissible tender of the progress of negotiations and dialogue with tenderers.<sup>45</sup>

Contracting authorities withhold information regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.<sup>46</sup>

Further, regardless of a specific request, contracting authorities shall as quickly as possible, and in any event within five days from the adoption of the measure, inform:

- a* the awardee and other recipients identified by the PCC of the contract award, as well as the signing date of the contract;
- b* excluded bidders of their disqualification;
- c* any candidate of the decision not to award a contract or not to conclude a framework agreement;<sup>47</sup> and, following the amendments introduced by the Sblocca Cantieri Law; and
- d* any candidates of the measures aimed at excluding from or admitting in the tender procedure following the requirements checks provided under Article 80 of the PPC.<sup>48</sup>

Once the contract is awarded, each bidder having a qualified interest can ask to have access to the bidding documents of the awardee as well as other undisclosed procurement documents. However, contracting authorities shall not grant access to information with regard to:

- a* information concerning technical or trade secrets of the bidder, unless access to this information is necessary for filing a legal action;
- b* legal opinions obtained for the solution of potential or ongoing disputes concerning public contracts; and
- c* technical solutions or software used by the contracting authority for electronic auctions, where covered by industrial property rights.<sup>49</sup>

As far as the standstill period is concerned, the PCC provides that the contract cannot be signed before 35 days from the last notice of the contract award by the contracting authority.<sup>50</sup>

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45 Article 76, Paragraphs 1 and 2 of the PCC.

46 Article 76, Paragraph 4 of the PCC.

47 Article 76, Paragraph 5 of the PCC.

48 Article 76, Paragraph 2 *bis* of the PCC.

49 Article 53 of the PCC.

50 However, exceptions to the standstill rule are set forth by Article 32 of the PCC.

Should the contract award be challenged and interim measures (such as suspension of the effects) be requested, the contract cannot be signed before the issuance of the precautionary decision by the administrative court.<sup>51</sup>

## IX CHALLENGING AWARDS

Litigation costs in the field of public procurement may depend on various circumstances. In particular, bringing a legal action before the administrative courts involves the payment of a tax ranging from €300 to €6,000.<sup>52</sup>

Time frames may also vary depending on a number of factors, such as the complexity of the case and the workload of the court seized of the case. However, specific rules are set forth by the Administrative Trial Code (ATC)<sup>53</sup> to accelerate the duration of judicial proceedings in the field of public procurement.

### i Procedures

In the Italian legal framework, enforcement of public procurement rules is granted not only through judicial review, but also by means of alternative dispute resolution (ADR), encompassing the following procedures:

- a friendly settlement agreements, which can be used by contracting authorities in the event the amount of the exceptions raised and quantified by the contractor is equal to or higher than 5 per cent and up to 15 per cent of the contract value;
- b civil settlements;
- c the arbitration panel of the ANAC; and
- d pre-litigation advice to be issued by the ANAC with regard to disputes arising during the tender procedures.

The Corrective Decree introduced some changes to the ADRs, in particular:

- a the removal of the technical advisory board, which could be entrusted by the parties with the task of submitting a non-binding solution to disputes; and
- b in the case of friendly settlement agreements, the enterprise refusing the proposal of friendly settlement will only be entitled to challenge it before a court within the peremptory term of 60 days.

Finally, some amendments have been introduced in relation to the provisional regime, providing that the arbitration procedures shall be applied to contracts whose call for tender or invitations to the tender have been published before the entrance into force of the PCC.

As far as judicial reviews are concerned, a distinction must be drawn between actions regarding the awarding procedure, which are subject to the jurisdiction of administrative courts, and actions concerning the performance of the contract once it has been awarded, which are subject to the jurisdiction of civil courts.

Judicial claims are regulated by the ATC. As a general principle, any interested party is entitled to challenge measures adopted by the contracting authority within 30 days of the communication (or acknowledgment) of the measure itself. Should the contract notice not

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51 Article 32, Paragraph 11 of the PCC.

52 Article 13 Paragraph 6 *bis* of the Decree of the President of the Republic No. 115/2002.

53 Legislative Decree No. 104/2010.

be published, the 30-day period starts from the day following the publication of the contract awarding notice. If no such notice is issued, challenge must be filed within six months of the day following the contract signing.

The appeal may be filed with the competent regional court of first instance, whose decisions may be challenged before the administrative court of second instance (the Council of State).

## **ii Grounds for challenge**

Appeals before administrative courts may be grounded on the breach of the procurement rules set forth by the law and the procurement documents as well as on the infringement of the general principles governing the exercise of administrative power (such as lack of competence, lack of a preliminary investigation and failure to state sufficient reasons, illogical and contradictory motivation).

## **iii Remedies**

Generally, claimants are entitled, *inter alia*, to challenge administrative measures issued by contracting authorities (such as calls for tender, admission or exclusion of a candidate) and ask for interim measures aimed at suspending the effectiveness of the challenged measure. Administrative courts may also award damages, including the loss of chances.

Should the court set aside the contract award, the former is bound to declare the contract ineffective, in whole or in part, only in cases of material violations set forth by the ATC.<sup>54</sup>

However, in spite of such serious violations, the contract remains effective if overriding reasons relating to a general interest require that its effects are maintained.

On the other hand, the administrative court identifies the following alternative sanctions to be applied alternatively or cumulatively:

- a* a fine to be paid to the contracting authority, whose amount range from 0.5 to 5 per cent of the value of the contract;<sup>55</sup> and
- b* a shortening of the contract duration, where possible, ranging from 10 to 50 per cent of the remaining duration at the date of the court decision.

Apart from the above-mentioned cases, the court that overturns the contract award determines whether or not to declare the contract ineffective.

Further procedural provisions are set forth with regard to disputes concerning strategic infrastructures. Apart from cases in which the court is bound to set aside the contract, the suspension or annulment of the contract award does not imply the ineffectiveness of the contract already signed, and the applicant is only entitled to claim for damages.

## **iv Extraordinary measures**

Due to the covid-19 emergency, Article 84 of the Cura-Italia Law Decree provides for several exceptions to the provisions of the ATC generally aimed at suspending the judicial activities, an exception being made for those that are urgent that cannot be postponed.

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54 Article 121 of the ATC.

55 Pursuant to Article 123, Paragraph 1, lett. a) of the ATC, the contract value is intended as the award price.

Among others, we highlight that Article 84 provides for the postponement of all hearings scheduled between 8 March 2020 and 15 April 2020. In addition, from 15 April until 30 June 2020, disputes will be decided by the Court without the oral discussion.

Moreover, to avoid human gatherings, the President of the High Administrative Court and of each regional administrative court may adopt all measures needed to meet health and hygiene requirements set forth by Law Decree No. 6, dated 23 February 2020.

## X OUTLOOK

As anticipated above, the PPC has been further amended by the Sblocca Cantieri Law.

Among the main changes to the PCC (not mentioned before), the following are worth noting:

- a* the percentage of works, services or supply that may be subcontracted to third parties has been increased from 30 per cent to 40 per cent of the contract amount until 31 December 2020;<sup>56</sup> also, the previous obligation to indicate at least three subcontractors in the tender and the checks on the general requirements of subcontractors have been suspended until 31 December 2020;<sup>57</sup>
- b* the prohibition on jointly awarding the design and construction of works (i.e., ‘integrated contract’) provided under Article 59, Paragraph 1 of the PCC has been suspended until 31 December 2020;<sup>58</sup> and
- c* for the purposes of the SOA qualification of the requirements of economic and technical capacity, the period of documentable activity has been extended to 15 years preceding the signing date of the contract.<sup>59</sup>

Forthcoming developments in the field of public procurement are expected to be brought by the Single Regulation which is supposed to be issued in the coming weeks (even though the final release could be delayed due to the covid-19 emergency). Moreover, from the first comments of the government committee in charge of the Single Regulation, certain legal issues provided by the PCC (subcontracts, awarding criteria, testing, qualifications of the contracting authorities, etc.) have not been touched on in detail by the Single Regulation and, therefore, they will need to be further amended.

Among the expected amendments, the main one will regard the subcontracts. Indeed, both the European Commission and the Court of Justice, with the recent Decision No. 63 of 26 September 2019, have stated that the limit thresholds to subcontract provided by the PCC are contrary to EU law. Therefore, it is likely that Article 105 of the PCC will be amended to comply with the decision taken at EU level and to provide the contracting authorities with a clear guide in this sector. From the recent warning notice to the Italian Parliament (No. 8 of 13 November 2019), ANAC asked for a legislative initiative and proposed to

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56 Article 1, Paragraph 18, first period, of the Sblocca Cantieri Law, that amended Article 105, Paragraph 2 of the PCC.

57 Article 1, Paragraph 18, second period, of the Sblocca Cantieri Law, that amended Article 105, Paragraph 6 of the PCC.

58 Article 1, Paragraph 1, lett. b), of the Sblocca Cantieri Law, that amended Article 59, Paragraph 1 of the PCC.

59 Article 1, Paragraph 20, lett. q), of the Sblocca Cantieri Law, that amended Article 84, Paragraph 4 lett. b) of the PCC.

(1) generally admit subcontracts requesting to the contracting authorities to strictly motivate any limitation to the subcontracts in relation to the tender context and specific sectors so as to ensure competition and (2) maintain a prohibition to subcontract only the entire contract or its relevant part.

In addition to the above, in order to revitalise the public procurement sector strongly affected by the emergency situation, it is likely that further measures affecting public procurement will be adopted both during the covid-19 pandemic and following the end of the health crisis, taking into account that simplification and acceleration of the tender procedures, specifically in relation to public infrastructure and PPP contracts, will be key measures to relaunch the Italian economy and get out of the crisis.

# MEXICO

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## I INTRODUCTION

Article 134 of the Mexican Constitution sets forth the values for the use of financial resources and public procurement at all governmental levels in Mexico. At the federal level, government procurement is particularly subject to: (1) the Law of Procurement, Leasing and Services for the Public Sector (LAASSP); and (2) the Law of Public Works and Related Services (LOPSRM), both with their respective regulations (jointly the Procurement Laws). Under the Mexican Constitution and the Procurement Laws, the general rule for public procurement shall be through public biddings and exceptionally by means of invitation to at least three participants or direct awards.

The entities subject to the Procurement Laws include: (1) the Presidency's administrative agencies; (2) the federal Ministries of State and the Legal Executive Office; (3) the Chief Federal Prosecutor; (4) federal state-owned companies or trusts; and (5) Mexican States, municipalities and its public agencies that totally or partially use federal resources. Generally the entities mentioned in items (1) to (4) issue specific internal policies, rules and guidelines that further detail the procurement of goods, leases, services and public works.

On the other hand, certain federal entities known as state productive companies, the legislative and judiciary branches, and autonomous constitutional bodies have their own specific regulations for public procurement (see Section III). States and municipalities also have their own specific public procurement rules.

On an international level, Mexico may carry out public procurement with local or foreign bidders by following the relevant free trade agreements' applicable chapters on government purchases. 'Public Procurement' chapters have been included in the agreements executed by Mexico with: the US and Canada (i.e., the North American Free Trade Agreement (NAFTA)), Colombia, Costa Rica, Nicaragua, Israel, European Union, European Free Trade Association, Japan, Chile and the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP).<sup>2</sup> Although Mexico has been a member of the World Trade Organization since 1995, the Government Procurement Agreement does not apply.

Government contract regulations shall follow the principles set forth on Article 134 of the Mexican Constitution: (1) efficiency to obtain services, leases and make acquisitions at a low cost; (2) efficacy in order to obtain the best results; (3) economy to take advantage of

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2 Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

and save the resources obtained; (4) transparency in the public procurement process, with standard procedures applicable to all participants and straightforward procurement results; and (5) honesty, including the proper exercise of authority by public officials.

According to recent amendments introduced by the new administration, with the exception of the Ministry of Finance and Public Credit (SHCP), Ministry of National Defence and Ministry of Navy, the heads of the new Administration and Finance Units (in charge of planning, budget, human and material resources, and accounting) of each federal entity will be appointed by the SHCP. Also, the SHCP has now the responsibility to establish and conduct the general policy on public procurement and consolidate procurement procedures for goods that it considers relevant (e.g., medicines), including the exercise of the corresponding budget.

The federal Ministry of Public Function (SFP) is the main agency in charge of verifying that public procurements comply with the Procurement Laws. The SFP may request information related to a specific project from public officials and suppliers that are involved with such procurement. Also, the Ministry of Economy is also empowered to oversee the enforcement of the Procurement Laws, particularly with respect to the promotion of small and medium businesses. The SFP may sanction conducts that violate the Procurement Laws by following the rules on the new General Administrative Responsibilities Law (LGRA). At the federal level, the Federal Superior Auditor (and autonomous body of the Chamber of Deputies) may also conduct oversight investigations of the use of public funds in government contracts. Similar accountability mechanisms exist on a state or municipal level.

On the other hand, public-private partnerships (PPPs) are also used by the Mexican government to promote long term competitive projects as an alternative to traditional public procurement procedures contemplated in the Procurement Laws. There are specific federal, state and even municipal regulations applicable to PPPs.

Finally, the granting of concessions regarding the use of public goods or the provision of public services are regulated under the relevant sector specific regulation and follow the principles of Article 134 of the Mexican Constitution.

## II YEAR IN REVIEW

In November 2019, the Federal Republican Austerity Law became effective for, among other things, the appropriate use of public funds by public servants, the nullity of contracts executed that were improperly granted, the prohibition on acquiring savings insurance and the like, and other restrictions in public procurement. At the same time, the LGRA was amended to include, among other things, new liabilities against public officials to avoid breaching federal administrative and government contracts regulations.

Also, additional guidelines were issued by the SHCP, to exercise its new powers regarding the consolidation of contracting procedures to acquire or lease goods and services within the federal government.

Notwithstanding the foregoing, we have not identified that public contracting practices have improved with the new administration in government and new problems and hurdles have been put in place.

On the other hand, the covid-19 pandemic has brought significant last-minute changes within government contracts' procedures at federal and local level. For ease of reference, the

SFP has recently issued an agreement to reduce health risks during the government contracts' procedures. At the same time, various administrative processes have been suspended to minimise the potential risks of the pandemic.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The entities subject to the Procurement Laws are those set forth in Section I. The entities listed below have their own procurement regulations, which follow the guidelines of Article 134 of the Mexican Constitution:

- a* autonomous constitutional bodies, such as the National Institute of Access to Public Information, the Federal Institute of Telecommunications, the Federal Economic Competition Commission, the National Commission of Human Rights and the National Institute of Elections, among others;
- b* entities that have a specific regime on public procurement such as the state productive companies (including its subsidiaries): Mexican Oil Company (Pemex) and the Federal Electricity Commission (CFE); and
- c* public investigation centres conducting acquisitions, leasing and services with their own funds for scientific investigations and for technology development encompassed under the Technology and Science Law.

#### ii Regulated contracts

In general terms, the contracts that are regulated by the LAASSP are the following: (1) the acquisitions and leasing of movable goods; (2) the acquisitions and leasing of movable goods that must be incorporated into immovable goods to accomplish the public works; (3) the acquisitions of movable goods that will be installed into an immovable good under the responsibility of public agencies or bodies; (4) the hiring of services relating to the incorporation of movable goods into immovable goods; and (5) the hiring of consultants, advisers or investigators.

On the other hand, the contracts regulated by the LOPSRM are those whose main purpose is building, installing, extending, remodelling, restoring, preserving, maintaining, modifying and demolishing immovable goods, such as: (1) maintenance, restoration and modification of goods incorporated into immovable goods; and (2) acquisition and installation of movable goods into immovable goods.

The Procurement Laws provide that public procurement may be carried out by means of the following procedures:

- a* public bidding (as a general rule) as an administrative procedure through which the relevant entity summons suppliers to offer the best conditions for procurement purchase;
- b* an invitation procedure to at least three participants (as an exception) where the relevant entity selects at least three suppliers that must have the capacity for immediate response to provide the relevant goods, lease, services or works under specific cases; and
- c* direct award (as an exception) where one supplier who has been previously selected by the relevant entity is directly awarded with the relevant contract under specific cases.



The LAASSP provides 20 and the LOPSRM 14 specific cases in which the invitation and direct award procedures could be conducted as exceptions and subject to the responsibility of the relevant entity. Some common examples are the following (in both laws): (1) where a single supplier has a special licence or exclusive rights (e.g., IP rights); (2) in cases of risk or danger to the economy, social order, public services or environmental security; (3) in the event of circumstances in which there could be important and justified additional losses or costs; (4) for procurements on defence, military and national or public security matters; and (5) in the event of force majeure and acts of god.

Under the Procurement Laws, government contracts must contain the following: (1) the name of the contracting entity; (2) the type of procurement used; (3) the budget of the contract; (4) whether the price is fixed or may be modified; (5) for leasing, whether there is an option to purchase the goods; (6) percentages for advance payments; (7) payment dates and terms; (8) penalties; (9) currency, (10) non-assignment clause (except payment rights); (11) causes for termination; (12) whether licences, authorisations and permits are required; and (13) alternative dispute resolution, among others.

#### **IV SPECIAL CONTRACTUAL FORMS**

##### **i Framework agreements and central purchasing**

The LAASSP provides the possibility for the SFP to execute framework agreements with two or more suppliers that would allow a relevant entity to follow a direct award or invitation exceptional procedure. The framework agreement must establish the price, quality, conditions and scope of the project. Some examples of these types of agreements are food vouchers as payments, granting software licences, and administering vaccines, among others.

Consolidating public purchases are relatively increasing in Mexico. As a way of example, the Mexican Social Security Institute (IMSS) and the Institute of Security and Social Services for State Workers (ISSSTE) have carried out purchasing of medicines and medicine supplies by means of consolidating public procedures in recent years. By doing so, the Mexican government pretends to obtain competitive prices and assuring quality efforts. Also, the new government has announced additional consolidation of public procurement procedures controlled by the SHCP.

##### **ii Joint ventures**

According to the Procurement Laws, agreements or any other procurement documents that are executed by and between the federal or state agencies and entities that are not subject to these regulations. However, these agreements are governed by the Procurement Laws when the relevant entity that is bound to deliver or provide the appropriate goods or services does not have the capacity to do it by itself and hires a third party.

Moreover, unless otherwise provided, PPPs are not subject to the Procurement Laws, and the relevant works or services that must be performed by the relevant private entity to fulfil its duties on a PPP project are not subject to the Procurement Laws.

## V THE BIDDING PROCESS

### i Notice

According to the Procurement Laws, the call for competition for public contracts must be advertised in an electronic system called CompraNet, which is a governmental access-free mechanism. Among other things, the following information must be provided:

- a* name of the contracting entity;
- b* if the bidding process is national or international;
- c* description of the goods, leases, services or works that are going to be contracted;
- d* requirements to participate in the bidding process;
- e* criteria for evaluation of proposals and for the award of contracts; and
- f* draft of the contract.

Additionally, a summary of the call must be published in the Federal Official Gazette (DOF) including at least: (1) purpose of the bidding process; (2) volume of good, lease, services or public work to be procured; (3) number of the bidding process; (4) schedule process; and (5) the date on which the call was published in CompraNet.

Although autonomous constitutional bodies have their own regulations regarding public procurement, the rules established in those regulations for bidding process are quite similar from those established in the Procurement Laws.

On the other hand, as a result of Mexico's 2013 energy reform, procurement of hydrocarbons and electricity are out of the scope of the Procurement Laws and Pemex and the CFE have their own special regulations. Regarding hydrocarbons, private companies are currently able to enter into contracts with the state productive company Pemex for the exploration and extraction of hydrocarbons in oil fields under the special rules applicable. In a nutshell, the Ministry of Energy decides the form of public procurement process and establishes the guidelines of the call, as well as the draft of the contract, while the SHCP establishes the fiscal terms of such contracts. After that, the National Hydrocarbons Commission prepares and publishes the call, carries out the bidding process and awards the contract. The procedure for procurement of electricity is practically the same as the above, but carried out by the CFE.

### ii Procedures

In general terms, according to Article 134 of the Mexican Constitution and the Procurement Laws, the public procurement procedure must be conducted in the following manner:

- a* A call for competition must be published in CompraNet.
- b* At least one clarification meeting must be carried out. There must be at least six calendar days between the clarification meeting and the next stage of the procedure (submission and opening of proposals).
- c* Proposals must be submitted and publicly opened. Between the call for competition and the submission and opening of the proposals there must be at least: 20 calendar days for international biddings, and 15 calendar days for national biddings.
- d* All proposals must be evaluated in accordance with the bidding rules. The contracting entity shall issue a decision awarding the contract to the tender that meets the applicable requirements.
- e* The contract must be signed during a period of 15 calendar days after the award of the contract is declared.

The Procurement Laws provide that the bidding process may be carried out using electronic means, in which case the whole process must be carried out through CompraNet using electronic identification means.

In the bidding process of oil fields, it is not possible to use electronic means since the submission and opening of the proposals are broadcasted live on the National Hydrocarbons Commission website. In contrast, the entire bidding process of electricity projects could be done on the CFE's procurement electronic system.

### **iii Amending bids**

Before issuing a call for competition, public entities are able to publish the project on CompraNet during at least 10 business days to receive relevant feedback from potential bidders. Comments and opinions received shall be analysed by public entities aiming to consider them in the final bidding document.

The contracting entities may change some terms and conditions of the bidding rules, provided that such changes are issued at least one week before the submission and opening of the proposals. All changes must be published on CompraNet.

## **VI ELIGIBILITY**

### **i Qualification to bid**

According to the Procurement Laws, bidders may be disqualified from bidding for a number of reasons, such as:

- a* not signing more than one public contract during a two-year period;
- b* insolvency;
- c* not complying with their obligations in a public contract, causing severe damages to the contracting entity;
- d* delivering goods, services or public works that do not comply with the requirements of the bidding rules;
- e* providing false information;
- f* if one bidder is linked to another through the same partner or partners; and
- g* lack of authorisation to provide goods or services protected by intellectual property rights.

Other disqualification causes could be included in the bidding rules as needed or requested by the contracting entity.

### **ii Conflicts of interest**

In order to avoid conflicts of interest, public entities are not able to receive proposals or award contracts to:

- a* companies in which relevant public officers have a financial, personal or family interest in the result of the bidding;
- b* companies in which public officers or their relatives are part of or have formed part, during a two-year period before the date of execution of the relevant contract; and
- c* persons who work for the government, unless it is authorised by the SFP.

As a general rule, in all bidding processes, participation of bidders who have conflict of interest is prohibited in order to avoid corruption, and particular rules could be included in the bidding documents. The LGRA also prohibits participation of bidders and authorities who have a conflict of interest.

### **iii Foreign suppliers**

Foreign suppliers are able to bid in international bidding procedures. There are two types of international bidding procedures: (1) under international treaties, and (2) open. In the first case, only Mexicans and national of foreign countries that have signed a free trade agreement with Mexico that contains a public procurement Chapter are able to bid. In the latter case, Mexicans and any foreign supplier are allowed to participate in the bid.

In general terms, the Procurement Laws do not establish that foreign suppliers must set up a local branch or subsidiary. However, depending on the subject matter, the industry and activities of the bid, there may be restrictions under the Foreign Investment Law or other sector-specific regulations that require the incorporation of a Mexican company or having Mexican participation. For example, foreign companies that are awarded an oil fields contract must constitute a special purpose company if they do not have a Mexican branch or subsidiary, because exploration and extraction contracts of hydrocarbons can only be executed with Mexican companies. For contracts awarded by the CFE to consortium bids, the consortium has to register a company with a specific purpose in Mexico, aimed at executing the contract.

## **VII AWARD**

### **i Evaluating tenders**

The criteria for evaluating proposals must be disclosed in the call. According to the Procurement Laws, there are three criteria that can be used to evaluate the proposals:

- a* points and percentages, which evaluates the best combination of quality and price;
- b* binary, which consists in the evaluation of whether the bids comply with all the requirements. The contract is awarded to the bidder who fulfils such requirements and offers the lowest price; and
- c* cost-benefit, which consists in the evaluation in monetary terms of the costs and benefits associated with the purchase, execution and operation of the good, lease, service or public work involved.

During the stage of submission and opening of proposals (economic and technical), all the proposals are received in a sealed envelope. Afterwards at the same act, proposals are publicly opened in order to put on the record what documents were submitted. The content of the documents is detailed but not evaluated at that moment.

Subsequently, the contracting entity evaluates the proposals according to the evaluation criteria contained in the bidding rules. Proposals that fail to comply with the requirement established are disqualified.

The award resolution must be notified in a public meeting within a 30-calendar-day period since the submission and opening of the proposals. This notice must contain: (1) a list of the bidders whose proposals were disqualified; (2) a list of the bidders whose proposals

were in compliance with the requirements; (3) the name of the awarded bidder; (4) place, date and hour for signing the contract; and (5) name, position and signature of the public officer issuing the award.

## **ii National interest and public policy considerations**

In bidding procedures regarding public works, public entities must consider the effects of such works in the environment. If the works can cause damages on the environment, the contract project must include the necessary works to preserve or restore such conditions.

The LAASPP sets forth that the procurement of wood goods, the bidders must submit a certificate that guarantee the origin and sustainable manage of the forest where the wood comes from. For the acquisition of office paper, the paper must contain a minimum of 50 per cent of recycled material or natural fibres not derived from wood or raw materials.

Regarding environmental considerations, domestic suppliers cannot be favoured.

In national bidding procedures only national goods, services and public works can be offered. For goods to be considered national, they must be produced in Mexico and have at least 50 per cent of national content. For public works and services to be considered national, they must be provided by nationals or companies registered in Mexico. These procedures are aimed to strengthen national industry.

## **VIII INFORMATION FLOW**

When submitting the information to the calling entity, the bidder must provide all the information requested, which may include information regarding the shareholders, financial information, legal details and information alike. Confidential information submitted by participants shall remain confidential. Bids are not available to the public on CompraNet.

During the procurement process, the bidders do not have access to the information provided by other bidders. During the event for the opening of the envelopes containing the economic and technical proposals, the bidders have the right to know if their proposal has been accepted because it met the requirements set out in the bidding rules. At that time the bidders do not know the details of other bidders' proposals, but they receive information during the event on whether their proposal will be analysed by the public servants of the relevant public entity and how many of the proposals were turned down because the bidders failed to provide legal, financial or other information.

The outcome of the bid is notified in a public meeting that all the bidders can attend. In the case of electronic bids or bids conducted by electronic means, the outcome is notified through the CompraNet and both winning and unsuccessful bidders receive formal notification. When the outcome is revealed to the bidders, it is explained and detailed by the relevant calling entity the reasons why the contract is awarded to a specific bidder, as well as the reasons others' proposals were rejected.

The relevant entity determines whether the type of goods to be purchased, or the services to be hired, must remain confidential because may adversely affect, for instance, national security. In such a case, the relevant entity may decide to follow a direct award process instead of a public bid. Then the entity and the company to which the contract is awarded must keep sensitive information confidential, and for that purpose, the relevant entity classifies the information as reserved to keep its confidentiality in terms of the relevant regulations. This classification is made at the time the information is requested to be disclosed according to the provisions of the Transparency Law and Access to Public Information.

Regarding access to public information, in general terms, all the government information is public, although it could be reserved under specific scenarios, in which case it is prevented for disclosure. Although the data protection authority has ruled that the purpose, as well as the amounts of the contracts, are public information, the details of the activities to be carried out could be reserved by the calling entity. While the contracts are public, the information contained in the 'technical exhibit' could become reserved to prevent its disclosure to the general public.

If national security could be jeopardised, the relevant defence and security entities could carry out either an invitation procedure or a direct award in order to keep the confidentiality of the project.

## IX CHALLENGING AWARDS

Challenges are not so frequent and the chances of success are slim mainly because the government body that handles the challenges at the federal level (SFP) is also an entity of the executive branch and therefore, most of the times it validates the outcomes or the decisions made by the relevant calling entity.

The complaint must be filed before the calling entity within six business days of the occurrence of the act that motivates the filing of the complaint (as explained below).

The complaining party may request an injunction. If the authority determines that by granting an injunction would not cause damages to the public interest (because in such case the injunction is denied), the complaining party must contract a surety bond to guarantee any damages if the complaint is finally rejected. Such bond must be between the 10 and 30 per cent of the amount of the economic proposal of the complaining party.

### i Procedures

According to the Procurement Laws, only a formal complaint can be filed with the SFP in the following cases:

- a* against the official call and the clarification meetings: Only bidders that have expressed interest in participating in the bid process are able to file the complaint within six business days of the last clarification meeting taking place;
- b* the official invitation to at least three participants: Only parties that received such an invitation are able to file the complaint within six business days of receiving the invitation;
- c* the act of presentation and opening of the proposals: Only bidders that submitted a proposal are able to file the complaint within six days of the official notification of the outcome of the public bid process;
- d* the cancellation of the bidding process: The complaint could be filed only by the party or bidder that submitted a proposal, within six business days of receiving official notification of the cancellation; and
- e* acts and omissions on behalf of the relevant calling public entity that prevented the execution of the contract as set forth either in the official call or the Procurement Laws. Only the awarded bidder is able to file the complaint within six business days of the expiry of the term set forth for the execution of the contract.

On the other hand, a bidder who considers affected during the public procurement process might file an *amparo* (constitutional challenge) before a federal court instead of following the provisions of the Procurement Laws. Nevertheless, courts are unlikely to rule in such

situations and find the *amparo* invalid if the bidder first does not first follows the challenge procedure set out in the Procurement Laws. The relevant party can file an *amparo* against the resolution resolving the challenge procedure.

## ii Grounds for challenge

The Procurement Laws only set forth the cases mentioned above as grounds for challenge acts within a public procurement procedure.

### *Remedies*

Normally, the SFP may determine the granting of injunctions, set aside contracts, order new tenders, replacing of one or more stages of the process, and measures alike.

For breach of procurement procedures, it is possible to impose fines on both the public servants that conducted the procedure and the private bidders as long as the latter agreed the breach with the former in order to obtain an illegal advantage (this may also constitute a felony under criminal laws). Breach of contracts can be sanctioned with fines that could range from around US\$225 to US\$4,500 and debarment for procurement procedures from three months to five years.

The public servants that breach a procedure can face dismissal, suspension and debarment, as well as fines if the consequence of the breach resulted in economic damage to the relevant calling entity.

From an antitrust perspective, the Federal Economic Competition Law (LFCE) prohibits absolute monopolistic practices, including any agreements, arrangements or combinations between competitors with the object or effect to coordinate positions or abstention in public procurement processes and exchange information towards this coordination. The LFCE sanctions this conduct as follows. From an administrative standpoint, fines for companies could be up to 10 per cent of annual income, and fines for individuals could be up to around US\$900,000. From a criminal standpoint: individuals may receive from five to 10 years' imprisonment and fines from around US\$4,500 to US\$45,000.

## X OUTLOOK

In response to the global covid-19 pandemic, the Mexican government has recently allowed various extraordinary actions for the procurement and importation of health-related goods and services. For ease of reference, the Ministry of Health, the Ministry of Defence and the Mexican Social Security Institute, among other federal and local public agencies and entities, may execute government health contracts through direct awards. In other words, the aforementioned entities are not compelled now to carry out public bids for the procurement of health-related goods and services. However, the SHCP and Ministry of Economy will follow up and provide the appropriate assistance to the relevant health institutions for the procurement of services deemed necessary to provide medical care. It appears that the federal government is trying to centralise all procurement of goods to cope with covid-19 and has imposed some restrictions on local governments to acquire and private entities to sell certain products. There was no planning carried out to prepare for the fight against this pandemic and we may witness an abuse of direct awards that could create transparency and other problems.

Lastly, public procurement procedures may suffer additional changes to control the covid-19 crisis and treat patients.

# RUSSIA

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## I INTRODUCTION

Broadly speaking, Russian government procurement (also referred to as public procurement) legislation provides for two different regulatory regimes depending on the contracting body: either public authorities or public entities. This chapter is focused on government procurement related to public authorities unless otherwise stipulated. The key law regulating procurement involving public authorities and some related entities (contracting authorities) is Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services, dated 5 April 2013 (Law No. 44-FZ). There are also numerous subordinate legal acts adopted in accordance with federal procurement legislation.

With regard to state defence procurement, in addition to general rules established by Law No. 44-FZ, some peculiarities are set out in a separate law, Federal Law No. 275-FZ on State Defence Procurement, dated 29 December 2012. Generally, the procurement regime under Law No. 44-FZ applies to utilities procurement; however, there are also basic laws regulating certain utilities (water and heat supply systems, etc.) that should be considered.

The EU procurement directives and the World Trade Organization (WTO) Agreement on Government Procurement (GPA) do not apply in Russia. However, on 29 May 2013 the WTO Committee on Government Procurement granted Russia observer status, which may represent a first step towards Russia's possible accession to the GPA as a full party in the near future.

The government and the Ministry of Economic Development are the key bodies responsible for setting government purchasing or procurement policy and guidelines. The control function in the area of compliance with procurement legislation is mainly exercised by the Federal Antimonopoly Service of Russia (FAS), which investigates different violations in this area, challenges procurement proceedings, brings suits, etc. Similar control powers are vested in the Federal Service for Defence Contracts with regard to government defence procurements. In practice, the FAS also actively participates in developing government procurement legislation.

On 5 April 2013, Federal Law No. 44-FZ on the Contract System of Procurement of Goods, Works and Services for State and Municipal Needs was adopted, with the majority of the provisions becoming effective as of 1 January 2014. This Law replaced and modernised

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the previous regulation of government procurement based on Federal Law No. 94-FZ on Placement of Orders for Delivery of Goods, Performance of Works and Rendering Services for State and Municipal Needs of 21 July 2005.

Among other new provisions, the Law introduced:

- a* a system of planned procurement based on annual and three-year procurement plans;
- b* additional methods of selecting a supplier, including rules relating to requests for proposals, tenders with limited participation and two-stage tenders;
- c* monitoring, auditing and public oversight of procurement; and
- d* anti-dumping measures intended to ensure that procurement participants comply with their price undertakings and select suppliers on the basis of important criteria other than price.

This Law led to the adoption of many new subordinate legal acts, and has been updated numerous times since its enactment to keep up with economic policy developments and new practical challenges.

Law No. 44-FZ regulates relations aimed at meeting state and municipal needs for the purpose of enhancing the productivity and efficiency of the procurement of goods, works and services, promoting transparency and preventing corruption and other abuses in this area. Thus, the contract system under Law No. 44-FZ is based on the following principles:

- a* uniformity of the contract system;
- b* transparency;
- c* competition;
- d* professionalism of contracting authorities;
- e* promotion of innovation;
- f* responsibility for productivity in meeting state and municipal needs; and
- g* efficiency of procurement.

However, while certain principles are developed further in the provisions of the relevant procurement laws, some are more general in nature. Consequently, whether the action of a contracting authority will be in accordance with the legal principles may depend on how those are interpreted by the Russian courts and other competent bodies.

With regard to procurement involving public entities (as opposed to public authorities), the main law in this area is Federal Law No. 223-FZ on the Purchase of Goods, Works and Services by Certain Types of Legal Entities, dated 18 July 2011 (Law No. 223-FZ), which provides for a more liberalised procurement mechanism in comparison with Law No. 44-FZ. The following entities fall within the scope of this law:

- a* state corporations, state-owned companies and public companies;
- b* natural monopolies;
- c* companies engaged in regulated activities in the fields of electric power, gas, heat, water, etc.;
- d* autonomous institutions;
- e* legal entities where the Russian Federation holds a stake exceeding 50 per cent;
- f* subsidiaries where the entities listed above hold a stake exceeding 50 per cent;
- g* subsidiaries where the above-mentioned subsidiaries hold a stake exceeding 50 per cent;
- h* budget financed institutions in certain cases; and

- i* state and municipal unitary enterprises in certain cases (e.g., when their procurements are made based on grants, gifts, wills or charitable donations provided by Russian and foreign individuals and legal entities).

Law No. 223-FZ leaves determination of the appropriate procurement procedure to the discretion of the contracting entity (and in this respect is more flexible than Law No. 44-FZ). Thus, contracting entities should adopt their own procurement policies, including the procedure for preparing for and carrying out procurement by competitive and non-competitive methods, as well as conditions for its application, procedure for conclusion and execution of contracts, and other related provisions. Until a contracting entity approves its own procurement policy, it must follow the procedures established by Law No. 44-FZ.

Certain executive authorities or entities may adopt model procurement policies and determine the entities that must follow such model policies, while elaborating their own.

Model policies must establish a date by which all the relevant policies will need to be brought in line with the model policy, and contain provisions regarding the procurement procedure, method and conditions of its application, and the term for entering into the agreement as a result of the competitive procurement, which may not be changed in policies elaborated pursuant to the model one. In addition, subsidiaries listed under the above-mentioned items (f) and (g) regarding the types of public entities defined under Law No. 223-FZ may join the procurement policy established by their parent company.

Public companies also fall under the scope of Law No. 223-FZ. Public companies are defined as unitary non-commercial organisations established by Russia, having powers and authority of public character and acting in the interest of the state and society.

State and municipal unitary enterprises, except for a limited number of cases, have been removed from the scope of Law No. 223-FZ. Starting from 1 January 2017, these enterprises must conduct procurement in accordance with the more stringent provisions of Law No. 44-FZ. Unitary enterprises may nonetheless engage in procurement under Law No. 223-FZ in a limited number of instances, provided that they have adopted their procurement policy and published it in the unified information system within the requisite deadline.

## II YEAR IN REVIEW

Since January 2019, a significant number of changes in procurement legislation have entered into force. An extensive package of amendments was adopted with respect to electronic forms of procurement. A number of changes were adopted regarding the enforcement of the contract, the possibility of changing the contract price and purchasing from a sole source.

In the light of covid-19 a number of changes have been introduced to the procurement legislation. Among such amendments that have entered into force on 1 April 2019:

- a* It is possible to purchase without bidding (from a single supplier) any goods, work or services for the provision of medical care in an emergency or urgent form, as well as in the case of force majeure circumstances; the introduction of a high alert regime to prevent an emergency has been added to the list of grounds for such procurements as well.
- b* The government of the Russian Federation has the right until 31 December 2020 to establish new grounds for procurement from a single supplier and determine the procedure for such purchases.

- c* The requirements regarding the need for preliminary selection and request for quotations in the case of a single supplier procurement to eliminate the consequences of natural and man-made emergencies have been removed.
- d* There is no restriction on the volume of purchases from a single supplier of goods necessary for the above-mentioned purposes (first bullet), if the use of time-consuming competitive methods of procurement is impractical; however, note that according to the position of the Federal Antimonopoly Service (letter as of 18 March 2020): the covid-19 pandemic should be treated as a force majeure, but the causal relationship of the target and the subject of procurement from a single supplier is important.
- e* In 2020, the parties to the contract by mutual agreement will be able to change the period of its execution and/or its price (unit price of goods, work, services) if, under the previous conditions, the contract cannot be executed due to circumstances beyond the control of the counterparties (a special mechanism for such amendments is provided).
- f* The penalties accrued in 2020 are subject to write-off in the same manner as the penalties for 2015 and 2016. The cases and procedure for writing off penalties in 2020 are to be further determined by the government of the Russian Federation.

### III SCOPE OF PROCUREMENT REGULATION

#### **i Regulated authorities**

A wide range of bodies are deemed contracting authorities pursuant to Law No. 44-FZ, including the following:

- a* state (federal or regional) and municipal authorities;
- b* state and municipal unitary enterprises;
- c* the State Atomic Energy Corporation Rosatom;
- d* the State Corporation for Space Activity Roskosmos;
- e* regulatory bodies of state non-budgetary funds (pension fund, social insurance fund, federal and territorial compulsory medical insurance funds);
- f* treasury enterprises that perform state functions or render state services based on the right of operative management;
- g* certain budgetary non-commercial institutions; and
- h* other institutions and entities in certain cases provided by law.

According to Law No. 44-FZ, any legal entity, regardless of its form of incorporation, ownership type, place of business or place of origin of its capital, and any individual, including those registered as a self-employed entrepreneur, may be a procurement participant. Since August 2015, an exception to this rule exists that prohibits offshore companies from participating in procurement. The list of offshore territories is established by the Ministry of Finance. For more information regarding procurement participants, see Section VI.iii.

#### **ii Regulated contracts**

Government procurement rules regulate contracts for the supply of goods, carrying out of works and provision of services (including the acquisition of immovable property or lease of property).

There are specific rules with regard to utilities and defence procurement contracts, as well as to contracts in relation to provision of goods to be used in emergency situations. Specific rules also apply to:

- a* goods supplied for federal needs in accordance with federal and interstate target programmes;
- b* energy service agreements;
- c* communication services for the needs of public authorities, national defence, national security and law enforcement;
- d* development of drugs and psychotropic substances;
- e* agricultural products supplied for state needs;
- f* gas supplied for federal (or municipal) needs;
- g* scientific research and experimental development;
- h* educational services;
- i* production and distribution of national films;
- j* regular automobile and city electric transport transportation;
- k* design and exploration works or construction and reconstruction of capital construction projects;
- l* procurement of goods the manufacturing process of which has been established, modernised or developed in Russia; and
- m* some other procurements.

Concession agreements, privatisation and the provision of services by international financial institutions are not within the scope of the government procurement law. Concession agreements are regulated by Federal Law No. 115-FZ on Concession Agreements, dated 21 July 2005.

One innovation of Law No. 44-FZ is a type of service contract called a 'life-cycle contract', which allows for the establishment by the government of a contract providing for the procurement of goods or works, covering different stages of the life cycle of the object (design, construction, subsequent maintenance, operation, etc.). Under the previous regulation it was impossible to enter into one contract covering different types of works, and it was necessary to conduct a separate tender for each different type of works.

The provisions of Law No. 44-FZ do not provide for a competitive dialogue procedure, and in this respect the procurement rules are quite strict. Thus, the current legislation generally does not provide for the possibility of amending a draft public contract that is an integral part of procurement documentation at the stage of submission of bids. Bidders may only submit requests for clarification of documentation requirements. However, in certain cases stipulated by Law No. 44-FZ, the parties may agree to amend certain provisions of the public contract at the execution stage.

The amendment of material conditions in contracts following their execution is prohibited, except for the following amendments, which do not require a new procurement procedure: a change of contracting authority; a change of supplier in cases of legal succession; or a change of the contract price by mutual agreement as provided by Law No. 44-FZ in certain cases. An existing contract may only be transferred to another supplier without a new procurement procedure in the case of legal succession.

## **IV SPECIAL CONTRACTUAL FORMS**

### **i Framework agreements and central purchasing**

Given that Law No. 44-FZ presumes the mandatory conclusion of public contracts without any amendments to contractual rights and obligations, framework agreements are not used in Russian procurements.

Contracting authorities are entitled to hold joint tenders or auctions in cases where they make purchases of the same goods, works and services. The authorities' rights, duties and liabilities when holding joint tenders or auctions are to be defined by an agreement between the relevant parties. A contract with the winner of a joint tender or auction is required to be concluded by each contracting authority. The government establishes the procedure for holding joint tenders and auctions.

According to the procurement legislation, for the purpose of centralised purchasing, the function of determining suppliers may be transferred to existing or specially created bodies (namely, state and municipal bodies or treasury enterprises). Under centralised purchasing, delegation of the functions of justifying purchases and determining the terms of a contract is not permitted, in particular for the fixing of the initial (maximum) price of a contract and the signing of the contract. Contracts must be signed by the contracting authority that procures the goods, services or works.

### **ii Joint ventures**

Depending on the nature of the project, a company established by state public bodies may act in accordance with special legislative acts regulating their activity or under Law No. 223-FZ.

Procurement procedures stipulated by Federal Law No. 44-FZ are not applicable to public-private partnerships (PPPs). At present, PPP projects may be implemented under Federal Law No. 224-FZ on Public-private Partnership, Municipal-Private Partnership in the Russian Federation and Amendments to Certain Regulatory Acts of the Russian Federation, dated 13 July 2015 (the PPP Law); or Federal Law No. 115-FZ on Concession Agreements, dated 21 July 2005, which provides for a two-stage tender procedure for awarding concessions: pre-qualification and evaluation of bids. The PPP Law, which came into force on 1 January 2016, has introduced a unified legal regime for the implementation of long-term infrastructure projects based on PPP agreements at the federal level. Previously, PPP agreements were structured based on the general rules of the Civil Code and regional legislation. The adoption of the PPP Law is a positive legislative development that has resolved problems arising from the prior lack of clear and uniform regulation of PPP agreements. Currently, there are discussions and legislative plans to improve the provisions of the PPP Law for the purpose of increasing the number of projects implemented under it.

## **V THE BIDDING PROCESS**

### **i Notice**

Public procurements must be published within a unified information system that is located on a designated website.<sup>2</sup> The content of the contract notice and terms for such notices will depend on the value of the contract, type of procurement procedure and other factors.

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<sup>2</sup> [www.zakupki.gov.ru](http://www.zakupki.gov.ru).

It is possible to place orders for goods, works or services without a procurement procedure or procurement publication in cases such as those set forth in Article 93 of Law No. 44-FZ (procurements from a sole supplier). Although in the area of procurements from a sole supplier there is generally no need for publication, there are some exceptions. For instance, there is a requirement to publish notices in relation to, *inter alia*:

- a* procurements of goods, works or services from the natural monopoly companies falling within the scope of Federal Law No. 147-FZ of 17 August 1995 on Natural Monopolies, as well as procurements of services of the central depository;
- b* services in the areas of water supply, heat supply and gas supply (except for services related to the sale of liquefied gas); and
- c* services in the area of storing and importing or exporting narcotic agents and psychotropic substances.

The contracting authorities are obliged to publish their procurement plans for a three-year period and scheduled plans for each financial year based on their procurement plans.

## **ii Procedures**

Where procurement regulations apply, contracting authorities must use one of the procedures prescribed by the relevant procurement regime. Procurements can be done through competitive methods of determining suppliers or from a sole supplier. Such competitive methods include:

- a* tenders (namely, public tender, tender with limited participation, two-stage tender, closed tender, closed tender with limited participation and closed two-stage tender);
- b* auctions (including closed auction);
- c* requests for quotations; and
- d* requests for proposals.

As of 2019, amendments to Law No. 44-FZ entered into force, obliging the contracting authorities to conduct all competitive procedures specified above in an electronic form. However, Law No. 44-FZ sets out an exhaustive list of exceptions (e.g., procurement from a sole source, procurement conducted in foreign countries and procurement conducted via closed procedures).

Electronic procedures (including filing applications for participation in procurement) and contracting are carried out through an electronic platform. Law No. 44-FZ provides a detailed regime for conducting electronic procurements.

The prevailing type of procurement procedure is an electronic auction. Procurement from a sole source means procurement from a particular supplier without a tender, which may be done in exceptional cases envisaged by Law No. 44-FZ. These exceptional cases include, for instance, the conclusion of the following contracts:

- a* the supply of Russian armaments and military equipment that have no Russian analogues and are made by the sole manufacturer, with the supplier of such armaments and military equipment;
- b* rendering services in relation to water supply, water discharge, heat supply and gas supply (except for the services related to the sale of liquefied gas);
- c* services in connecting to (cutting in) engineering networks at prices (tariffs) controlled in compliance with Russian legislation;
- d* storing, importing or exporting narcotic agents and psychotropic substances;

- e* the procurement of goods, works or services for an amount not exceeding 100,000 roubles, provided that the total annual volume of procurements, which the contracting authority may make pursuant to this provision, must not exceed 2 million roubles or 5 per cent of the aggregate annual volume of the authority's procurements and must not comprise more than 50 million roubles (it is noteworthy that the 100,000 roubles limitation does not apply to contracting authorities operating outside of Russia, such as diplomatic or trade missions, consular offices, etc.);
- f* the delivery of items of cultural value (including museum collections, rare and valuable editions, manuscripts and archival documents) intended to replenish state museum funds, libraries, archive funds, film and photo funds, as well as similar funds;
- g* the procurement of goods of which the manufacturing process has been established, modernised or developed in Russia, in accordance with a special investment contract, which is a new type of contract introduced in 2015 for the purpose of promoting national industry. The investor under such a contract must be approved by the government provided that certain conditions are met (e.g., the investment should equal or exceed 3 billion roubles);
- h* the procurement of legal services for protecting the interests of Russia in foreign and international courts and arbitral tribunals, and in the bodies of foreign states;
- i* the procurement of works relating to the modernisation of federal state information systems that provide informational and legal support to the Russian parliament, and services that support such systems ; and
- j* some other exceptional cases provided by Law No. 44-FZ.

With effect from 1 July 2018, Law No. 223-FZ lists competitive and non-competitive procurement methods, but as opposed to the provisions of Law No. 44-FZ, the list is not exhaustive. A procurement policy, established in accordance with Law No. 223-FZ, may set forth other competitive methods aside from tenders, auctions, requests for quotations and requests for proposals, provided that such methods comply with the conditions established by Law No. 223-FZ. Non-competitive methods, in turn, include methods that do not comply with these conditions (e.g., procurements from a sole supplier). Similarly to Law No. 44-FZ, competitive procurement procedures under Law No. 223-FZ must be held in an electronic form, unless otherwise stipulated in the procurement policy. Competitive procurement procedures under Law No. 223-FZ whose participants are limited to small- and medium-sized businesses must be held in an electronic form only.

### **iii Amending bids**

A bidder is entitled to modify or withdraw its application before the expiry of the period for filing applications, subject to the provisions of Law No. 44-FZ. In these cases, a tender participant or auction participant does not forfeit the right to the monetary assets provided to secure the application thereof. The modification of an application or a notice of its withdrawal is deemed valid before the expiry of the period for filing applications. In relation to requests for quotations, a bidder is entitled to change or withdraw its application for participation in the request only if the contracting authority has amended the notice making the request for quotations. Once the period for filing applications has expired, no changes to the bid may be made.

## VI ELIGIBILITY

### i Qualification to bid

There are two types of procurement procedures depending on whether they are one-stage or two-stage tenders. A separate pre-qualification stage is used in most tenders (tenders with limited participation, two-stage tenders, closed tenders with limited participation and closed two-stage tenders). The winner in the latter case is determined during the second stage of the tender from the bidders who passed the pre-qualification stage.

In any type of procurement procedure, the procurement commission must first verify whether a bidder meets mandatory unified requirements and any mandatory additional requirements established by the government.

Thus, a bidder may be excluded when the supplier is being determined, or the conclusion of a contract with the winning supplier may be cancelled at any time prior to concluding the contract if the contracting authority or procurement commission finds that the bidder does not satisfy mandatory unified and additional requirements, or has provided unreliable data in respect of satisfying the requirements.

Unified requirements include, in particular, the following:

- a* satisfaction of the requirements established in compliance with the legislation of Russia for persons engaged in the supply of the goods, carrying out of the work and the provision of the services that are the object of the procurement;
- b* a bidder shall not be in the process of liquidation, and there must be no decision of a court declaring a bidder bankrupt and initiating bankruptcy proceedings;
- c* a bidder's activities are not suspended in accordance with the Code of Administrative Offences of the Russian Federation as of the date of filing an application for participation in purchases;
- d* a bidder shall have no arrears on taxes, fees, debts or other mandatory payments to budgets of the budget system of Russia;
- e* a bidding individual or the general director, members of the board of directors or chief accountant of a bidding legal entity have not been subject to criminal liability for certain crimes related to economic activities;
- f* a bidder that is a legal entity has not been subject to administrative liability in accordance with the Code of Administrative Offences for illegal gratification of an official on behalf of a legal entity;
- g* a bidder possesses the necessary intellectual property rights in case, as a result of the procurement, the contracting authority shall acquire such rights;
- h* the absence of any conflict of interests, etc., between bidders and the contracting authority; and
- i* a bidder is not an offshore company.

The contracting authority may also establish a requirement for the exclusion of any bidder that is included in the register of unfair suppliers maintained by the FAS.

The government is entitled to establish additional mandatory requirements for participants in procurements of certain kinds of goods, works and services that are procured by way of tenders (except for public and closed tenders) or auctions, in particular for the availability of the following:

- a* financial resources for a contract's execution;
- b* equipment and other material resources for a contract's execution held under ownership or on other legal grounds;



- c* work experience connected with the subject of a contract and business reputation; and
- d* a required number of specialists and other employees with a definite qualification level for a contract's execution.

The government is also entitled to establish additional mandatory requirements for participants in procurements of audit and related services and consulting services. These additional requirements have been elaborated and are expected to be adopted.

In Russia, much attention is given to compliance with formal requirements. Thus, in practice, the bidder may be disqualified if the application does not comply with all formal requirements or if certain documents are missing even when the bidder substantially meets all requirements.

### **ii Conflicts of interest**

Law No. 44-FZ prohibits participation in procurement commissions by persons that have a personal interest in the results of the procurement or that may be influenced by a bidder.

In particular, the following persons cannot act as members of a procurement commission:

- a* individuals who were involved as experts in respect of the procurement documentation;
- b* individuals personally interested in the results of the selection of suppliers;
- c* individuals who are influenced by the procurement participants (member or shareholder of a relevant organisation, member of governing bodies, creditor, etc.);
- d* individuals married to the head of a procurement participant; or
- e* individuals who are members of the procurement control authority.

In the event that any member of a procurement commission is found to fall within any of the categories set out above, that member must immediately be replaced by another person.

Commission members may only be replaced by the decision of the contracting authority that adopted the decision on the establishment of the commission.

### **iii Foreign suppliers**

Generally, contracting authorities can accept bids from foreign suppliers provided that they comply with the qualification criteria. There is no requirement to set up a representative office or a subsidiary in the territory of Russia for the purpose of bidding. However, the participation of foreign suppliers may be restricted in a procurement if the procurement involves state secrecy. In addition, according to Law No. 44-FZ only Russian legal entities may participate in tenders for entering into a state contract envisaging mutual investment undertakings of a supplier or investor to establish, modernise or develop the manufacturing of goods in the territory of one of the Russia's regions. This type of investment contract has been introduced with a view to support the national industry and manufacturing. Such a contract must provide for an investment amount of no less than 1 billion roubles and must be entered into for a period of no longer than 10 years. With regard to national interest issues, see Section VII.ii.

## VII AWARD

### i Evaluating tenders

The procurement documentation (in the case of tenders and auctions) along with the information specified in a notice of holding a procurement must also contain the criteria for the evaluation of bids, the weighting of these criteria and the procedure for consideration and assessment of bids in compliance with Law No. 44-FZ.

The process of the assessment of bids in relation to all procurements, except for auctions, requests for quotations, sole-supplier procurements and certain requests for proposals, is based on value and non-value assessment criteria. Value criteria include price, costs for operation and repair or life-cycle value (if applicable), and non-value criteria include qualitative, functional and environmental characteristics of the procurement object and qualification of the bidders. The latter refers to, in particular, the existence of financial resources, equipment and other material resources held by them under ownership or on some other legal grounds; work experience connected with the subject of a contract and business reputation; and specialists and other employees holding a specific level of qualification. To determine the winner, the use of at least two criteria is required, provided that price is one of these.

The legislation specifies the weightings for the assessment criteria. The sum of the respective weightings for the assessment criteria must total 100 per cent. Thus, the proportion of minimum value to maximum non-value criteria is generally 70:30 in relation to procurement of goods, and 60:40 in relation to procurement of works and services. However, there are certain exceptions. Thus, the proportion of 40:60 is established, for instance, for such goods, works and services as the performance of emergency rescue works, restoration of cultural heritage objects, and provision of medical, educational and legal services. In the case of creating and developing state (municipal) information systems and official websites, a 30:70 proportion applies, and in the case of scientific research works, 20:80.

### ii National interest and public policy considerations

Under the procurement regulations, national interest can only be taken into consideration to a limited extent. Equal treatment and non-discrimination of suppliers is presumed. However, Russian suppliers may be granted certain advantages over foreign suppliers in certain cases in accordance with Article 14 of Federal Law No. 44-FZ.

Law No. 44-FZ establishes the following regimes for the admission of foreign goods, works and services to procurements:

- a* national regime: applies when and where the international agreements of Russia so provide; within the framework of the WTO, the application of the national regime will depend on the accession of Russia to the GPA and the conditions of that accession;
- b* prohibition or limitation of admission: established by the government to guarantee national defence and state security to protect the fundamentals of the constitutional system, internal market and the development of the Russian economy and to support Russian manufacturers. It is worth noting that some of the prohibitions or limitations currently in force do not apply to suppliers coming from Eurasian Economic Union Member States; and
- c* admission conditions: established by the Ministry of Economic Development upon the government's instruction.

Environmental considerations have become more important in recent years, although there is still generally little knowledge of how such considerations can best be taken into account in public procurements. There is as yet no wide practising of 'green' procurement in Russia. However, Law No. 44-FZ introduced new criteria for bid evaluation (ecological characteristics of the procurement object), which is a first step towards establishing a system of green public procurement.

## VIII INFORMATION FLOW

In Russia, access to information about the contractual system in the area of procurement is required to be unimpeded and free of charge. The openness and transparency of this information is to be ensured, in particular, by way of its placement in the unified information system. The information required by Law No. 44-FZ to be placed in the unified information system must be full and reliable. Data constituting a state secret are not published in the unified information system. From 31 December 2017, entities falling within the scope of Law No. 223-FZ may introduce corporate information systems connected with the unified information system. These systems exchange information and, in the event of any discrepancies, the information in the unified information system prevails.

Based on the principles of transparency and ensuring competitive procedures, the contracting authority must provide all procurement participants with the same information and inform them about the proceedings of a public procurement. The procurement participants are entitled to receive clarifications regarding the provisions of procurement documentation.

It is a legal obligation of the tender commission to inform any unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of the bid and the earliest date of the conclusion of the contract. However, there is no requirement to be specifically notified – the publication of the minutes of the tender commission regarding the procurement procedures is sufficient. Once the winner has been determined, the commission should publish the minutes of the bid evaluation no later than the day following the expiry of the period for consideration of applications by the commission.

Bidders are not granted access to the comprehensive procurement file (encompassing all procurement documents, submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation and the award process). However, they are granted access to the procurement documentation and minutes of decisions taken by the procurement commission, and can check the registers of concluded contracts.

Further, contracting authorities must 'stand still' for a certain period; for example, in the case of electronic auctions or tenders, a contract may not be concluded until 10 days after the date of the publication in the unified information system of a protocol with the results of an electronic auction. This period allows unsuccessful bidders time to bring claims to prevent the contract award if they consider the award decision to be unlawful.

There are confidentiality obligations in relation to personal data and other types of data (e.g., commercial secrecy) in cases stipulated by federal law. The data constituting a state secret must not be published in the unified information system. Specific obligations to ensure confidentiality of information apply in the field of defence and security.

## IX CHALLENGING AWARDS

### i Procedures

There are two key procedures for reviewing complaints:

- a administrative review through the authorised state body dealing with such claims, the Federal Antimonopoly Service. In relation to the procurement procedure for state defence orders or other federal needs that deal with state secrets, the Federal Service on Defence Orders is the body for reviewing complaints; and
- b court review through state *arbitrazh* courts.

Complaints regarding the actions (or inaction) of the contracting authority and procurement commissions can be filed no later than 10 days from the date of posting the minutes with the results of assessments of bids by the contracting authority on the official website except for certain cases established by Law No. 44-FZ.

Administrative review takes up to five business days. A copy of a decision taken as a result of an administrative review is published and sent to the interested parties within three business days of the decision being taken.

The deadline for court review of administrative decisions taken under administrative review is three months from the date of the decision.

Court appeals may be filed within three years from the date the applicant finds out or should have found out that his or her rights were violated (including for claims for the application of consequences of contract invalidity).

Court reviews must be performed within a 'reasonable time', which is determined based on the specific nature of each case. In practice, a first-level judicial review usually takes up to three months.

### ii Grounds for challenge

Any procurement participant that believes a violation of the public procurement procedure has taken place may file an application for administrative review (complaint) or submit a claim to court. The application or claim should include certain information and needs to be accompanied by documents evidencing the grounds for the claim. Authorised state bodies may also submit applications and claims in the event of violations of the procurement legislation on a general basis.

### iii Remedies

An application for review does not lead to an automatic suspension of the procurement procedure or the conclusion of the contract; however, the antimonopoly authorities are entitled to suspend the procurement process until the application for review is examined. In the event of court proceedings, the claimant can apply to a court for the adoption of injunctive measures, which include the suspension of the conclusion of the contract.

Upon review of the complaint, the FAS can either issue a binding order to the affected contracting entity (including obliging it to rectify the relevant violations) or cancel the results of the procurement procedure.

A concluded contract may be cancelled by a court decision if the court rules that the procurement procedure that led to the conclusion of the contract violated procurement law.

The current legislation provides for various penalties for the breach of the procurement legislation by contracting authorities (or their officers) depending on the procurement law

breached and the character of the administrative offence. Procurement participants may bear criminal liability, liability in accordance with antimonopoly laws or liability for the non-performance of the relevant contracts provided that material harm has been inflicted on the interests of the state and society.

Please also note that administrative and criminal liability measures were introduced for providing a deliberately false expert opinion in the procurement process under Law No. 44-FZ (Federal Laws No. 510-FZ and 520-FZ of 27 December 2018). In addition, Federal Law No. 99-FZ, according to which a wider range of individuals involved in the procurement under Law No. 44-FZ may be subject to criminal liability (see Articles 200.4 and 200.5 of the Criminal Code of Russia), entered into force in 2018.

## **X OUTLOOK**

Law No. 44-FZ came into force on 1 January 2014 and represents a progressive step in improving regulation of government procurement. This Law also requires the adoption of a significant amount of new subordinate legislation and government regulations to put a new contractual system into successful operation. A number of new legal acts have been issued, and the work on adopting the appropriate regulations in Russia is ongoing. There are also certain initiatives to amend procurement legislation further.

# SWITZERLAND

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## I INTRODUCTION

Public procurement in Switzerland is regulated by international treaties, federal law, and cantonal and intercantonal law. The international treaties set out standard principles, constitute the basic legal framework of rights and obligations, and are binding on authorities. These include international framework agreements such as the Government Procurement Agreement of 15 April 1994 (GPA) (which will be replaced in Switzerland by the GPA 2012 by 1 January 2021), the Bilateral Agreement between the European Community and Switzerland on certain aspects of public procurement of 21 June 1999 (EU-CH AAGP) and the Convention establishing the European Free Trade Association of 4 January 1960 as amended (EFTA Agreement). As Switzerland is not a Member State of the EU, EU law on public procurement is not applicable.

On state level, public procurement is governed by federal law. The principal legislative acts regulating federal public procurements in Switzerland are the Federal Act of Public Procurement of 16 December 1994 as amended (FAPP), and the corresponding Federal Ordinance of Public Procurement of 11 December 1995 as amended (OPP) and the Ordinance on the Organization of Public Procurement of the Federal Administration of 24 October 2012 as amended (OOPP). Whereas the FAPP sets forth the general framework, the OPP contains detailed provisions to execute the FAPP and further stipulates the procedure for public procurements not covered by the FAPP. The OOPP aims to centralise public procurement at federal level.

Every canton in Switzerland has its own procurement law for the procurement of the cantonal administration. The main legislative acts for the procurements of regional and local authorities are the Intercantonal Agreement on Public Procurement of 25 November 1994/15 March 2001 (IAPP), which is thought to harmonise the legal framework within the cantons, and the cantonal public procurement regulations of each canton. While the IAPP, certain federal acts and international treaties do not lead to a harmonisation of the public procurement laws, they do, however, contain minimal standards to be respected during the public procurement process.

The purpose of the FAPP is to make efficient use of public funds by enabling competition between tenderers. The FAPP stipulates that the contract must be awarded to the tenderer with the most economically favourable bid. Furthermore, transparency as an important tool to facilitate competition is a fundamental principle of the procurement procedure and stated as the purpose of the FAAP. The principle of equal treatment and non-discrimination is also

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a key principle of the FAAP. Additionally, the FAAP states that tenderers must guarantee compliance with health and safety regulations as well as employment regulations, including equal treatment of men and women.

In principle, exemptions from the general regime of applicable procurement laws derive from the relevant procurement acts directly. The FAPP, for example, contains a list of procurements for which the FAPP does not apply. For instance, with regard to the procurement of weapons, munitions or war materials, or the construction of fighting and command infrastructure for overall defence as well as the army contracts relating to national defence, the FAPP itself stipulates the non-applicability of the FAPP.

This chapter focuses primarily on federal law, owing to the numerous and different cantonal and even municipal regulations in the Swiss Confederation.

## II YEAR IN REVIEW

The entire legislative framework has undergone revision in the past to implement the revised WTO Agreement on Government Procurement (GPA 2012). In addition to the implementation of the GPA 2012 in the FAPP, one of the main objectives of the revision was to harmonise the federal and cantonal procurement regulations. On federal level, the revised FAPP and OPP will enter into force on 1 January 2021. On a cantonal level, the new acts are expected to enter into force as soon as enacted by the cantonal governments.

The key changes to the laws are as follows:

- a* Contracts are to be awarded to the ‘most advantageous offer’ and no longer to the ‘most economically favourable’ one. The numerous new awarding criteria contained in the new laws are to be given more weight in relation to the price. These criteria particularly include suitability, deadlines, technical value, cost-effectiveness, life cycle costs, aesthetics, sustainability, plausibility of the offer, the different price levels in the countries in which the service is provided, price reliability, creativity, customer service, delivery conditions, infrastructure, innovative content, functionality, service readiness, professional competence and efficiency of the methodology. The overall aim is to place greater emphasis on quality competition rather than price competition.
- b* Bidding rounds (i.e., negotiations with the sole purpose of reducing the price offer) are going to be prohibited by law on federal and cantonal level. However, price adjustments will remain possible in the context of a bid adjustment or special procedures such as the dialogue, where minor modifications may result in a corresponding adjustment of the price offer. In addition, price adjustments may be made within the framework of an electronic auction or during the negotiation of an offer in an invitation procedure.
- c* Flexible and modern procurement instruments will be introduced in the revised federal law, such as the possibility of concluding framework agreements or study contracts as well as competitions. With respect to modern technologies, the law will provide for electronic auctions and the electronic processing of award procedures.
- d* Legal protection on procurement proceedings will be harmonised across the federal and cantonal levels (e.g., the appeal period for awards will be 20 days at both federal and cantonal level).

Since the current legislation will remain effective until entry into force of the revised decrees, the following remarks will focus primarily on the current legislative framework but also take into account the planned new legislation where fundamental changes are expected.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The FAPP lists the public authorities, which are subject to the law. The list contains entities both with and without legal personality. Appendix 1, Annex 1 of the GPA has a conclusive list of awarding authorities. However, this list is not exhaustive and entities founded after the contract signing may also be subject to public procurement law. Explicitly regulated are contracting authorities in the water, energy, transport and telecommunications sectors. However, entities active in these sectors may be granted individual exemptions by the federal department.

Private entities are, under specific circumstances and for certain actions, especially when providing public services in the area of production, transport or distribution of electrical power, subject to public procurement law. They have to meet the same legal requirements, in particular, if they act in place of contracting authorities for procurements (Article 2d OPP).

Under the new legislation, the FAPP will provide for a definition of the term 'public authority'. In addition to the current regulated entities, other entities such as courts, federal prosecutors and parliamentary services will also be subject to the FAPP.

#### ii Regulated contracts

Under Swiss law, the following contracts are covered by public procurement rules:

- a* supply contracts (i.e., contracts for the supply of movable goods, in particular by purchase, lease, rent or hire);
- b* service contracts (i.e., contracts for the rendering of services); and
- c* works contracts (i.e., contracts for building and civil engineering work).

Based on the FAPP, the competent federal department regularly issues an ordinance on the adjustment of the threshold values valuable for a period of two years. The following threshold values (without VAT for each single assignment) are valid from 1 January 2020 until 31 December 2021:

- a* 230,000 Swiss francs for supplies and services;
- b* 8.7 million Swiss francs for works; and
- c* 700,000 Swiss francs for supplies and services procured (1) by a contracting authority regulated under the FAPP (Article 2 Paragraph 2) or (2) by the Swiss Post for its activities in the public transport sector.

For a number of sector entities, the OPP provides for specific thresholds. In addition, the OPP lays down (low) thresholds (without VAT) for contracts, which can be awarded directly, and without invitation to tender:

- a* 150,000 Swiss francs for works and services; and
- b* 50,000 Swiss francs for supplies.

The same thresholds apply for areas and sectors not covered by international agreements.



Where the contracting parties wish to vary a contract or transfer the contract to a different supplier, the following applies: in general, Swiss public procurement law assumes that the project described in the invitation to tender materially remains the same during the entire procurement process. No new procurement procedure is therefore necessary unless the amendment materially changes the scope of the contract or the amendments exceed the applicable threshold values. However, the contract cannot be transferred to a different entity without conducting a new procurement procedure following the award of the contract to the entity different to the previous one.

The revised law provides for an explicit definition of ‘public contracts’, which are defined as transactions by which a contracting authority subject to the law procures against payment the products or services for the fulfilment of its (public) tasks. Accordingly, the public contract is characterised by its remuneration and the exchange of goods or services in return. It is not necessary for the consideration to consist in money; monetary benefits that are only indirectly exchanged are also covered.

With regard to the award of concessions, the revised law now stipulates that these are subject to procurement law if the tenderer thereby acquires exclusive or special rights that it exercises in the public interest and for which it receives remuneration or compensation directly or indirectly in return. However, specific legal provisions (e.g., under the Water Act, the Electricity Supply Act or in telecommunications and broadcasting legislation) take precedence over this new regulation.

## **IV SPECIAL CONTRACTUAL FORMS**

### **i Framework agreements and central purchasing**

In Switzerland, the FAPP currently does not regulate framework agreements. It is generally accepted that the tendering of framework agreements must follow the same rules if the single contracts to be concluded under the framework agreement qualify as public procurements. The sum of the values of the single contracts provided for in the framework agreement is relevant for calculating the threshold.

Under the revised legislation, framework agreements will be explicitly regulated by the FAPP. The revised FAPP provides that, apart from in exceptional circumstances, framework contracts may have a maximum duration of five years and may not be automatically renewed.

### **ii Joint ventures**

The FAPP does not provide for specific rules on public-public joint ventures (JVs) and does not specify when a contract is to be considered as an ‘in-house’ contract. If a contract is made between the contracting authority and an entity belonging to, or being controlled by, the same public authority as the contracting authority, the FAPP does not apply. This must be distinguished from the case where the JV company as a supplier also offers its goods or services for a non-significant part to third parties and competes in this way in the market or where a third party has a shareholding interest in the supplier. In these cases, the FAPP applies. However, the application of the FAPP may be exempted if a public entity procures from another public entity.

Similar to the regulation of public-public JVs, Swiss public procurement legislation does not provide for special rules that apply to public-private partnerships (PPPs). Also, there is no clear definition of PPP in Swiss procurement legislation. Generally, procurement procedures apply as PPPs are viewed as ordinary procurements of supplies, services or

works. It has been confirmed by a court case that a PPP partner once being selected by the contracting authority according to the FAPP is no longer subject to procurement laws when subcontracting. Despite the recognition of the one-time procurement principle, the contracting authority must ensure that the selected partner obligates its subcontractors to comply with the compulsory regulations.

Also, the revised FAPP does not provide for PPP specific provisions. Therefore, the applicability of procurement laws to PPP projects will in the future also have to be examined case by case, depending on the specific characteristics of the procured service. However, the revised FAPP provides for specific rules on the applicability of the FAPP in constellations where the procurement is conducted from an entity, which is regulated, part of the regulated authority or controlled by the regulated authority.

## **V THE BIDDING PROCESS**

### **i Notice**

As far as regulated procurement contracts on the federal level are concerned, all calls for tender as well as the awards of the contract are published on Simap.ch.

### **ii Procedures**

Swiss public procurement law provides four main methods of procurement. The contracting authority may award a regulated contract by means of an open, a selective, a negotiated or an invitation procedure.

Under the open procedure, all interested bidder may submit a tender. In the selective procedure, all interested bidders may submit an application to participate, but the contracting authority identifies bidders based on their suitability who may submit a tender. Within the negotiated procedure, the contracting authority negotiates a contract directly with a supplier of its choice without issuing any invitation to submit a tender. In the invitation procedure, the contracting authority determines at least three suppliers, if possible, who will be invited to submit a tender.

As far as electronic procurements are concerned, Simap.ch – where regulated procurement contracts on the federal level are advertised – is an electronic platform. Electronic submissions are standard practice within federal administration.

Under the revised legislation, the same four methods of procurement will remain, but will be regulated in more detail. Moreover, the revised law is intended to give the contracting authorities greater leeway in the use of modern technologies. To this end, the revised law now provides for electronic auctions and the electronic processing of award procedures. Flexible procurement instruments such as the dialogue (competitive dialogue) are likely to be increasingly important in the future, especially in the awarding of intellectual services. Practical experience will show to what extent these new instruments will be used and whether further need for modification of the provisions will result.

### **iii Amending bids**

Modification to the tender documents is limited and amendments are possible in the event that formal negotiations take place. However, bidders may submit alternative tenders in addition to their main offer, as long as such alternatives have not been excluded in the tender documents.

See also Section III.ii for where the contracting parties wish to vary a contract or transfer the contract to a different supplier.

## **VI ELIGIBILITY**

### **i Qualification to bid**

As a general rule, all bidders must comply with general requisites. For example, bidders may be excluded from tenders if they have provided the contracting authority with false information, failed to pay social security contributions or taxes, are the subject of insolvency proceedings, the violation of formal conditions or entered into arrangements to avoid or substantially prejudice competition.

As mentioned in Section V.ii, the qualification to bid may also depend on the method of procurement applicable to the tender. Only the 'selective procedure' provides for a selection or 'shortlisting' of the bidders that fulfil the qualification criteria established by the contracting authority. These criteria may concern the bidders' financial, economic and technical capacity. To meet the principle of transparency, the criteria are published in the invitation to tender or tender documents. The contracting authority can reduce the number of tenderers if the tender could not otherwise be processed in an efficient way. However, even when limiting the number of participants, the contracting authority has to guarantee an effective competition between the bidders.

In addition, in certain cases, the contracting authority may restrict or exclude the possibility for consortia to participate to the invitation to tender.

Finally, the contracting authority may also require in certain cases that the successful bidder has a specific legal status before being awarded the contract.

### **ii Conflicts of interest**

The FAPP does not provide for any rules on conflicts of interest. However, general principles of constitutional and administrative law, according to which members of the administration must recuse themselves if they have a personal interest or could be regarded as lacking impartiality, apply to public procurements. The IAPP also provides for persons concerned to recuse themselves if certain conditions are met but does not specify these conditions.

Under the revised legislation, specific provisions are inserted in the general principles sections of the revised FAPP and OPP to strengthen the conflicts of interest policy that shall be in place for the contracting authority and its members.

### **iii Foreign suppliers**

Foreign suppliers coming from WTO GPA contracting states to the extent that these states grant reciprocal rights, or third states with whom Switzerland has a contractual agreement or of whom the Swiss government has established that they guarantee equality of treatment to Swiss tenderers can participate in Swiss public procurement procedures.

Although Switzerland is not a member of the EU, it concluded a set of bilateral agreements with the EU (and EFTA), notably the EU-CH AAGP. Companies from the EU or EFTA have the right to participate in tenders in Switzerland and to second the necessary personnel to Switzerland.

A foreign bidder that does not fall under the above-mentioned categories may still attempt to take part in the tendering procedure and the awarding authority is not prohibited from awarding the contract to such entity. However, there is no legal remedy if the contracting authority does not consider or excludes such a bidder's tender.

Foreign companies must, however, apply for work permits for their seconded personnel in accordance with the applicable Swiss legislation. They must therefore comply with the social and working conditions applying to the location of the awarded contract.

Under the revised legislation, the rules will not change. The Federal Council will regularly update its list of countries that grant reciprocal rights.

## **VII AWARD**

### **i Evaluating tenders**

The FAPP provides that the contract has to be awarded to the most economically favourable offer. The most economically favourable offer is evaluated taking into account a number of criteria, in particular, deadlines, quality, price, operating efficiency, operating costs, customer service, expedience of the performance aesthetics, environmental sustainability, technical value and training of apprentices within the meaning of a basic vocational training. The last criterion, however, applies only outside the scope of international agreements.

The contracting authorities have to determine a catalogue of awarding criteria and their degree of relevance, and must publish them in the tender documentation. Contracts for broadly standardised goods may also be awarded solely on the basis of the lowest price.

As mentioned in Section II, under the revised legislation the contract will be awarded to the most advantageous offer. Case law will show how this new criterion will be applied in practice.

The contracting authority may request further information from the bidder filing an abnormally low tender (e.g., regarding the calculation method) in order to assess whether there is a reason for exclusion of the bidder. Although there is no definition in the OPP for 'abnormally low' tenders, tenders that range below production costs or that differ noticeably from the other tenders should be verified and examined on a case-by-case basis. The revised law provides for an obligation of the contracting authority to request further information from the bidder filing an abnormally low tender and enables the contracting authority to exclude the respective bidder if it cannot adequately respond to the authority's request.

### **ii National interest and public policy considerations**

The GPA 2012 lays down the principle that authorities are required to act in a non-discriminatory manner. National legislation shall not limit the market (i.e., encourage national or local companies or discriminate against foreign bidders).

Under the revised legislation, the procurement may take into account social or environmental criteria but these must have a relevance to the market to which the contract is awarded. Thus, to avoid discriminating against foreign companies, one must always ensure that such criteria are objectively necessary for the underlying market.

Furthermore, as mentioned in Section III.i, there are sectors that may be granted with individual exemption from tender procedures, in particular for public policy considerations.

These exemptions are exhaustively listed in the revised FAPP.

## VIII INFORMATION FLOW

Invitations to tender must be published on the Simap.ch platform. Tender documents containing all information relevant for a company to decide whether to participate in the tender procedure and to prepare its bid must also be available.

The contracting authority may set a date in the tender documents after which no questions will be answered by the contracting authority with respect to the tender documents.

Awards must also be published on the Simap.ch platform. Furthermore, the contracting authority has to communicate its decision to the bidders and must include a reasoned summary of its decision.

In addition, an unsuccessful bidder has the right to request the contracting authority to provide the following information on the award procedure:

- a* the type of tendering procedure used;
- b* the name of the successful tenderer;
- c* the value of the successful tender or the value of the highest and lowest tender taken into account in the tendering procedure;
- d* the main reasons for the rejection of their tender; and
- e* the characteristics and decisive advantages of the successful tender.

However, the awarding authority must not provide this information to unsuccessful bidders if disclosing such information would result in a violation of federal law, be against public interest, prejudice the legitimate commercial interests of the bidders or interfere with fair competition among bidders.

The contracting authority may provide this information in a written statement or invite the unsuccessful bidders for an oral debriefing, which is often the case in practice.

Furthermore, other decisions listed in Article 29 of the FAPP, such as the interruption of an award procedure, the choice of participants in the selective procedure, or the exclusion of a bidder, must also be communicated to the bidders with summary reasons or be published.

## IX CHALLENGING AWARDS

### **i Procedures**

The FAPP defines several (final and interim) decisions that can be independently contested by way of appeal. This non-exhaustive list includes (1) the award of contract or discontinuation of the award procedure; (2) the invitation to tender for the contract; (3) the decision on the selection of participants in the selective procedure; and (4) exclusions from the tender. Appeals against these decisions must be brought forward immediately. Their unlawfulness cannot be pleaded at a later point in the procedure.

Appeals against decisions issued by a contracting authority subject to the FAPP may be submitted to the Federal Administrative Court filed within 20 days from the notification of the decision. If the decision is published on the internet platform Simap.ch before the tenderers are personally informed about the outcome of the procedure, the date of publication thereon will be relevant for the limitation period.

In addition, in the federal public procurement procedure, suspensive effect has to be requested by the appellant. If suspensive effect is not granted or not requested by the appellant, the contracting authority can conclude the contract with the successful bidder.

Appeals against decisions of cantonal or local procurement authorities may generally be submitted to the cantonal public law court within 10 days from the date of publication

of the decision. The cantonal decision can then be appealed to the Federal Supreme Court within 30 days, although the Federal Supreme Court's power to review may be very restricted, depending on whether the thresholds are reached.

Furthermore, on the cantonal level, a standstill clause exists under which the contract may not be concluded before the time limit for appealing against the award decision has expired.

Decisions of the Federal Administrative Court or the cantonal public court can in general be appealed to the Federal Supreme Court within 30 days from the notification of the judgment of the Federal Administrative Court or the cantonal public court.

Under the revised legislation, the deadline for appealing decisions of federal, cantonal or local procurement authorities will be 20 days.

## **ii Grounds for challenge**

The appellant may plead any violation of substantive or procedural law, including excess or abuse of discretionary power. The appeal court will review the legality of the contested decisions but not its appropriateness. The contracting authority has a great deal of discretion when taking decisions and the judge may only review the evaluation made by the contracting authority of the tenderer's bid, in the light of the awarding criteria. The grounds may also relate to an incorrect factual situation. In practice, the judge's control in such cases is limited to arbitrariness.

An ordinary appeal to the Federal Supreme Court is limited to the ground of federal law violation and manifestly wrong factual assessment established in violation of the law. In the particular case of a subsidiary constitutional appeal, only those constitutional rights of which the unsuccessful bidder is the holder may be invoked.

Furthermore, according to the Federal Act on Administrative Procedure of 20 December 1968, as amended, an appeal against other separately notified interim orders is permitted if they may cause a non-redressable prejudice, or granting the appeal would immediately bring a final decision, and would therefore obviate significant expenditure in time or money in prolonged evidentiary proceedings.

## **iii Remedies**

A distinction ought to be made between the situation in which the unsuccessful tenderer appeals after the award but before the contract is signed with the successful tenderer and the situation in which the unsuccessful tenderer appeals after the contract has been concluded.

In the first case, the possibility to request suspensive effect in order to prevent the conclusion of the contract remains and, if granted, the unlawful award can be annulled or reformed by the appeal court.

In the second case, the appeal court can only determine the extent to which the contested procurement is in breach of federal (or cantonal) law. The only remedy available thereafter is a distinct claim for damages for the costs in connection with the procurement procedure and the appeal procedure.

Regarding remedies outside the legislation, the doctrine is divided on whether the remedies provided by the FAPP are conclusive or whether civil claims based on *culpa in contrahendo* are possible. As an informal remedy, a complaint to the supervisory authority of the contracting authority can be made.

Under the revised legislation, it will be possible for the appellant to claim for damages within the same appeal procedure as the contested procurement procedure.

## **X OUTLOOK**

The revised GPA, which improves transparency and market access, was ratified by the Swiss parliament on 21 June 2019.

On the same date, the Chambers of the Swiss parliament have ratified the revised FAPP. Concurrently, the Swiss Federal Council ratified the revised OPP. The revised FAPP and OPP will enter into force on 1 January 2021. At an extraordinary plenary meeting on 15 November 2019, the cantons also unanimously adopted the revised IAPP. These revisions aim at implementing the revised GPA on the Swiss level and at aligning the federal and cantonal procurement laws.

As mentioned in Section II, the main changes of the revised FAPP include, in particular, increased sustainability in the area of public procurement and quality-oriented competition (instead of price-oriented competition), better prevention of corruption, moderate extension of legal protection, changes in language requirements (implementation of various interventions adopted by Parliament) and the use of flexible instruments such as dialogue (currently regulated at ordinance level), framework contracts, electronic procurement, electronic auctions and reduced deadlines.

As, with the current revision, the procurement legislation has undergone important changes, new changes are not to be expected in the near future.

# UNITED KINGDOM

*Louise Dobson, Ryan Geldart and Jack Doukov-Eustice*<sup>1</sup>

## I INTRODUCTION

The key procurement legislation<sup>2</sup> applicable in England, Wales and Northern Ireland is the Public Contracts Regulations 2015 (PCR), the Utilities Contracts Regulations 2016 (UCR), the Concession Contracts Regulations 2016 (CCR), and the Defence and Security Public Contracts Regulations 2011 (Defence Regulations), referred to collectively in this chapter as the 'procurement regulations'.

The PCR, UCR and CCR do not apply to Scotland, which has its own procurement legislation, while the Defence Regulations apply throughout the United Kingdom. The Scottish Ministers have devolved competence to make procurement regulations by virtue of Section 53 of the Scotland Act 1998. The key procurement legislation applicable in Scotland, which implements the corresponding EU directives, is similar to that in the rest of the United Kingdom: the Public Contracts (Scotland) Regulations 2015; the Procurement (Scotland) Regulations 2016; the Utilities Contract (Scotland) Regulations 2016; and the Concession Contracts (Scotland) Regulations 2016, all of which came into force on 18 April 2016.

The procurement regulations implement the corresponding EU directives. The PCR came into force on 26 February 2015, and the UCR and CCR came into force on 18 April 2016.<sup>3</sup> Contracts for health services above £663,540 in value let by the National Health Service (NHS) and clinical commissioning groups can be subject to the 'light touch regime' in the PCR (see Section V.ii). Separate procurement regulations<sup>4</sup> specific to the health sector continue to apply (alongside the PCR) to contracts for NHS healthcare services regardless of contract value.

The Small Business, Enterprise and Employment Act 2015 (SBEE Act) gives the UK government power to make further regulations in relation to procurement.<sup>5</sup>

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2 Except for defence and security procurement, where the rules are UK-wide, this chapter focuses on the legislation in England, Wales and Northern Ireland.

3 The EU directives corresponding to the UK regulations currently in force are, therefore, 2014/24/EU, 2014/25/EC, 2014/23/EC, 2009/81/EC and 89/665/EEC. References in this chapter to the EU directives are to those EU directives currently implemented in the United Kingdom, unless otherwise stated.

4 The Procurement, Patient Choice and Competition Regulations (No. 2) 2013.

5 To date, only the Public Procurement (Electronic Invoices etc) Regulations 2019 have been made, covering electronic invoicing following the UK's exit from the EU in a 'deal' scenario (see Section II).



Beyond the EU Directives and procurement regulations, it is also important to consider the case law of the Court of Justice of the European Union (CJEU) and the General Court, the general EU Treaty principles of transparency, equal treatment, non-discrimination and proportionality, and the decisions of UK courts.

The Cabinet Office (part of Her Majesty's Treasury) has responsibility for central government procurement policy; it and the Crown Commercial Service (CCS), an executive agency of the Cabinet Office, publish guidance notes and procurement policy notes (PPNs) on a range of issues. In Northern Ireland, policy and guidance are issued by the Central Procurement Directorate, and the Welsh Minister for Finance and Government Business has issued the Wales Procurement Policy Statement. The Scottish Ministers issue guidance under the equivalent Scottish legislation.

Formal legal challenges to procurement decisions are made in the High Court. However, less formal options exist. The Cabinet Office's Public Procurement Review Service<sup>6</sup> allows bidders to make complaints, and the SBEE Act reinforces this by providing a statutory basis for its procurement investigations and enabling the investigation of procurement processes and practices of certain contracting authorities by a government minister. Bidders can also refer matters to NHS Improvement, where the contracting authority is a Clinical Commissioning Group or NHS England. NHS Improvement may use its investigation and enforcement powers under the Procurement, Patient Choice and Competition Regulations (No. 2) 2013 to prevent or remedy breaches of procurement law, and can even declare arrangements for the provision of NHS healthcare services ineffective if there has been a serious breach.

## **II YEAR IN REVIEW**

This year has been dominated by Brexit, a continued increase in challenges to procurements and, more recently, the response to the covid-19 pandemic.

On 31 January 2020, the UK officially exited the European Union having passed the European Union (Withdrawal Agreement) Act 2020, but its relationship with the EU during the current transitional period effectively maintains the status quo. The transitional period is set to end on 31 December 2020 with the UK still preparing for a possible 'no-deal' scenario and any extension to this period requiring approval by 1 July 2020. At the time of writing, the UK and the EU have exchanged draft legal texts setting out their respective positions on their future relationship and continue to negotiate.

As part of the UK's domestic preparation for Brexit, the UK government and Scottish ministers have introduced statutory instruments (amending regulations<sup>7</sup>) that, at the end of the transition period, will amend or remove provisions in the UK regulations that would otherwise be inoperable or inappropriate after that date. The key difference under these changes is that procuring entities will have to send notices (e.g., contract advertisements) to a

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6 Previously called the 'Mystery Shopper' scheme but renamed on 29 November 2018.

7 Public Procurement (Amendment etc) (EU Exit) Regulations 2019 No. 560; Public Procurement (Amendment etc) (EU Exit) (No 2) Regulations 2019 No. 623; Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 No. 697; Public Procurement (Electronic Invoices etc) Regulations 2019; Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 No. 112; and Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 No. 114.

new UK e-notification service instead of to the EU Publications Office. The UK government has also published a number of guidance notes on matters relating to public procurement as part of its preparations for Brexit.<sup>8</sup>

In the event that no agreement is reached on the future EU-UK relationship and the transition period is not extended, the amending regulations would come into effect immediately. At present, the UK regulations and EU law continue to apply unamended. After the transition period the changes made by the amending regulations will come into effect and ministers will have powers, for a short period, to make further necessary amendments and corrections to the UK regulations to ensure they are workable in the UK context. However, more significant changes would need to go through the full parliamentary procedure and are unlikely in the short term.

The UK is currently a party to the World Trade Organization Government Procurement Agreement (GPA) through its EU membership. The UK began negotiations in June 2018 to become a member in its own right following its withdrawal from the EU, and on 27 February 2019 the GPA members approved the UK's accession to the GPA as an independent member, which will take effect at the end of the transition period.<sup>9</sup> This will require the UK to open up higher value public procurement opportunities to other GPA parties (including EU Member States) in exchange for their public procurement market being opened up in a similar way.

There have also been several key court decisions, including *AEW Europe v. Basingstoke and Dean Borough Council*,<sup>10</sup> where the court considered the thorny issue of whether the remedy of ineffectiveness is available where the contract that is awarded departs from the precise wording of the contract notice that started the procurement process leading to the award. The argument of the claimant was that the first ground for a declaration of ineffectiveness was available because the contract that was awarded departed so far from the original contract notice that the contract notice no longer applied, and therefore no contract notice was ever placed for the awarded contract. For a number of practical reasons (temporal, and the fact the claimant was not part of the procurement process concerned) this was the only remedy reasonably available to it. Rather than treating it as an issue of contract modification and assessing whether the contract was materially different from that envisaged by the contract notice, the court held (following the reasoning in *Alstom Transport v. Eurostar International Limited*<sup>11</sup>) that the relevant test was to determine whether there was an effective contract notice capable of being related to the procedure and the contract awarded; using this 'mechanistic' test, regard should be had to the fact that the contract notice 'sparked the competition' that led to the contract being awarded. The court concluded that there was 'a sufficient and indeed close connection' between the contract notice and the awarded contract. To an extent, this decision reflected the need for a commercially workable regulatory framework for awarding public contracts that recognises the realities of specific requirements changing over time.

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8 These include guidance on public-sector procurement under the EU Withdrawal Agreement (updated 8 August 2019); guidance on public-sector procurement from 31 January 2020 (updated 25 September 2019); guidance on bidding for overseas contracts from 1 January 2021 (published 16 August 2019) and PPN(2) 02/19 – Preparing for the UK leaving the EU (updated 9 May 2019).

9 Communication from the United Kingdom (WT/GC/206).

10 [2019] EWHC 2050 (TCC).

11 [2011] EWHC 1828 (Ch).

*Amey Highways Ltd v. West Sussex County Council*<sup>12</sup> potentially significantly limits the ability of contracting authorities to control risk of challenge by ‘winding back the clock’ to an earlier stage of the procurement, or abandoning it altogether. The claimant, an unsuccessful tenderer, challenged the award of the contract on the basis that the evaluation was erroneous and that it, rather than the preferred bidder, should have been awarded the contract. Having failed to have the claim struck out for being time-barred, the contracting authority sought to abandon and re-run the procurement rather than take on potentially costly litigation. The claimant then sought to challenge the lawfulness of the abandonment and its effect on its claim. The court held that, but for the litigation, the contracting authority would have entered into the contract with its preferred bidder and that, if its challenge was correct, the claimant would have suffered a loss as a result of not being awarded the contract. Accordingly, the claimant’s right to challenge the award accrued at the point where the contracting authority would have signed the contract with the preferred bidder. The abandonment, despite being made for lawful reasons, did not extinguish the claimant’s cause of action, and the claimant remained free to pursue its claim for damages. Contracting authorities will now need to be mindful of the original timetable to signing when considering the implications of a decision to abandon, to avoid a protracted procurement dispute.

A case regarding the scope of the CCR<sup>13</sup> confirmed the approach taken in *Faraday*,<sup>14</sup> that, for there to be a public contract, there must be a legally enforceable obligation to perform a relevant activity and, when assessing whether this is the case, a transaction must be looked at as a whole, looking at its substance rather than form. This particular case concerned a transaction for the lease of land. The court held that the fact the land may be used by the lessee for a commercial purpose (in this case, for advertising) does not prevent the transaction being one ‘for land’ and therefore exempt from the application of the CCR where there is no positive obligation to use the land for the purpose of advertising.

The courts’ recent decisions in relation to the regular applications to lift the automatic suspension have tended to reinforce the difficulty for challenging bidders in maintaining the suspension. This is particularly the case when the procurements relate to significant projects of widespread or national importance. A key example from the past year is *Alstom*,<sup>15</sup> where the court decided to lift the automatic suspension. The claimant argued that damages were not an adequate remedy given that the defendant was claiming (on the basis of the decision in *Energy Solutions*)<sup>16</sup> that the alleged breaches were not ‘sufficiently serious’ to warrant damages, and that it might ultimately be left without any remedy. This argument fell away, however, when the defendant changed its position and conceded that a breach of the type claimed would have been sufficiently serious to justify damages; the public safety concerns and disruption to the travelling public arising from aged signalling equipment swung the balance of convenience in favour of lifting the suspension. Another key example from the past year where the suspension was lifted is *Circle Nottingham v. NHS*,<sup>17</sup> discussed further below in Section IX.iii.

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12 [2019] EWHC 1291 (TCC).

13 *Ocean Outdoor UK Ltd v. Hammersmith and Fulham London Borough Council* [2019] EWCA Civ 1642.

14 *R (Faraday Development Limited) v. West Berkshire Council* [2018] EWCA Civ 2532.

15 *Alstom Transport UK Ltd v. Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC).

16 See Section IX.iii and footnote 113.

17 *Circle Nottingham Ltd v. NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC).

The outbreak of covid-19 saw the CCS release three PPNs. PPN 01/20 provided guidance to contracting authorities in responding to urgent procurement needs. PPN 02/20 provided practical guidance to contracting authorities and suppliers on keeping payments flowing through the supply chain and encouraged all contracting authorities to provide support to their suppliers during the disruption arising from covid-19. PPN 03/20 promoted wider use of ‘procurement cards’, by more staff and for increased categories of goods and services, and recommended raising key card holders’ transaction limits to £20,000 and monthly caps to £100,000. At the time of writing there was no further guidance or legislation regarding procurement and covid-19 but, along with much of the global economy, suppliers and procuring entities were facing significant issues.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The PCR regulate most public sector entities. Many are specifically listed in the PCR (e.g., government departments); others are regulated on the basis that they are ‘bodies governed by public law’.<sup>18</sup>

Contracts awarded by private firms are regulated by the PCR in limited circumstances for certain projects. Contracting authorities are required to ensure that, where they subsidise certain works and services contracts by more than 50 per cent, the subsidised contract is competitively tendered under the PCR.<sup>19</sup> More generally in relation to grant-funded projects, a condition of the funding may in practice require grant recipients to let contracts for the project by competitive tender.

The UCR apply to utility activities carried out by the public sector entities regulated by the PCR, other bodies subject to their control (public undertakings) and utilities pursuing the relevant activity on the basis of special or exclusive rights granted by a competent authority.<sup>20</sup> Pursuant to EU derogations, the UCR do not apply to exploration for and exploitation of oil and gas, or to the generation and supply (but not transmission) of electricity and gas, on the basis that these are competitive markets.

The CCR apply to the award of works and services concessions by the entities regulated by the PCR and the entities covered by the UCR (when pursuing a utility activity).

The Defence Regulations apply to all entities covered by the PCR and the UCR, and the equivalent Scottish regulations.

#### ii Regulated contracts

Generally, contracts for the construction of works, supply of goods and provision of services valued at or above specified EU financial thresholds are subject to the procurement regulations.<sup>21</sup>

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18 PCR 2(1).

19 PCR 13.

20 See *Alstom Transport v. Eurostar International Limited* [2012] EWHC 28 (Ch) Paragraphs 70 and 71, where the court held that Eurostar was not a utility.

21 In this chapter, the term ‘above-threshold contract’ is used to refer to contracts meeting these EU financial thresholds and ‘below-threshold contract’ to those that do not meet them.

The financial thresholds applying from 1 January 2020 are:

	PCR	UCR Defence Regulations	CCR
Goods	£122,976 or 189,330**	£378,660	Not applicable
Services*	£122,976 or 189,330**	£378,660	£4,733,252
Works	£4,551,413	£4,551,413	£4,733,252
<p>* For 'light-touch' services, the threshold is £663,540 under PCR, £884,720 under UCR and £4,733,252 under CCR (there is no light touch regime for the Defence Regulations).</p> <p>** Broadly, the lower threshold applies to central government and the higher threshold to all other authorities.</p>			

Below-threshold contracts are not subject to the procurement regulations, but some form of advertisement and a fair, competitive tender procedure is required if there may be certain cross-border interest.<sup>22</sup> The PCR, however, contain limited additional provisions for below-threshold contracts that are designed to assist small to medium-sized enterprises (SMEs)<sup>23</sup> which go beyond the requirements of the 2014 Public Sector Directive (e.g., the advertising obligations outlined in Section V.i).

The UCR apply only to regulated utility activities,<sup>24</sup> except in the case of concession contracts, when the CCR will apply. Procurements in relation to a utility's other activities are unregulated unless the utility is also a contracting authority for the purposes of the PCR, in which case its non-utility activities will be subject to the PCR.<sup>25</sup>

The Defence Regulations apply to the procurement of defence and sensitive security equipment, works and services. Works and services concession contracts in these fields are covered by the CCR. The most sensitive defence contracts may still be awarded outside the scope of the procurement regulations.

One area that can cause particular difficulties is land redevelopment. Land redevelopment often requires cooperation between a local authority and a private developer, and these arrangements are negotiated directly between a major local landowner and the authority without a competitive process. In practice, a number of local authorities have taken such arrangements outside the procurement regulations by avoiding imposing any legally binding obligation upon the developer to build.<sup>26</sup> As noted in Section II, a UK Court of Appeal decision<sup>27</sup> has found that contingent legally enforceable obligations to perform works will constitute a public works contract that ought to be advertised and procured under the procurement regulations.

22 See Commission 'Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives', OJEU 2006 C 179/02.

23 See CCS 'Guidance on provisions that support market access for small businesses', August 2015.

24 As listed in UCR 9 to 15.

25 C-393/06 *Ing Aigner, Wasser-Wärme-Umwelt GmbH v. Fernwärme Wien GmbH*, Paragraph 59.

26 This relies on the CJEU decision in C-451/08 *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*. See also *R (on the application of Midlands. Cooperative Society Ltd) v. Birmingham City Council* [2012] EWHC 620 (Admin); and *AG Quidner Hounslow LLP v. Mayor and Burgesses of the London Borough of Hounslow* [2012] EWHC 2639 (TCC).

27 See footnote 14.

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. The CCS frameworks for central government are an example of this. Single-supplier frameworks are also common.

Framework agreements are often established by one authority on behalf of itself and a (frequently very large) number of other authorities.

Dynamic purchasing systems are not widely used at present.

Utilities have used both framework agreements and qualification systems widely to reduce the burden of procurement processes, often establishing single-supplier framework agreements for one or two control periods (i.e., five or 10 years). Under the UCR, frameworks must now be limited to eight years, unless a longer period can be justified.

### ii Joint ventures

Public-public JVs are common. They have typically relied on the *Teckal*<sup>28</sup> or the *Hamburg Waste*<sup>29</sup> exceptions for 'in-house' and cooperation agreements in the public sector that meet certain conditions, which are not subject to competitive tender under the procurement regulations. These exceptions are 'codified' in the PCR, UCR and CCR.<sup>30</sup>

JVs have sometimes been used in public-private partnerships (PPPs), but typically the appointment of the JV partner is advertised and tendered.

PPPs have typically been procured under the competitive dialogue procedure. The PCR now provide the option of the competitive procedure with negotiation.<sup>31</sup> This has obvious similarities with competitive dialogue, but the greater flexibilities<sup>32</sup> offered by the competitive dialogue procedure may mean that it remains the more attractive option.

The UCR have separate rules on JVs and intra-group supplies. In practice, however, they have not been as widely used as the public sector rules embodied in the *Teckal* and *Hamburg Waste* exceptions.

## V THE BIDDING PROCESS

### i Notice

Above-threshold<sup>33</sup> contracts must be advertised in the Official Journal of the EU (OJEU). The PCR also require contracting authorities to publish details of these contracts on the government portal (Contracts Finder). Similarly, the PCR require that, where a contracting authority advertises contracts that meet lower minimum thresholds (£10,000 or more in

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28 C-107/98 *Teckal Srl v. Comune di Viano and another*.

29 C-480/06 *Commission v. Germany*.

30 See CCS 'Guidance on 'public/public' contracts', August 2015.

31 See Section V.ii.

32 For example, under competitive dialogue the authority is not required to set out its minimum requirements at the outset of the procurement, and there is more flexibility to clarify, fine tune and optimise final tenders and to confirm financial commitments and other terms of the winning bid, provided essential aspects are not materially altered and there is no risk of distortion of competition or discrimination.

33 See footnote 20.

the case of central government authorities, and £25,000 or more for sub-central contracting authorities or NHS trusts), it must also publish information about the opportunity on Contracts Finder, regardless of any other means it uses to advertise the opportunity. This requirement does not apply to contracting authorities carrying out devolved functions in Scotland, Wales and Northern Ireland. In Scotland, contracts that meet a minimum threshold of £50,000 (for supplies and services contracts) or £2 million (for works contracts) must be advertised on the Public Contracts Scotland website.<sup>34</sup>

Voluntary *ex ante* transparency (VEAT) notices can be used where authorities directly award a contract without a competitive process, to seek to overcome the risk of the contract being declared ineffective because it was not properly advertised in the OJEU. However, a VEAT notice is unlikely to offer such protection unless the authority, acting diligently, had a legitimate belief that the procurement regulations did not apply and has been sufficiently transparent in the VEAT notice about the proposed transaction.<sup>35</sup>

## ii Procedures

For above-threshold contracts, the procurement regulations generally require use of one of the prescribed procedures. Under the PCR these are the open, restricted, competitive with negotiation, competitive dialogue and innovation partnership procedures. The PCR also provide for the negotiated procedure without prior publication of an OJEU advertisement (that is, a direct award) in certain exceptional circumstances. The procedures available under the UCR are the open, restricted, negotiated, competitive dialogue and innovation partnership procedures.

The PCR and UCR include light-touch regimes<sup>36</sup> for the award of contracts for health, social, education and other specific services.<sup>37</sup> Subject to compliance with certain mandatory requirements (e.g., principles of transparency and equal treatment), contracting entities have significant flexibility in determining the procedures to be applied.

The PCR apply a number of procedural requirements to below-threshold contracts. In addition to the advertising requirements (described in Section V.i), these are a prohibition on including a separate pre-qualification stage in the tender process and a requirement to publish information on Contracts Finder in respect of contracts that have been awarded.

Under the CCR, contracting entities are free to decide on the procedure to be followed, subject to certain specified safeguards; even lighter requirements apply in respect of light-touch services.

The Defence Regulations offer unrestricted use of the restricted and the negotiated (with prior advertisement) procedures. The competitive dialogue procedure is available for particularly complex contracts and the negotiated procedure (without prior advertisement) in extremely limited circumstances.

Under the Defence Regulations and the UCR, authorities and utilities generally use the negotiated procedure with prior advertisement in the OJEU.

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34 Section 23, Procurement Reform (Scotland) Act 2014.

35 C-19/13 *Ministero dell'Interno v. Fastweb SpA*, Paragraph 50 and *Faraday Development Ltd v. West Berkshire Council* [2018] EWCA Civ 2532, Paragraphs 87 to 91.

36 See CCS 'Guidance on the new light touch regime for health, social, education and certain other service contracts', October 2015.

37 Set out in PCR Schedule 3, UCR Schedule 2 and CCR Schedule 3.

### iii Amending bids

In a number of court cases, the courts have upheld an authority's refusal to allow bidders to correct defects in, or omissions from, their bid.<sup>38</sup>

The dichotomy between a right and a duty of an authority to allow correction of defects in, or omissions from, bids arose in the case of *Hersi & Co*<sup>39</sup> and received marked criticism from Coulson J (as he then was) as running a real risk of over-complication. In our experience, authorities take different approaches to this issue.

The PCR and UCR contain express provisions dealing with tenders where information or documentation appears to be incomplete or erroneous.<sup>40</sup> Although those provisions appear to allow authorities to request information or documentation to clarify or complete information or documents at tender stage (as well as pre-qualification stage), the authority must observe the principles of equal treatment and transparency in exercising this right. Therefore any decision to allow the submission of such information must be taken with care and with regard to those principles.

## VI ELIGIBILITY

### i Qualification to bid

The procurement regulations replicate the grounds for assessing bidders' fitness to contract set out in the corresponding EU directives.

There are also Cabinet Office and CCS publications on the qualification stage, which require that:

- a authorities use a standard Selection Questionnaire (which has been aligned with the requirements of the European Single Procurement Document) and have regard to associated CCS guidance on the selection stage that develops general principles including self-certification, 'self-cleaning' and proportionality;<sup>41</sup>
- b selection criteria relating to a bidder's reliability, as demonstrated by its performance of past contracts, are established and applied in procurements by central government departments, their executive agencies and non-departmental public bodies for contracts relating to information and communications technology, facilities management and business processing outsourcing and which have a value of £20 million or greater;<sup>42</sup>

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38 For example, *R (on the application of Harrow Solicitors and Advocates) v. The Legal Services Commission* [2011] EWHC 1087 (Admin); *R (on the application of All About Rights Law Practice) v. Legal Services Commission* [2011] EWHC 964 (Admin); *Hossacks (A firm of Solicitors) v. The Legal Services Commission* [2011] EWHC 2700 (Admin); and *Hersi & Co Solicitors & Anor v The Lord Chancellor* [2017] EWHC 2667 (TCC).

39 [2017] EWHC 2667 (TCC).

40 PCR 56(4); UCR 76(4).

41 Cabinet Office and CCS PPN 'Standard Selection Questionnaire (SQ)', 9 September 2016. The guidance is issued under PCR 107(1).

42 PPN 04/15 'Taking Account of Suppliers' Past Performance', 25 March 2015.



- c selection criteria relating to a bidder's payment of suppliers, as demonstrated by its performance of past contracts, are established and applied in procurements by central government departments, their executive agencies and non-departmental public bodies for contracts relating to goods, services and/or works (including framework agreements and dynamic purchasing systems) with an anticipated value above £5 million (excluding VAT) per annum;<sup>43</sup> and
- d bidders convicted of tax offences or successfully challenged under the 'General Anti-Abuse Rule' may be excluded from public procurements.<sup>44</sup>

## ii Conflicts of interest

The PCR, UCR and CCR require authorities to take appropriate effective measures to prevent, identify and remedy conflicts of interest.<sup>45</sup> Economic operators may be excluded from participation in a procurement procedure where a conflict of interest cannot be effectively remedied by other less intrusive means.<sup>46</sup> The provision is very wide, extending to 'financial, economic and other personal interest' that is either actual or even 'perceived' to compromise impartiality. In *Counted4*,<sup>47</sup> the court noted that 'other personal interest' need not be financial but could amount to anything pertaining to the relevant individual. This has become an area of increased scrutiny by both challenging bidders and contracting authorities, as the circumstances where a conflict may arise, or an allegation of conflict could be made, are wide ranging. The CCS has issued a PPN reminding contracting authorities of their obligations in applying mandatory and discretionary exclusion grounds and managing conflicts of interest in public procurement.<sup>48</sup>

## iii Foreign suppliers

The procurement regulations do not prevent foreign suppliers from tendering for public contracts, but utilities may (or in some cases must) reject certain bids to supply goods from third (non-EU) countries with which the EU does not have reciprocal agreements.<sup>49</sup>

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43 PPN 04/19 'Taking account of a supplier's approach to payment in the procurement of major contracts', updated 29 August 2019.

44 PPN 03/14 'Measures to Promote Tax Compliance', updated 15 May 2015.

45 PCR 24; UCR 42; CCR 35. There are no express conflict of interest provisions in the Defence Regulations, but the same obligations arise because of the duty to comply with the principle of non-discrimination – see T-160/03 *AFCon Management Consultants and others v. Commission*, Paragraphs 75 and 90; although this case was decided under internal Commission rules, the same principles are likely to apply under the Defence Regulations.

46 PCR 57(8)(e); UCR 80; CCR 38(16)(d).

47 *Counted4 Community Interest Company v. Sunderland City Council* [2015] EWHC 3898 (TCC).

48 PPN 01/19 'Applying Exclusions In Public Procurement, Managing Conflicts of Interest and Whistleblowing'.

49 UCR 85.

The PCR, UCR and CCR only confer a right to challenge a breach of the regulations upon:

- a* a person from an EEA<sup>50</sup> state;<sup>51</sup>
- b* a person from a World Trade Organization GPA state,<sup>52</sup> where the GPA applies to the procurement concerned;<sup>53</sup> and
- c* a person from another state if a relevant bilateral agreement applies.<sup>54</sup>

The Defence Regulations only confer rights to challenge breaches of the regulations on persons who are nationals of, and established in, an EU Member State.

Arguably, foreign persons who do not have a right to challenge under the procurement regulations may seek to bring a similar challenge by way of judicial review or for breach of an implied contract. In practice, however, many foreign-owned businesses have rights to challenge because they bid through a subsidiary incorporated within the EEA.

## VII AWARD

### **i Evaluating tenders**

Most contracts are awarded using award criteria implementing a blend of quality and price.<sup>55</sup> Approaches to setting award criteria vary. Many authorities use a very detailed marking scheme with each small element of the project receiving a predefined mark (e.g., 0.3 per cent for proposals on staffing levels); others take a much broader approach, with no subcriteria and global figures for each criterion of, say, 15 or 20 per cent. Tenders structured to be entirely pass or fail on quality aspects, with the rest of the evaluation based on price, are also encountered.

Under the PCR, UCR and CCR, authorities must disclose the evaluation criteria from the date of publication of the notice in the OJEU. This allows bidders to understand what is important to the authority and to decide whether to participate accordingly.<sup>56</sup> Where the Defence Regulations apply, authorities must disclose the marking criteria, at the latest, when issuing the contract documents (e.g., in the invitation to tender).

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50 The EEA comprises the EU Member States plus Liechtenstein, Norway and Iceland.

51 For example, PCR 89.

52 In addition to the 28 EU Member States, the other GPA states are Armenia, Australia, Canada, Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Moldova, Montenegro, the Netherlands (with respect to Aruba), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States.

53 For example, PCR 90(1)(a).

54 For example, PCR 90(1)(b).

55 In Scotland, contracts must be awarded on the basis of best price–quality ratio; price or cost alone cannot be used as the sole award criterion (Section 67, The Public Contracts (Scotland) Regulations 2015).

56 PCR 49; UCR 69; CCR 32.

The courts tend to uphold disclosure of the main criteria and subcriteria only, on the basis that disclosure of the finer detail would not in fact affect the content of bids.<sup>57</sup> Nevertheless, in practice many authorities disclose full details of the marking scheme, regardless of whether this is strictly required by law.

## ii National interest and public policy considerations

Under the procurement regulations, national interest can be taken into account only to a limited extent. Authorities may not favour local business. For example, while specifications may refer to British Standards, they must expressly permit equivalent standards from other European jurisdictions.

The government has adopted a policy on how procurers should deal with businesses that have adopted certain aggressive tax avoidance measures.<sup>58</sup>

Another key government policy is securing access to public contracts for SMEs. This policy is in part implemented through the PCR<sup>59</sup> and reinforced by CCS guidance.<sup>60</sup> The government has acknowledged the importance of prompt payment for SMEs by requiring public sector contracting authorities to pay invoices to their suppliers within 30 days and to ensure that prompt payment is enforced through the supply chain. Contracting authorities are required to publish data demonstrating compliance with these requirements at the end of each financial year.<sup>61</sup>

The PPN on supply chain visibility<sup>62</sup> directs central government departments, their executive agencies and non-departmental public bodies tendering contracts under the PCR with a value above £5 million per annum to require the successful prime suppliers to:

- a advertise on Contracts Finder any subcontract opportunities with a value over £25,000 that arise after contract award (although authorities may consider setting a higher threshold where the £25,000 threshold is overly burdensome to suppliers); and
- b report on how much they spend on subcontracting and how much they spend directly with SMEs in the delivery of the contract.

Further policies include obtaining commitments from suppliers to provide training and apprenticeships,<sup>63</sup> and guidance, a digital tool and training package to help tackle modern slavery in government supply chains.<sup>64</sup>

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57 In *Healthcare at Home Ltd v. The Common Services Agency* [2014] UKSC 49, the Supreme Court endorsed the test of whether the 'reasonably well-informed and normally diligent' bidder would have understood the criteria in the same way.

58 See Section VI.i.

59 See Sections III and VI.

60 For example, PPN 05/15 'Prompt payment policy and reporting of performance', 27 March 2015 and PPN 04/19 'Taking account of a supplier's approach to payment in the procurement of major contracts', updated 29 August 2019.

61 PPN 03/16 'Publication of payment performance statistics', 29 March 2016.

62 PPN 01/18 'Supply Chain Visibility', 10 April 2018.

63 PPN 14/15 'Supporting apprenticeships and skills through public procurement', 27 August 2015.

64 PPN 05/19 'Tackling modern slavery in governments supply chains', 18 September 2019.

## VIII INFORMATION FLOW

During the procurement process, authorities must ensure they give bidders sufficient information to enable them properly to understand the authority's requirements and to ensure a 'level playing field'. This is particularly important where an incumbent service provider will be in a privileged position when a new procurement is run because it has additional information. The PCR and UCR require authorities to take appropriate measures to ensure that competition is not distorted by the participation of bidders that have had prior involvement in the procurement procedure (e.g., in the preparation stage).<sup>65</sup> Where the distortion of competition cannot be effectively remedied by other less intrusive means, bidders may be excluded from the procedure.<sup>66</sup>

Authorities may withhold information from bidders on a number of grounds such as the public interest, the legitimate commercial interest of any person or possible prejudice to fair competition between economic operators.<sup>67</sup> Additionally, authorities must not disclose information reasonably stipulated by the bidder as confidential,<sup>68</sup> and under the Defence Regulations an authority may impose measures to protect classified information.<sup>69</sup>

Under the procurement regulations, authorities are required to notify bidders and supply certain information when they make an award decision. They must then 'stand still' for a minimum of 10 calendar days before signing the contract.<sup>70</sup> This period allows unsuccessful bidders time to bring a legal challenge to prevent the contract award if they consider that the award decision is unlawful, provided that the bidders are otherwise within the limitation period for procurement claims. The standstill requirement often proves to be onerous for authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid to each unsuccessful bidder.

Many authorities consider that best practice is to give fulsome details of their reasons in the standstill notice, so as to be seen to be transparent, to flush out any complaints as soon as possible, to seek to ensure that the time for bringing a challenge in the courts is running on any complaints (see Section IX.i), and to reduce the risk of delay where a bidder asks for more information and claims that the standstill notice is defective. Authorities should also be mindful of the need to provide standstill information to all bidders, even those who have previously been disqualified, unless the disqualification has been upheld by a court or the full extended limitation period for any challenge stemming from that disqualification has passed.

## IX CHALLENGING AWARDS

The EU rules on challenging procurement decisions, some of which are optional, have been implemented in the procurement regulations. The main options that have been adopted are that courts are not to make declarations of ineffectiveness where overriding reasons relating to the general interest require the contract to be maintained and that, in certain circumstances, courts may shorten the contract instead of declaring it ineffective.<sup>71</sup>

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65 PCR 41; UCR 9.

66 For example, PCR 57(8)(f).

67 See, for example, PCR 50(6) and 86(6).

68 See, for example, PCR 21.

69 Defence Regulations 11.

70 See, for example, PCR 86 and 87.

71 See, for example, PCR 100, and Section IX.iii on ineffectiveness.

The courts may agree to expedite procurement cases at the parties' request, which means that a typical first instance judgment may be handed down within a number of months following commencement of proceedings. Nonetheless, because of the cost, delay and inherent litigation risk in proceedings, many cases are settled without a full trial. Expedition can be key to the success of any procurement challenge by an unsuccessful bidder; it significantly increases both the likelihood of maintaining the automatic suspension (as such a suspension would only be in place for a short time pending a full expedited trial)<sup>72</sup> and the ability to adhere to a timetable, which means obtaining judgment on a mid-tender challenge before any contract is awarded.<sup>73</sup>

Procurement challenges necessarily require the establishment of confidentiality rings to protect tenderers' commercially sensitive and confidential information. The contracting authority will need to have recorded and be able to evidence its evaluation process, or face possible legal challenge and criticism by the court if it fails to do so.<sup>74</sup> Disclosure of key information may be anticompetitive, prevent a fair and equal re-tender, or negatively affect the commercial interests of a bidder. The recent approach has been for contracting authorities to adopt a 'neutral' position on disclosure, as Merseytravel did in *Bombardier v. Merseytravel*,<sup>75</sup> so that the real focus of any dispute is between the successful and challenging bidders who are often competitors in the same market. However, the court in that case ruled that costs will be payable by a successful tenderer (even if it is a non-party) if it does not permit the contracting authority and challenging bidder to agree sensible and reasonable disclosure directions.

The Technology and Construction Court in England and Wales published guidance in the summer of 2017 on confidentiality rings in procurement proceedings, disclosure and pre-action conduct in an annex to the Technology and Construction Court Guide.<sup>76</sup> The protocol also seeks to encourage the use of alternative dispute resolution to resolve cases. While the protocol is not binding, failure to follow the protocol may lead to a party being penalised in costs.

The losing litigant is generally required to pay 60 to 70 per cent of the other party's legal costs, in addition to all of its own legal costs, and in procurement cases this can extend to meeting the majority of the legal costs of the successful bidder if, as an interested party, the presiding judge feels the successful bidder has assisted the court.<sup>77</sup>

The trend continues towards increased challenges. Pre-action correspondence challenging a decision is frequently written and can be successful. In England, it is still rare for a bidder to be successful in a court challenge. There have been more bidder-friendly decisions in recent years, particularly on upholding the automatic suspension, as in *Lancashire Care*,<sup>78</sup> *Bristol Missing Link*<sup>79</sup> and *Counted4*,<sup>80</sup> but that is still the exception rather than the norm, and

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72 *Lancashire Care NHS Foundation Trust and another v. Lancashire County Council* [2018] EWHC 1589 (TCC).

73 *Joseph Gleave & Son Limited v. Secretary of State for Defence* [2017] EWHC 238 (TCC).

74 See, for example, *Lancashire Care* (footnote 71), in which the court found a 'pervasive inadequacy' in the evaluation panel's approach, in particular in documenting the evaluation process carried out.

75 *Bombardier Transportation UK Ltd v. Merseytravel* [2018] EWHC 41 (TCC).

76 [www.procurementportal.com/files/Uploads/Documents/TCC%20Guidance%20Note%20on%20Public%20Procurement%20Cases%20final.pdf](http://www.procurementportal.com/files/Uploads/Documents/TCC%20Guidance%20Note%20on%20Public%20Procurement%20Cases%20final.pdf).

77 *Group M UK Ltd v. Cabinet Office* [2014] EWHC 3863 (TCC).

78 See footnote 71.

79 *Bristol Missing Link Ltd v. Bristol City Council* [2015] EWHC 876.

80 See footnote 46.

normally only achievable where a challenger is the incumbent provider. Northern Ireland is perceived by some to be more bidder-friendly. However, as with the courts in England, in reality much turns on the specific facts and merits of the cases that have actually proceeded to a hearing or trial (and the appetite of the specific bidders and authorities to fight or to settle challenges). The case of *Lowry Brothers*<sup>81</sup> shows that the authority can succeed in Northern Ireland.

## i Procedures

Procurements can provide their own complaints mechanisms, but High Court litigation is the main method of challenging awards.

Each High Court jurisdiction (England and Wales, Northern Ireland and Scotland) is separate, and has its own case law, save that the Supreme Court is the highest appellate court for all UK jurisdictions. Each court will have regard to relevant case law from the other jurisdictions.

The reason that challenges tend to be brought in the High Court stems largely from the very short time limit set for commencing these proceedings. At 30 calendar days (from when the claimant knew or ought to have known of grounds for bringing a claim), the limitation period for procurement claims is the shortest in English law. It can be extended (up to three months) where the court determines there is good reason. The trend in England has been to uphold the limitation period strictly;<sup>82</sup> however, the case of *Amey Highways*<sup>83</sup> provides an example of a case in which the court was prepared to extend time, albeit just for a few days.<sup>84</sup> In Northern Ireland the courts are more flexible.<sup>85</sup>

It is important to note that the 30-day time limit for bringing claims only applies to claims brought pursuant to the PCR, UCR or CCR. The Court of Appeal confirmed in *Arriva Rail East Midlands Limited*<sup>86</sup> that, in the context of procurements for rail franchises (which are expressly excluded from the scope of those regulations and instead governed by Regulation 1370/2007<sup>87</sup>), in the absence of specific statutory time limits the general rules for private law claims, including those for Francovich damages, will apply, resulting in a six-year limitation period.

There is an increasing trend for parties to a potential procurement claim to reach both an agreement to extend the standstill period, and any applicable limitation period. It was previously considered extremely risky to enter into any agreement that would 'standstill' the 30-day limitation period, given the operation of the regulations and strict application of time limits, even though such standstill agreements are routinely used across the jurisdiction for other claims. However, there has been a softening on this position in recent months, since

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81 *Lowry Brothers Ltd v. Northern Ireland Water Ltd* [2013] NIQB 23.

82 See *J Varney & Sons Waste Management Ltd v. Hertfordshire CC* [2011] EWCA Civ 708.

83 *Amey Highways Ltd West Sussex County Council* [2018] EWHC 1976 (TCC).

84 It should be noted that in this case the authority had agreed a 'standstill agreement' that time would not run for limitation purposes for a specified period of time. Whilst the authority did not seek to argue that the court should not exercise its discretion to extend time during that period, the court noted that 'the existence of that agreement is good reason to extend time'. It is yet to be seen whether, as a result of this case, such agreements will become common practice in procurement claims.

85 See *Henry Brothers (Magherafelt) Ltd v. Department of Education for Northern Ireland* [2011] NICA 59.

86 *The Secretary of State for Transport v. Arriva Rail East Midlands Limited and others* [2019] EWCA Civ 2259.

87 Regulation (EC) No. 1370/2007 of the European Parliament and of the Council.

the *Amey Highways*<sup>88</sup> case noted above, in which the court allowed a short extension of time on the basis of an agreement between the parties. Such agreements are now being used to provide more time for parties to exchange information and consider their positions before proceedings become unavoidable.

The remedies available in judicial review are a quashing order (to set aside the decision made) and a mandatory order (requiring the authority to make the decision again). Damages may also be sought, although not as a sole remedy. The Court of Appeal also confirmed in the *Arriva Rail East Midlands*<sup>89</sup> case that, in circumstances where the PCR, UCR or CCR do not apply, it is not necessary to bring a public law claim in judicial review seeking to undo the underlying decision in order to pursue a private law claim for Francovich damages on the basis of a private law breach of statutory duty.

Claims under the procurement regulations can be brought in the High Court by economic operators, including contractors, suppliers and service providers.

Some bidders and third parties, such as subcontractors, who do not enjoy protection under the procurement regulations, bring claims in judicial review in the High Court, asking the Court to review the decision of the public authority. However, it does appear that the approach to procurement challenges by subcontractors is changing after the *Sysmex* case,<sup>90</sup> when Sysmex challenged as an embedded subcontractor only, even when it was not in a position to sign the contract, nor to deliver the services required as a whole.

## ii Grounds for challenge

Claims may be brought for breach of a duty owed to the bidder under the procurement regulations if the bidder either suffers or risks suffering loss. Examples include:

- a undisclosed evaluation criteria and weightings, in breach of the obligations in the procurement regulations, or the duty of transparency under the Treaty on the Functioning of the European Union, or both;<sup>91</sup>
- b manifest error in evaluation;<sup>92</sup> the error must be obvious, and expert evidence is not permitted to prove it;<sup>93</sup>
- c failure to exclude abnormally low tenders;<sup>94</sup>
- d unlawful abandonment of procurement;<sup>95</sup> and
- e post-award substantial changes to contracts, in reliance on the codification of *presstetext Nachrichtenagentur*<sup>96</sup> in the procurement regulations.

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88 See footnote 82.

89 See footnote 85.

90 *Sysmex (UK) Ltd v. Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC).

91 See, for example, *McLaughlin & Harvey Ltd v. Department of Finance and Personnel* [2011] NICA 60; *Lettings International Ltd v. London Borough of Newham* [2007] EWCA Civ 1522; *Healthcare at Home Ltd v. The Common Services Agency* [2014] UKSC 49.

92 *Woods Building Services v. Milton Keynes Council* [2015] EWHC 2011 (TCC), and *BAM Civil Ltd v. The Department for Infrastructure* [2018], NIQB 68 where manifest error was established.

93 *BY Development Ltd v. Covent Garden Market Authority* [2012] EWHC 2546 (TCC).

94 *NP Aerospace Ltd v. Ministry of Defence* [2014] EWHC 2741 (TCC).

95 *Amey Highways Ltd v. West Sussex County Council* [2019] EWHC 1291 (TCC).

96 *C-454/06 presstetext Nachrichtenagentur GmbH v. Republic of Austria and others*. In *Gottlieb, R (on the Application of) v. Winchester City Council* [2015] EWHC 231 (Admin) the claimant was granted relief on

There are four main grounds for judicial review of decisions:

- a error of law;
- b irrationality or *Wednesbury*<sup>97</sup> unreasonableness (which is the closest that judicial review comes to a review of the merits);
- c procedural unfairness or breach of natural justice; and
- d legitimate expectation.

### iii Remedies

The procurement regulations provide three main remedies: suspension, ineffectiveness and damages.

The ‘automatic’ suspension, which is unique to procurement challenges, arises when a claim form is issued before the contract is awarded, and does not require a court hearing. Once in place, the authority cannot award the contract until the court ends the suspension, or the parties end it by agreement or a consent order.

In England, in cases where authorities have applied to lift the automatic suspension, they have usually been successful (although much turns on the merits of those cases in which applications are actually made). Traditionally, it has been extremely difficult to maintain the suspension in contracts in the health and social care sector, where patient wellbeing and safety are paramount, but in *Lancashire Care*,<sup>98</sup> *Bristol Missing Link*<sup>99</sup> and *Counted4*<sup>100</sup> the courts were persuaded to do so. The most recent cases show that it is still more often than not that the suspension is lifted, particularly where significant procurements with large-scale impact or national importance are concerned, such as in *Bombardier v. Hitachi Rail*<sup>101</sup> and *DHL Supply Chain*.<sup>102</sup> Recently, in *Circle Nottingham v. NHS*,<sup>103</sup> the court has also lifted the suspension where the claimant faced potential damage and loss of the sort discussed in *Bristol Missing Link*<sup>104</sup> and *Counted4*<sup>105</sup> and where doing so would likely result in ‘paying twice’ for the same service by virtue of a damages claim. This judgment thereby refines the rule laid down by Coulson J in *Covanta Energy*,<sup>106</sup> which stated this ‘could not be in the public interest’: where there is a breach of procurement legislation that is sufficiently serious to justify an award of damages then paying twice was, where the cost was not unduly high, ‘a price worth paying in order to achieve proper compliance’ and this was in the contemplation of the legislatures when drafting the PCR. It appears now that while the prospect of paying twice remains a factor militating against lifting a suspension, the value of that payment is to be considered and weighed in the judicial scales.

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this basis in a judicial review claim. The *presstext* principles are now codified in the PCR, UCR and CCR (e.g., PCR 72).

97 *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223.

98 See footnote 71.

99 See footnote 78.

100 See footnote 46.

101 *Bombardier Transportation UK Ltd v. Hitachi Rail Europe Ltd & Ors* [2018] EWHC 2926 (TCC).

102 *DHL Supply Chain Ltd v. Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC).

103 See footnote 16.

104 See footnote 78.

105 See footnote 46.

106 *Covanta Energy Ltd v. Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC).



In Northern Ireland, suspensions have generally been maintained.<sup>107</sup>

Under the procurement regulations, the court may also set aside the decision or amend a document.

A declaration of ineffectiveness may be made when one of the grounds for ineffectiveness is satisfied. For the PCR,<sup>108</sup> these are:

- a awarding a contract illegally without advertisement in the OJEU where this is required;
- b awarding a contract in breach of the standstill period or automatic suspension with another breach of the procurement regulations; and
- c awarding a specific contract under a framework agreement when the requirements relating to the reopening of competition are not followed or when tendering procedures are not followed in a dynamic purchasing system.

Ineffectiveness means that a contract is prospectively, but not retrospectively, ineffective from the date of the declaration. The court can deal with matters consequent on the contract being declared ineffective. It must also impose penalties and may award damages. Some contracting authorities and utilities make contractual provision for the parties' rights and responsibilities in the event of a declaration of ineffectiveness (as expressly permitted by the procurement regulations<sup>109</sup> and encouraged by government guidance).<sup>110</sup>

The first ever successful claim in the UK for a declaration of ineffectiveness was in Scotland in the *Lightways Contractors* case.<sup>111</sup> The court found that a call-off contract under a framework had been awarded to an economic operator not on the original framework. In the absence of any other valid procurement process, the award was unlawful and the contract declared ineffective. *Faraday*<sup>112</sup> is the first case in England and Wales in which the court has made a declaration of ineffectiveness, having decided that where a developer of land has an option to and does draw down land and, in doing so, comes under an obligation to develop that land, that contingent obligation to carry out works is sufficient to amount to a public works contract caught by the PCR (and, therefore, should have been advertised and competed in accordance with those regulations).

Unless grounds for ineffectiveness exist, damages are the only remedy that can be awarded under the procurement regulations after the contract has been entered into. Claims for damages are usually for wasted bid costs, or loss of profit or opportunities. The *EnergySolutions*<sup>113</sup> case requires that an authority's breach of the procurement regulations be sufficiently serious before damages can be awarded. It remains to be seen whether this will have a material impact upon the ability of claimants to recover damages and the development of the *Alstom*<sup>114</sup> case (above) will be one to watch.

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107 *First4skills Ltd v. Department for Employment and Learning* [2011] NIQB 59; *Traffic Signs and Equipment Ltd v. Department for Regional Development* [2010] NIQB 138, but see *John Sisk & Son Holdings Ltd v. Western Health and Social Care Trust* [2014] NIQB 56, where the suspension was lifted.

108 Under the UCR, the third ground (c) only relates to contracts awarded under a dynamic purchasing system; under the CCR, only the first two grounds (a) and (b) apply.

109 For example, PCR 101(5) and (6).

110 'Implementation of the Remedies Directive: OGC Guidance on the 2009 amending regulations Part 3: The new remedies rules', Office of Government Commerce, 18 December 2009, paragraphs 43 to 48.

111 *Lightways Contractors Ltd v. Inverclyde Council* [2015] CSOH 169.

112 See footnote 14.

113 *Nuclear Decommissioning Authority v. EnergySolutions EU (Ltd)* [2017] UKSC 34.

114 See footnote 15.

The remedies available in judicial review are a quashing order (to set aside the decision made) and a mandatory order (requiring the authority to make the decision again). Damages may also be sought, although not as a sole remedy.

With substantial increases to court fees from April 2015, there has been a trend in recent years towards non-monetary procurement claims, as the court fees to issue proceedings for such claims are considerably lower than for claims involving damages, but still have the benefit of attracting the automatic suspension. If no damages are claimed at the outset, non-monetary claims may become a potential means to frustrate applications to lift until there is judicial consideration of the issue, but it is likely a court would consider a decision not to claim damages from the outset as definitive in such a case.

## **X OUTLOOK**

Despite the current uncertainty around the terms of the future EU-UK relationship, it is expected that the rules governing public procurement in the UK will remain largely unchanged in the short term. There are currently no proposals on the table for major changes to the framework and principles of the procurement regime. The main impact of Brexit in the immediate term will be changes brought about by domestic amendment regulations designed to ensure that the current regime continues to operate effectively following the end of the transition period, including the requirement to use a new UK e-notification service for the publication of notices rather than sending notices to the EU publications office.

The future shape of UK procurement law will depend on the international agreements it chooses to make with the EU and other countries. As a signatory to the GPA, but outside the EU, the UK could have more freedom to set its own procurement policy than it currently has as an EU Member State, although many of the basic principles would remain the same. Much depends, however, on the nature of the UK's future relationship with the EU. Further commitments on procurement could be made as part of any eventual EU-UK trade agreement or other arrangement, which could require the UK rules to stay in closer alignment with the EU rules.

# UNITED STATES

*Daniel Forman, Adelia Cliffe, Judy Choi and Christian Curran*<sup>1</sup>

## I INTRODUCTION

Public procurement in the US is governed by a number of different statutes and regulations. Most of the statutes applicable to civilian agencies are found in Title 41 of the United States Code, and those statutes specific to military procurement are found in Title 10. In addition, government procurement policy and requirements are implemented through a uniform set of regulations, the Federal Acquisition Regulation (FAR), found in Title 48, Chapter 1 of the Code of Federal Regulations (CFR). Many agencies, including the Department of Defense (DoD), have their own supplemental regulations that supplement the FAR. The primary underlying principles are competition, transparency, integrity and fairness.

The agencies enforce federal procurement policy and rules through acquisition personnel, such as contracting officers, offices of inspectors general providing oversight to fight fraud, waste, and abuse and ensure compliance with the various statutes and regulations, and suspension and debarment officials with authority to suspend or debar contractors from doing business with the government. An additional enforcement tool, which can be invoked by a private person whistle-blower, is the civil False Claims Act (FCA), which imposes liability on persons and companies that submit fraudulent claims to the federal government.

The US has acceded to the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and federal procurement regulations are largely consistent with the procurement obligations of that agreement, with some exceptions, such as contract set-asides for US small businesses and preferences for domestic products.

## II YEAR IN REVIEW

The US federal procurement system is constantly updated through legislation, including annual appropriations statutes that include new requirements or change existing requirements, agency rulemaking, and case law interpreting the laws and regulations.

The Fiscal Year 2020 National Defense Authorization Act (NDAA) included several key provisions affecting government contractors, especially as it relates to supply chain security, including development of a new cybersecurity framework applicable to the defence industrial base and pilot programmes for acquisition strategy and intellectual property. Regarding cybersecurity, the NDAA requires the DoD to undertake a top-down review of its utilisation of existing cybersecurity contractors, military, and civilian personnel, as well as develop

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a comprehensive framework to enhance the cybersecurity of the US defence industrial base.<sup>2</sup> The NDAA also addresses perceived risks with foreign ownership of companies in the US supply chain, and establishes new disclosure obligations and prohibitions where there is risk of foreign-government influence.<sup>3</sup> Specifically, the new requirement creates a duty for contractors and subcontractors on unclassified contracts and subcontracts above US\$5 million (other than commercial item contracts) to disclose foreign ownership, control, or influence (FOCI) for assessment by the contracting agency.

Other developments from the past year further emphasise the increased focus on supply chain security. In August 2019, pursuant to Section 889 of the 2019 NDAA, the DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) issued an interim rule to implement Section 889(a)(1)(A)'s prohibitions at FAR Subpart 4.21. The rule bans the government from 'procuring or obtaining, or extending or renewing a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.' Consistent with the 2019 NDAA, the regulation defines 'covered telecommunications equipment or services' to include, among other things, any telecommunications equipment or services produced or provided by Chinese companies Huawei or ZTE, or similar equipment produced or provided by any entity that the US Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country. Further, effective 13 August 2020, these prohibitions will be extended to prohibit entering into any contract with an entity that uses any prohibited covered telecommunications equipment or services as a 'substantial or essential component' of their systems.

This increased focus on supply chain security is also demonstrated in the FCA arena, where, in a case of first impression, a court decided that a relator's *qui tam* case against Aerojet Rocketdyne (AR) alleging, among other things, violations of the FCA stemming from AR's lack of compliance with DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, could continue past the pleading stage.<sup>4</sup> Then, a couple of months later, Cisco Systems agreed to pay US\$8.6 million to settle allegations in *United States ex rel Glenn, et al v. Cisco Systems, Inc.* that the company violated the FCA by selling video surveillance systems to state and federal agencies that contained software flaws enabling those agencies to be hacked.

In bid protest cases, there were several notable developments in decisional law impacting competition requirements. First, in *National Government Services, Inc. v. United States*,<sup>5</sup> the US Court of Appeals for the Federal Circuit ruled that limitations on contract awards for an individual offeror under a multiple award contract violated competition requirements. In that case, the court found that caps on the percentage of work any one contractor could obtain violated the Competition in Contracting Act (CICA) because offerors were arbitrarily denied the ability to compete for particular work. Second, in *Blue Origin Fla., LLC*,<sup>6</sup> GAO sustained a protest of a solicitation contemplating that the agency's award determination for

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2 See National Defense Authorization Act for Fiscal Year 2020, S.1790, 116th Congress §§ 1652, 1648 (2019).

3 id. § 847.

4 *United States ex rel. Markus v. Aerojet Rocketdyne Holdings*, No. 2:15-cv-2245 (ED. Cal. May 8, 2019).

5 923 F.3d 977, 981 (Fed. Cir. 2019), 61 Gov't Contractor ¶ 140.

6 B-417839, Nov. 18, 2019, 2019 CPD ¶ 388.

a space launch services contract would go to the pair of proposals that collectively provided the best value to the government. GAO found that the agency's evaluation scheme failed to provide offerors with a basis to compete intelligently and on a common basis given that one offeror could not know the contents of another offeror's proposal absent illegal collusion.

Additionally, in another notable bid protest decision, *Oracle America, Inc. v. United States*,<sup>7</sup> the Court of Federal Claims held that an offeror alleging conflicts of interest stemming from acts affecting a personal financial interest codified at 18 USC Section 208 still must demonstrate competitive injury. In this instance, the court found that Oracle failed to demonstrate competitive injury in its pre-award challenge attempting to disqualify rival bidder, Amazon Web Services, Inc (AWS), despite alleged conflicts of interest and allegations that several former AWS employees who subsequently worked for the DoD improperly tainted the procurement. The Court found that Oracle could not demonstrate that the alleged conflicts impacted the procurement, and therefore it suffered no competitive injury.

Finally, in a separate regulatory development also dealing with competition requirements, in September 2019, the DoD amended the DFARS to restrict the use of low-cost technically acceptable (LPTA) evaluation schemes for DoD contracts.<sup>8</sup> The DoD must 'avoid, to the maximum extent practicable' using an LPTA evaluation scheme for procurements in information technology services, personal protective equipment, and knowledge-based training or logistics services in contingency operations. The rule also creates more stringent guidelines for the use of LPTA procedures.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

All federal executive agencies are subject to the FAR, subject to a few exceptions (e.g., Federal Aviation Administration, United States Postal Service, the Tennessee Valley Authority, and Amtrak).

#### ii Regulated contracts

The FAR and various agency FAR supplements govern public procurement regardless of sector, though the specific provisions that apply depend on the contract type (e.g., services versus goods versus construction, commercial items versus non-commercial items, firm-fixed price versus cost reimbursement), contract value and other considerations. With few exceptions, the FAR requires that all contracts be awarded competitively, which means that all responsible offerors are eligible to compete for award, or for awards set aside for certain types of business concerns (i.e., awards set-aside for small businesses).<sup>9</sup> If an agency chooses to award a contract without competition, the contracting officer must typically complete a 'justification and approval' and obtain approval for a sole source award, based on the specifically identified circumstances set forth in the FAR.<sup>10</sup>

Certain clauses within the FAR are only included in contracts above a certain dollar threshold. While that threshold may vary by clause, all contracts that fall below the

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7 144 Fed. Cl. 88, 115 (2019), appeal pending No. 19-2326, Fed. Cir. August 28, 2019.

8 See 84 FR 50785, Sept. 26, 2019.

9 See FAR Part 6.

10 FAR 6.302, 6.303.

micro-purchase threshold (currently US\$3,500, but US\$10,000 for GSA<sup>11</sup>, DoD<sup>12</sup>) are exempt from the requirements for competition.<sup>13</sup> In addition, contracts at or below the simplified acquisition threshold (currently US\$150,000, but US\$250,000 for GSA<sup>14</sup>, DoD<sup>15</sup>) may be awarded using a simplified acquisition process and include only a limited number of FAR clauses.<sup>16</sup> Furthermore, the FAR allows for a streamlined acquisition process for the acquisition of 'commercial items,' as defined by FAR 2.101, which includes both items and services, and generally includes products 'of a type' offered for sale to the general public, or such products that have undergone minor modifications or modifications 'of a type' offered to the general public.

The Anti-Assignment Act, 41 USC Section 6305, prohibits the assignment of a government contract from one entity to another without the government's consent, but the FAR dictates specific procedures for executing a novation agreement among the parties (the transferee, transferor, and the government), a process that requires early and active engagement with the customer agency in the event of an internal reorganisation, merger, or an asset purchase.

Other transaction authority (OTA) refers to a set of statutes that allow certain agencies to enter into agreements which are exempt from the FAR and many statutes that apply to procurement contracts, grants, and cooperative agreements. While OTAs have been around since 1958, they have grown in popularity as the DoD has made a special push to leverage its OTA authority to quickly award contracts without having to engage in the traditional FAR procurement process.<sup>17</sup> The DoD currently has permanent authority to award OTAs for research, prototype and production purposes.<sup>18</sup> Other agencies with OT authority include NASA and the Departments of Energy and Homeland Security.

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

Framework agreements, frequently referred to in the United States as indefinite-delivery/indefinite-quantity (IDIQ) contracts, are governed by FAR Subpart 16.5. Among other things, the solicitation for such a contract must:

- a* specify the period of the contract, including any options;
- b* specify the total minimum and maximum quantity of supplies or services the government will acquire;
- c* include a statement of work sufficiently detailed to allow a prospective offeror to decide whether to submit an offer; and

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11 GSA Class Deviation 2018-01.

12 DoD Class Deviation 2018-O0018.

13 FAR 13.203.

14 GSA Class Deviation 2018-01.

15 DoD Class Deviation 2018-O0018.

16 FAR Subpart 13.3.

17 See Scott Maucion, OTA contracts are the new cool thing in DoD acquisition, Federal News Network, 19 October 2017.

18 10 U.S.C. 2371.

- d* state the procedures to be used in issuing orders, including – if multiple awards may be made – the selection criteria to be used to provide awardees with a fair opportunity to be considered for each order.<sup>19</sup>

There is a statutory preference for awarding multiple IDIQ contracts for the same or similar services or supplies.<sup>20</sup> The competition requirements in the FAR do not apply to individual orders under such IDIQ contracts, but the contracting officer has to provide each awardee with ‘a fair opportunity to be considered for each award exceeding US\$3,500 issued under multiple deliver-order contracts or multiple task-order contracts’.<sup>21</sup> The contracting officer is not required to contact each of the multiple awardees under the contract before awarding an order that does not exceed US\$5.5 million, so long as the contracting officer has provided the awardee a ‘fair opportunity to be considered’.<sup>22</sup>

While central purchasing may occur on the state and local level, each federal agency (or sub-agency or sub-component) is generally responsible for making procurements on its own behalf. However, agencies frequently make purchases using interagency contracting vehicles, through government-wide acquisition contracts (GWACs), the Multiple Award Schedules (MAS) programme, and other multi-agency contracts used by more than one agency pursuant to the Economy Act, 31 USC Section 1535.

## **ii Joint ventures**

In the United States, most public-private partnerships (PPPs), including joint ventures, are at the state (not federal) level, and approximately half of the states have (different) PPP-enabling statutes that, along with implementing regulations, define the procedures for establishing a PPP. The actual procurement procedures vary by state. While not as common, PPPs exist in the federal context as well, such as the National Institute of Standards and Technologies’ National Cybersecurity Center of Excellence, which seeks to generate solutions for cybersecurity challenges,<sup>23</sup> as well as various PPP opportunities with the Department of Transportation for design and construction projects.<sup>24</sup> The requirements for private companies wishing to participate in a PPP vary by opportunity and agency.

## **V THE BIDDING PROCESS**

### **i Notice**

FAR Part 5 provides a central set of ‘policies and procedures for publicising contract opportunities and award information’.<sup>25</sup> For contract actions expected to exceed US\$25,000, federal agencies must post a synopsis of the contract action at a government-wide point of entry (GPE). The main GPE used for federal procurements is the System for Award

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19 FAR 16.504(a)(4).

20 10 U.S.C. 2304a(d), 41 U.S.C. 253h(d).

21 FAR 16.505(b)(1)(i).

22 FAR 16.505(b)(1)(iv).

23 <https://www.nccoe.nist.gov/partners/partnerships>.

24 <https://www.transportation.gov/buildamerica/programs-services/p3>.

25 See FAR 5.000.

Management (SAM) website found at [beta.sam.gov](https://beta.sam.gov).<sup>26</sup> The [USASpending.gov](https://www.usaspending.gov) site is also used by the US government as a repository for awarded contracts. Agencies are generally required to post a notice of proposed contract action for at least 15 days prior to the issuance of a solicitation for proposals or bids and must provide for a minimum response time of 30–45 days.<sup>27</sup> For contracts utilising procedures other than full and open competition, a synopsis of the sole-source decision must be posted depending on the type of contract.<sup>28</sup>

## ii Procedures

Government agencies must utilise procedures for full and open competition of contracts wherever possible. The parameters of competition are delineated in CICA, 41 USC Section 253 and FAR Part 6. The two main types of competitive procedures are sealed bids and competitive proposals.<sup>29</sup>

For sealed bidding procedures under FAR Part 14, offerors must submit a bid in response to an invitation for bids issued by the agency. Bids are opened publicly by the agency and evaluated without discussions. Award is made based on price and ‘price-related factors’ included in the invitation for bids, and is made to the lowest priced bidder found to be responsive based on the criteria set forth in the invitation.<sup>30</sup>

Negotiated procedures under FAR Part 15 are more commonly used in competitive procurements. Under these procedures, offerors must submit proposals responding to specific instructions and evaluation criteria supplied in the solicitation.<sup>31</sup> Once offerors submit proposals, agencies have the option to engage in exchanges with offerors in order to clarify points in their proposals or raise significant weaknesses or deficiencies.<sup>32</sup>

Different procedures govern the more limited situations where full and open competition is not used. For example, federal supply schedule contracts with the General Services Administration are governed by specific procedures in FAR Part 8.4. Task and delivery orders issued under IDIQ contracts are governed by FAR Part 16. Small business contracts are governed by specific procedures set forth in FAR Part 19.

## iii Amending bids

Bids submitted under sealed bidding procedures may be amended or withdrawn if notice is provided prior to the time set for bid opening.<sup>33</sup> Similarly, under negotiated procedures, proposal revisions or modifications must be received by or before the time set for submission of proposals.<sup>34</sup> Proposals submitted under negotiated procedures may also be revised after submission in response to discussions with the agency.<sup>35</sup>

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26 The main GPE switched from the Federal Business Opportunity (FedBizOpps) website to SAM.gov in 2019.

27 FAR 5.203.

28 FAR 5.301.

29 FAR 6.102.

30 FAR 14.101.

31 FAR 15.304.

32 FAR 15.306(a), (d).

33 FAR 14.303.

34 FAR 15.208(a).

35 FAR 15.307.



## VI ELIGIBILITY

### i Qualification to bid

Under FAR Part 9, only contractors that are found to be responsible by the procuring agency may bid on government contracts. Agencies will evaluate an offeror's financial resources, record of performance, operational controls, means of performance, and its record of integrity and business ethics when determining responsibility.<sup>36</sup> In situations where particular skills or resources are necessary, agencies may include additional 'special standards' in the solicitation.<sup>37</sup>

In addition, some procurements may be restricted to small businesses or small businesses with certain socioeconomic preferences (i.e., women-owned, veteran-owned, etc.). Procurements for classified defence programmes are limited to companies that meet certain standards for classified programmes. Agencies may also limit the issuance of certain solicitations to holders of existing GWAC or IDIQ contracts.

### ii Conflicts of interest

Agencies are required to evaluate proposals for potential Organizational Conflicts of Interest (OCI) 'as early as possible' in the procurement process and must 'avoid, neutralize, or mitigate significant potential conflicts before award'.<sup>38</sup> In certain circumstances, OCIs may also be waived by an agency at the request of the contracting officer and by approval of the 'agency head or designee'.<sup>39</sup> OCIs arise in three main scenarios: (1) impaired objectivity; (2) biased ground rules; or (3) unequal access to information.<sup>40</sup> An impaired objectivity OCI arises where a contractor is in a position to evaluate its own or its competitor's performance or products. A biased ground rules OCI arises where a contractor, as part of one government contract, sets the rules for another contract that it then bids on. An unequal access to information OCI arises where an offeror gains access to competitively useful non-public information under one contract that can be used to obtain another contract (e.g., competitor proprietary information, government confidential information, etc.).

Offerors may also be conflicted through a related doctrine known as 'unfair competitive advantage'.<sup>41</sup> An unfair competitive advantage is related to the same principle as an unequal access to information OCI, where access to competitively advantageous non-public information is obtained through a former government official.

Personal conflicts are dealt with through a variety of separate restrictions on US government employees that restrict their activities once they leave government service. The FAR also requires contractors to prevent personal conflicts of interest of their employees, providing specific restrictions on contractor employees that perform 'acquisition functions' that are 'inherently' governmental.<sup>42</sup> Contractors participating in such functions must have specific procedures in place to screen for personal conflicts.

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36 FAR 9.104-1.

37 FAR 9.104-2.

38 FAR 9.504(a)(2).

39 FAR 9.503.

40 FAR 9.505-2 (Biased Ground Rules); FAR 9.505-3 (Impaired Objectivity); FAR 9.505-4 (Unequal Access to Information).

41 See *Health Net Federal Services, LLC*, B-401652.3, B-401652.5, 4 November 2009, 2009 CPD ¶ 220.

42 FAR 3.1102-3.

### **iii Foreign suppliers**

Public procurement in the US is largely open to foreign companies, because historically, the US has placed restrictions on the procurement of foreign-origin supplies, services, and materials, through domestic preference regimes, and not the citizenship of the company providing the good.

Although US laws and regulations allow foreign companies to compete in the US government market, certain restrictions apply to contracts that implicate national security concerns. This includes contracts that require access to classified information, which are wholly limited to US companies and US citizen employees, and contracts that require access to items that are subject to US export controls. For contracts requiring access to classified information, there are certain steps that a foreign corporation can take to insulate a US subsidiary from FOCI, allowing the government to award the US subsidiary contracts that require access to classified information. With respect to export controls, certain activities may trigger a requirement for a US presence and export authorisation.

## **VII AWARD**

### **i Evaluating tenders**

Agencies are required to include the standards and evaluation criteria used for evaluating offerors in the solicitation. For sealed bidding procurements, the agency will award to the lowest bidder that satisfies the requirements in the invitation for bids. For negotiated procurements, solicitations can include a variety of factors for evaluation but, at a minimum, must address price/cost, quality, past performance (with limited exceptions), and the extent of small and disadvantaged business concern participation (where subcontracts are used). Procurements can be evaluated on an LPTA basis, although, as discussed above, its use is increasingly limited. Many negotiated procurements are decided on a best value basis, and require the agency to conduct a trade-off between cost and non-cost factors if award is made to a higher-rated but higher-priced offeror. Agencies must document the rationale for their evaluation and selection decision.

### **ii National interest and public policy considerations**

The United States has historically given preference to products made in the United States under the Buy American Act (BAA); however, the US has opened up its government procurement to reciprocal international competition, through multilateral and bilateral trade agreements (such as the WTO GPA), as implemented by the Trade Agreements Act (TAA). The BAA effectively acts as an evaluation preference for 'domestic end products', or 'domestic construction materials', which are products 'manufactured' in the United States and for which more than 50 per cent of the total cost of the components are for components produced or manufactured in the United States (though the component test is waived for commercially available off-the-shelf items).<sup>43</sup> The TAA, which applies to acquisitions over certain dollar thresholds, waives the BAA for the acquisition of end products or services from 'designated countries' (including those countries with which the US has entered into bilateral or multilateral agreements opening up government procurement for reciprocal treatment), and prohibits the acquisition of end products or services from 'non-designated countries'. The

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43 FAR 25.003, 25.101.

TAA requires products to be wholly made or ‘substantially transformed’ in the United States or a designated country.<sup>44</sup> There are distinct domestic preferences that apply to procurement by the DoD, and to state and local projects funded by federal grants.

The United States has a policy to provide maximum practical opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns.<sup>45</sup> Agencies are required to set-aside certain contracts for small business concerns when there are expected to be at least two small businesses that can perform the work or provide the products being purchased.<sup>46</sup> This policy for contracting with small business concerns flows down to subcontracts as well; contracts exceeding certain dollar thresholds are required to subcontract with small business concerns to the maximum practicable extent and, if certain conditions are met, submit to the government a small business subcontracting plan that indicates the contractor’s goals for small business subcontracting.<sup>47</sup>

The government also implements numerous public policy considerations through its procurement policy, including policies for equal employment opportunity,<sup>48</sup> non-discrimination because of age<sup>49</sup> and anti-human trafficking.<sup>50</sup>

## VIII INFORMATION FLOW

The FAR encourages agencies to engage with industry to identify and resolve concerns during the procurement process. In the acquisition strategy phase, this includes seeking input through requests for information or issuing a draft solicitation requesting feedback from industry. Once the solicitation is issued, agencies will often provide for a question and answer period and will incorporate responses in the solicitation, to clear up any issues with interpretation prior to bid submission.

In negotiated procurements, after proposals are submitted, the agency can engage in several different types of exchanges with offerors.<sup>51</sup> Clarifications are often used to clear up ambiguities in an offeror’s proposal through the issuance of questions that do not allow proposal revisions. Agencies may also engage in discussions, which provide an opportunity for offerors to materially revise or modify their proposals. Discussions must be meaningful, equal and not misleading, and must address significant weaknesses and deficiencies identified by the agency. If engaging in discussions, the agency must establish a competitive range of the most highly rated proposals. Offerors who are not included in the competitive range are required to be notified of their exclusion. If the agency intends to award without discussions, it must so state in the solicitation.

Offerors in negotiated procurements are entitled to request a debriefing if they are eliminated from consideration prior to award or after the award is made.<sup>52</sup> A debriefing provides the offeror with an overview of its evaluation, the rationale for award, and any

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44 FAR 25.225-5.

45 See FAR Subpart 19.2.

46 FAR 19.502-2.

47 See FAR Subpart 19.7.

48 See FAR Subpart 22.8.

49 See FAR Subpart 22.9.

50 See FAR Subpart 22.17.

51 FAR 15.306.

52 FAR 15.505 and 15.506.

significant issues that may have prevented it from being selected for award. The debriefing will normally include the awardee's price, overall technical rating, and ranking of offerors if any such ranking was developed, but not specific information about the awardee's proposal or evaluation. DoD now allows offerors to ask additional questions after their initial debriefing, and expansion of debriefing rights is expected to follow in civilian agencies.

## IX CHALLENGING AWARDS

Disappointed bidders can challenge an agency's award by filing a bid protest. There are several different forums for protest including the contracting agency, GAO and the US Court of Federal Claims (COFC). The terms of the particular procurement may affect which forum a contractor can and should select. For example, task or delivery order protests generally cannot be brought at COFC (except in very limited circumstances), and such protests at GAO are otherwise limited to orders over US\$25 million for defence agency procurements and US\$10 million for civilian agencies.<sup>53</sup>

GAO tends to be the most popular forum for bid protests. For Fiscal Year 2019, 2,198 protests were filed at GAO. Of those, 587 cases went to a decision on the merits, and 77 cases were decided in the protester's favour. This is an effective sustain rate of 13 per cent; however, 44 per cent of protests are considered to have been resolved 'effectively', meaning they were either sustained or the agency took corrective action.<sup>54</sup>

### i Procedures

The procedures for a bid protest vary by forum. To have standing to protest, a protester must demonstrate that it is an 'interested party' to the procurement, meaning that it has submitted a bid or proposal and has a direct economic interest in the award decision.<sup>55</sup> Essentially, a protester must demonstrate that it would be 'next in line' for award if it prevails in its protest.

GAO has well-established procedures governing protests. A protester at GAO must file its protest within 10 days of when it knew or had reason to know of its grounds for protest. In the post-award context, a protest must be filed within 10 days of award or within 10 days of a required debriefing. If a debriefing is requested and required, the protest may not be filed prior to the debriefing date. CICA also provides for an automatic stay of performance if the protest is filed within 10 days of award or five days of a required debriefing, which may be overridden by the agency under limited circumstances. Any stay-override can be challenged at COFC. Once the protest is filed, the agency must respond by filing its agency report (the response to the protest arguments) within 30 days of filing. The protester then has 10 days to file comments to the agency report. Supplemental protests can also be filed if new information becomes available as long as they are independently timely (filed within 10 days of when the protester knew or should have known of the basis for its protest). GAO protests must be decided within 100 days of filing.

For COFC protests, there is no similar deadline to file a protest, but protesters generally file as quickly as possible. There is no automatic stay of performance for protests filed at COFC. In order to stay performance, protesters must either negotiate an agreement with the agency to voluntarily stay performance, or litigate a motion for preliminary injunctive

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53 FAR 16.505(a)(10).

54 See 4 C.F.R. Part 21, Bid Protest Regulations.

55 GAO Bid Protest Annual Report to Congress for Fiscal Year 2019, 5 November 2019.

relief. Protesters must demonstrate immediate and irreparable harm to receive an injunction. COFC is not subject to the same 100-day decision deadline as GAO, but protests at COFC are heard and decided on an expedited schedule.

Decisions from the agency, GAO, or COFC can also be reviewed further or appealed in the event of an adverse decision. If you lose an agency challenge, you can refile your protest with GAO, and after that COFC (although you only get one CICA stay, which expires at the end of your first protest with the agency or GAO). Adverse COFC decisions can be appealed to the US Court of Appeals for the Federal Circuit.

## **ii Grounds for challenge**

In order to prevail, a protester must show that the agency's decisions were arbitrary or unreasonable. A protester must also demonstrate competitive prejudice for a protest to be viable, meaning that but for the alleged error, it would have had a substantial chance of receiving the award.

Common protest grounds include challenges to the reasonableness of the agency's technical, past performance, or price evaluations, disparate treatment of offerors, flaws with the discussions process, errors with regard to the agency's responsibility determination, challenges to the awardee's qualifications, conflicts (OCIs, unfair competitive advantage, etc.), and flaws in the agency's best value determination or trade-off decision. In GAO's annual report to Congress for FY 2019, GAO indicated that the most 'prevalent reasons for sustaining protests during the 2019 fiscal year were: (1) unreasonable technical evaluation; (2) inadequate documentation of the record; (3) flawed selection decision; (4) unequal treatment; and (5) unreasonable cost or price evaluation'.<sup>56</sup>

## **iii Remedies**

Remedies for bid protests vary by forum. GAO may only make recommendations regarding an agency's corrective action if it sustains a protest, but as a matter of practice, all agencies follow the recommendation because otherwise they must report to Congress. Common GAO recommendations include re-evaluation of proposals, reopening discussions and the submission of a new selection decision. COFC protests are decided by court order for declaratory or injunctive relief. In either forum, winning a protest will not necessarily result in award to the protester, but such directed awards are possible (if exceedingly rare). Successful protesters may also be able to recoup bid and proposal costs, and reasonable attorney's fees. Punitive damages are not permitted.

## **X OUTLOOK**

Cybersecurity and supply chain security continues to be a focus of government agencies, and we expect to see new and evolving evaluation criteria and contract requirements related to these issues. For cybersecurity, the DoD is in the process of rolling out the Cybersecurity Maturity Model Certification (CMMC) programme, which requires all contractors subject to DFARS 252.204-7012 to obtain a certification issued by an independent third party. In January 2020, the DoD released its CMMC framework, and is expected to start training third-party assessors in the spring of 2020. In addition, the National Institute of Standards

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56 GAO Bid Protest Annual Report to Congress for Fiscal Year 2019, 5 November 2019.

and Technology (NIST) issued a draft of NIST SP 800-171B, designed to protect controlled unclassified information (CUI) from advanced persistent threats, and details 33 'enhanced' controls that would apply to contractors handling CUI that is part of a 'critical program' or is a 'high value asset'.

Separately, there will likely be a continued emphasis by the US government in battling procurement fraud. This is evidenced by the recent formation of the Procurement Collusion Strike Force (PCSF) by the DOJ, which will focus on detecting, investigating and prosecuting antitrust crimes in public procurements, such as bid-rigging conspiracies and related fraudulent schemes, by recipients of government procurement, grant, and programme funding. The PCSF will train and educate procurement officials nationwide to recognise and report suspicious conduct in public procurements.

Finally, the US procurement landscape will undoubtedly be impacted by the covid-19 pandemic and the residual effects of the pandemic on government and private industry. As many states shut down non-essential businesses and the federal government deals with the impact to existing contracts, there will likely be a large-scale impact in the form of delay and disruption claims, emergency procurements, and the use of private industry to fulfil demand for essential equipment and healthcare-related goods.

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Adelicia Cliffe is a partner in the Washington DC office, where she practises in the firm's government contracts and international trade groups. Addie represents clients with respect to a broad range of government contracts and international trade compliance issues, with specialities including US export controls, the Buy American Act, Trade Agreements Act and other domestic preference programmes, the Foreign Military Sales and Foreign Military Financing programmes, and other US laws and regulations applicable to international transactions. She also counsels clients with respect to foreign investment and ownership in the United States, and applicable US laws and regulations such as Exon-Florio and the National Industrial Security Program.

### **CHRISTIAN CURRAN**

*Crowell & Moring LLP*

Christian N Curran is a counsel in Crowell & Moring's Washington DC office, where he practises in the government contracts group. His practice focuses on government contracts litigation and counselling, including bid protests, government investigations and compliance with federal and state procurement laws and regulations. Christian has broad experience in the government contracts arena, including bid protest litigation at both the Government Accountability Office and the Court of Federal Claims, contract claims before the Armed Services Board of Contract Appeals, prime-sub disputes, internal investigations, mandatory disclosures, transactional due diligence, Defense Contract Audit Agency audits and compliance assessments. He also has experience in both traditional litigation and alternative dispute resolution forums, including international arbitration and mediation, and administrative proceedings before various government agencies.

### **JONATHAN DAVEY**

*Addleshaw Goddard LLP*

Jonathan Davey specialises in procurement and commercial law.

First ranked in *Chambers UK* for procurement law, Jonathan frequently advises a variety of public bodies as well as significant private sector clients on procurement law and commercial matters. Chambers' directory describes him as 'very affable, and willing to listen and properly understand the issues facing the client', having noted previously that 'his advice is excellent, particularly in minimising risk' and that he is "very much at the forefront of the procurement circuit'.

He was founder of and first chair of the Procurement Lawyers' Association, and speaks and writes widely on procurement and commercial law topics in the UK and abroad. He won the Who's Who Legal Global Procurement Lawyer of the Year award in 2014 and 2015 and Government Contracts Lawyer of the Year in 2016, 2017 and 2018.



His experience includes leading the AG team advising the Danish government on the Fehmarnbelt Tunnel project, a €6 billion, 19 kilometre road and rail tunnel linking Denmark and Germany; advising the Department for Transport on aspects of rail franchising; and advising Parliament on its proposed multibillion-pound refurbishment programme.

## **LOUISE DOBSON**

*Addleshaw Goddard LLP*

Since qualifying in 2007, Louise Dobson has specialised in commercial dispute resolution and risk management, with a focus on procurement challenges and high-value complex contractual disputes. She acts for both public and private sector clients and provides advice on live claims alongside dealing with dispute avoidance and risk management work, assisting with contract negotiations, terminations, exit strategies and payments and supporting tender teams with high-value procurement processes and the related contracts.

Ms Dobson is a partner and is ranked in *Chambers and Partners* as an ‘Associate to Watch’ for litigation and public procurement, and sources note that Louise ‘is establishing herself firmly . . . by acting on a number of high-profile procurement cases’ (*Chambers and Partners 2017*), has ‘very good understanding of tactics and strategy’ (*Chambers and Partners 2018*) and is ‘a very effective public procurement litigator’ (*Chambers and Partners 2020*). Louise is ranked as a ‘Next Generation Lawyer’ in *The Legal 500* in 2018, 2019 and 2020 and is noted as ‘very hard working’ with specialist knowledge of the health and pharmaceuticals sector.

Ms Dobson has particular experience working in the health sector, advising arm’s-length bodies of the NHS on complex contractual claims, businesses in the healthcare, life sciences and pharmaceutical sectors, and dealing with the management of confidential and commercially sensitive data and information in procurement disputes (whether personal, patient or business data). She successfully acted alongside Bill Gilliam for the claimant in *Counted4 Community Interest Company v. Sunderland City Council* [2015] EWHC 3898 (TCC). She is a member of the Procurement Lawyers’ Association.

## **JACK DOUKOV-EUSTICE**

*Addleshaw Goddard LLP*

Jack Doukov-Eustice is an associate in Addleshaw Goddard’s commercial team. He advises both private companies and public bodies (contracting authorities and utilities) on a range of contentious and non-contentious procurement matters covering both EU and UK law. Jack has particular expertise in running high-value and high-profile procurements via the competitive dialogue and competitive procedure with negotiation, guiding clients on topics such as structuring of transactions, conflicts of interest, effective evaluation models, clarification of bids, award of contract, modification and management of risk throughout the procurement. He is regularly asked to assist clients on particularly complex and discrete issues that arise during procurements and works closely with Addleshaw Goddard’s commercial dispute resolution team reviewing procurements and identifying challenges and defences. Jack is a member of the Procurement Lawyers’ Association.

## **CLARE DWYER**

*Addleshaw Goddard LLP*

Clare Dwyer is a commercial litigator, described by *Chambers and Partners* as having a ‘particular expertise in public procurement litigation’. She has been involved in several high-profile cases in this field, including the 2019 case of *AEW Europe LLP v. Basingstoke and Deane Borough Council*, and regularly advises on procurement challenges, both for and against public authorities.

She is a member of the Procurement Lawyers’ Association and was involved in drafting and launching in 2017 the litigation protocol for the conduct of public procurement claims in the English Court. She also trains clients in dealing with problems arising from the conduct of public procurement processes, and other matters of public law such as health and transport.

Mrs Dwyer deals with a wide range of other disputes, including specialist rail arbitration, judicial review, substantial warranty claims, pension claims and tax litigation. Her clients range from those in the public sector (such as transport infrastructure providers, NHS trusts and other public bodies) to leading manufacturers, retailers and service providers.

She is a CEDR-accredited mediator and has higher rights of audience in civil proceedings.

## **ADA ESPOSITO**

*Legance – Avvocati Associati*

Ada Esposito is a counsel in the administrative law department of Legance. She assists national and international clients taking part in public procurement bids for works, services and supplies contracts. Her main focus is on infrastructure (highways, airport, ports and railways), public utilities and privatisations, in addition to PFI/PPP projects and the bankability of the relevant agreements. She also provides legal assistance in relation to the different steps of the procedures, including in the healthcare sector (from the pre-qualification to the execution of the relevant agreements), supporting clients in the executive phase of public contracts, and in relation to any issues concerning the performance of public contracts in general.

## **DANIEL FORMAN**

*Crowell & Moring LLP*

Daniel R Forman is a partner in Crowell & Moring’s Washington DC office and is co-chair of the firm’s government contracts group. He is also a member of the firm’s management board. Dan’s practice focuses on a wide variety of government procurement law, including bid protests, False Claims Act and *qui tam* litigation, investigations of potential civil and criminal matters, ethics and compliance, contract claims and disputes, GSA schedule contracting and small disadvantaged business contracting. Dan is also experienced in negotiating and drafting teaming agreements and subcontracts, as well as providing counselling on the interpretation of FAR clauses and solicitations. Dan’s practice also focuses on state and local procurement matters, including State False Claims Act issues, lobbying and contingency payment compliance. He has been involved in bid protest litigation in six states and the District of Columbia. Dan has been named one of the top lawyers in the government contracts field

by *Chambers USA*. Dan was also honoured as a 2015 Law360 MVP and named on BTI Consulting Group's list of 'Client Service All-Stars'. In 2017, Dan was named a 'leading lawyer' in government contracts by *The Legal 500 United States*.

### **AMY GATENBY**

*Addleshaw Goddard LLP*

Amy Gatenby has been a solicitor in England and Wales since 2006 and is a legal director in Addleshaw Goddard's procurement team. She specialises in all aspects of EU and UK public procurement law and regularly advises both public and private sector clients on a wide variety of non-contentious and contentious procurement matters.

She routinely advises public authorities and utilities on high-profile procurement processes for major projects, and advises on all aspects of the procurement process from the structuring of a transaction and whether the public procurement regulations apply, to pre-market engagement, choice of procedure, drafting contract notices, designing effective evaluation models, material change risk and handling award challenges. She is a member of the Procurement Lawyers' Association.

Her recent experience includes advising the Corporate Officer of the House of Lords and House of Commons in relation to the restoration and renewal programme for the Palace of Westminster and the development of the House of Commons Northern Estate. She is also advising the Department for Transport on the West Midlands and West Coast rail franchise competitions.

### **RYAN GELDART**

*Addleshaw Goddard LLP*

Ryan Geldart is a managing associate in Addleshaw Goddard's commercial dispute resolution team. Ryan focuses on commercial dispute resolution with a particular emphasis on procurement challenge in the transport and health sectors, acting for both contracting authorities and bidder clients in those challenges. Ryan regularly advises clients on all aspects of procurement challenges, with particular interest in issues relating to disclosure, and has input on the public consultation regarding the Disclosure Pilot in the Business and Property Courts. Ryan is a member of the Procurement Lawyers' Association.

### **BILL GILLIAM**

*Addleshaw Goddard LLP*

Bill Gilliam is a commercial dispute resolution and litigation partner. He specialises in heavyweight disputes. He has particular expertise in the management and resolution of procurement challenges. He has an enviable track record of success in litigation and arbitration, together with all forms of alternative dispute resolution, including expert determination, negotiation and mediation.

Mr Gilliam acts for national and international clients in a wide range of fields and has considerable experience of advising both private and public bodies in a range of sectors, including health, transport, retail and technology. He has led many of the highest-profile procurement litigation cases in recent years, including *Network Rail v. Mermec* (successful strikeout of a claim that was just out of time), *Covent Garden Market Authority v. Bouygues* (including a major hearing dealing with a complex disclosure exercise) and *Roche Diagnostics*

*v. Mid Yorkshire Hospitals NHS Trust* (precedent-setting application for specific and early disclosure from the defendant trust). In December 2015, he successfully acted for the claimant in *Counted4 Community Interest Company v. Sunderland City Council* [2015] EWHC 3898 (TCC), the first reported case dealing with automatic suspension under the Public Contracts Regulations 2015. Most recently, he has acted on the 2019 *Rail Franchising* litigation, involving a challenge to the Department of Transport and Secretary of State for Transport by bidders for three regional rail franchises.

As noted in *Chambers and Partners 2019*, he is praised by sources for giving ‘clear legal advice and is willing to go the extra mile for the client’ and being ‘a very good strategist’. Mr Gilliam is praised by clients in *The Legal 500* for being ‘a stand out solicitor – a fantastic technical lawyer but also commercial and practical’.

## **KLAAS GOETHALS**

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Klaas Goethals graduated with a Master of Laws from KU Leuven in 2016. He completed part of his studies at the Université Paris 1 Panthéon-Sorbonne. He joined Liedekerke in 2016.

## **FEDERICO HERNÁNDEZ A**

*Hogan Lovells BSTL, SC*

Federico Hernández has extensive experience in counselling clients on administrative, government contracts, public-private partnerships (PPPs), telecommunications, infrastructure and commercial matters.

Federico has worked in-house at Mexico’s former telecoms commission, so he has first-hand knowledge of complex regulatory issues for telecommunications and the administrative sector, helping clients with regulatory, commercial, public procurement and administrative transactions.

Nowadays, Federico represents procurement companies, resellers, infrastructure and equipment providers before regulators on various matters, so he is able to advise major local and foreign companies in their daily operations in Mexico. He has also actively participated with various clients, obtaining public contracts published under local or federal regulations.

Federico has experience in obtaining regulatory authorisations for, among others, allowing foreign air carriers making flights to Mexico and operation of unmanned aircraft systems. Likewise, he has developed a strong reputation for defending his clients’ interests and facing issues with public and private situations.

National and international companies call on Federico to help them navigate challenges in regulatory, administrative and public procurement procedures and other hurdles involved in establishing and maintaining operations in Mexico. He focuses on collaborating with clients to understand the public sector and get favourable business results.

## **FRANK JUDO**

*Liedekerke*

Frank Judo graduated with a licentiate in law from KU Leuven in 1998, where he also studied philosophy, modern history and canon law. He has been associated with Liedekerke since 1998 and has been a partner since 2008. Alongside his advocacy practice, he has also

published numerous articles on a wide range of matters. Between 1998 and 2004, he was a lecturer at the Institute for Constitutional Law at KU Leuven. He is a member of the High Council of Justice.

### **KARINA KUDINOVA**

*Baker McKenzie*

Karina Kudinova is an associate within the firm's IP/technology practice group in the Toronto office of Baker McKenzie. Karina focuses her practice on regulatory and commercial matters in the areas of information technology, privacy and data protection, cybersecurity, telecommunications, information governance and e-commerce. Karina received her joint JD/MBA degree from Osgoode Hall Law School and the Schulich School of Business. She is admitted to practise law in Ontario and California.

### **THEO LING**

*Baker McKenzie*

Theo Ling is a partner based in the Toronto office of Baker McKenzie. He heads Baker McKenzie's Canadian information technology/communications practice and is a member of the firm's global IP/technology practice group, and technology, media and telecoms and financial institutions industry groups. His international commercial and regulatory practice is focused on technology-based issues and the converging computer, internet and communications industries, as well as supply chain, procurement and outsourcing issues. Beyond his international commercial and regulatory practice, Theo has been active in developing innovative solutions driven by data analytics in the areas of legal processes and compliance, where his work has been recognised by the *Financial Times* as being at the forefront of innovation in the Canadian legal market.

### **PHILIPP J MARBOE**

*Wolf Theiss*

Philipp J Marboe is an attorney-at-law and counsel at Wolf Theiss. He is a member of the regulatory and procurement practice group. Prior to joining Wolf Theiss he was junior partner in a leading Vienna-based Austrian and central European practice. Mr Marboe is recognised as one of Austria's leading procurement lawyers.

He has extensive professional experience in tender procedures, ranging from railways and public passenger transport services, project development and construction projects, including building information modelling, to the security and defence sector. Mr Marboe also specialises in public commercial law and contract law. He regularly represents contracting authorities and bidders in review proceedings. He gained international experience in working at the Vienna office of a British multinational law firm and for a law firm in Paris.

Mr Marboe has authored numerous publications on regulatory and procurement-related topics. He studied law at the University of Vienna and the Autonomous University of Madrid. Mr Marboe wrote his doctoral thesis in international law at the French Institute of International Relations in Paris. He is fluent in German, English, French and Spanish.

## **BENOÎT MERKT**

*Lenz & Staehelin*

Dr Benoît Merkt is a leading expert in competition law and is renowned for his first-rate practice. He specialises in all areas of Swiss and European merger control work and competition law, notably in the banking and finance, energy, high-tech, infrastructure (electricity), consumer goods, chemical, luxury goods, motor-car distribution, public broadcasting and retail sectors. He has been responsible for a large number of merger notifications to the Swiss Competition Commission and coordinated multi-jurisdictional merger filings. Dr Merkt advises in contentious and non-contentious matters and has acted in high-profile cases on alleged abuses of dominant positions, vertical restraints, cartels and public procurement.

## **FILIPPO PACCIANI**

*Legance – Avvocati Associati*

Filippo Pacciani is the head of the administrative law department of Legance. He has developed a considerable and specialist expertise in the public contracts sector at both a judicial and an extrajudicial level. He deals with tender procedures aimed at awarding a complete range of public contracts (i.e., works, services and supply contracts, work concessions, public-private partnerships) assisting both contracting authorities in structuring the tender process, leading companies and lenders, respectively, in participating in tender procedures and financing public contracts. Owing to the high-profile experience gathered in the public contracts sector, he has been involved in pivotal transactions closed in recent years on the Italian infrastructure market.

Filippo Pacciani is mentioned in *Chambers and Partners* as follows: ‘Strong lawyer’ (2020), ‘A very analytical and solution-oriented lawyer’ whose ‘advice is practical, logical and accurate’ (2019), ‘Great experience in administrative issues, excellent overall view and problem-solving approach’ (2017), ‘lauded for his ability to manage complex issues’ (2015), he ‘handles a broad range of contentious and advisory issues with a particular focus on public contracts’ (2014). *The Legal 500* mentions Filippo Pacciani as a Leading Individual in the Administrative and Public Law section, quoting testimonials such as: ‘Filippo Pacciani is able to identify the core elements of cases and to advise on an efficient strategy from the beginning. He comes highly recommended’ (2020).

Filippo graduated, *maxima cum laude*, from the Federico II University in Naples in 1994 and has been entitled to plead before the Council of State and Court of Cassation since 2010. He is the author of several specialist public law articles.

## **LUIS ERNESTO PEÑA JIMÉNEZ**

*Martínez, Peña & Fernández*

Luis Ernesto Peña Jiménez specialises in public law, with his practice focusing on public procurement, political/electoral, administrative and constitutional law. He graduated from the George Washington University Law School, Washington, DC (LLM in public procurement law, 2014), Castilla-La Mancha University, Albacete, Spain (LLM in constitutional law and fundamental liberties, 2013) and the Pontifical Catholic University Mother and Teacher, Santo Domingo, Dominican Republic (bachelor’s degree in law, 2011). He is currently managing partner of Martínez, Peña & Fernández in the Dominican Republic. He is a

member of the American Bar Association in the Public Contract Law Division, a professor of constitutional law at the Catholic University of Santo Domingo, and is the author of *The Constitutional Right to Appeal*, published in 2015.

**DAVID PEREIRA CARDOSO**

*Arruda Alvim, Aragão, Lins & Sato Advogados*

David Pereira Cardoso has been an attorney at Arruda Alvim, Aragão, Lins & Sato Advogados for the past 12 years, mostly practising public law. He received his bachelor's and master's degrees from the Federal University of Paraná.

**ANNE PETTERD**

*Baker McKenzie*

Anne Petterd is a partner in the technology, communications and commercial team in Baker McKenzie's Sydney office. She advises on major defence and government projects and procurement requirements, focusing on the telecommunications industry, and advises on telecommunications regulatory and transactional matters. She regularly advises on Australian consumer law requirements, and customs and export control requirements.

**SALLY PIERCE**

*Baker McKenzie*

Sally Pierce is a senior associate in the technology, communications and commercial team at Baker McKenzie in Sydney. Sally advises on a range of commercial and non-contentious technology matters. She has experience in negotiating and advising on defence and government procurements, and more broadly on the supply of technology and technology-related services. Sally also advises on a range of related issues, including privacy law, consumer law and intellectual property.

**OLGA POLKOVNIKOVA (VASILYEVA)**

*Herbert Smith Freehills*

Olga Polkovnikova is a Russian-qualified lawyer. She specialises in advising private investors, public authorities, state-owned companies and financial organisations on infrastructure and public-private partnership projects in Russia.

Olga graduated from the Moscow State Institute of International Relations (University) in 2015 with honours. Before joining Herbert Smith Freehills in 2015, she worked in the Moscow office of another international law firm. She speaks Russian, English, French and Italian.

**MICHAEL RAINEY**

*Addleshaw Goddard LLP*

Michael Rainey is a partner specialising in public procurement law. He works with a wide range of authorities to structure and conduct efficient and effective procurement processes. He also advises on the bidder side, reviewing and challenging processes and award decisions.

He has a wealth of experience in drafting and negotiating public contracts for works, goods and services. His work is focused on a number of sectors, mainly transport, energy, local government, health and water.

Mr Rainey's expertise covers managing and defending procurement challenges for authorities, including correspondence with unsuccessful bidders, explaining the risks and requirements of the contentious process, and guiding authorities through the detailed rules on standstill and limitation.

He is a member of the Procurement Lawyers' Association.

## **NADIA RAUF**

*Baker McKenzie*

Nadia Rauf is a research lawyer with the information technology/communications practice group in the Toronto office of Baker McKenzie. Nadia focuses her legal research expertise in the areas of information governance, privacy and data protection, regulatory compliance, among other areas. Nadia is a graduate of the dual JD programme from the University of Windsor and University of Detroit Mercy School of Law. She is admitted to practise law in Ontario.

## **OLGA REVZINA**

*Herbert Smith Freehills*

Olga Revzina is the regional partner for infrastructure and PPP practice for Europe, including Russia and other CIS Member States at Herbert Smith Freehills international law firm. Olga advises clients on infrastructure projects, including PPP and concession projects across Europe. She has developed particular expertise in central and eastern Europe, Russia and other CIS Member States. Olga advises public clients (state authorities, state-owned and regional companies), and domestic and foreign private investors (including infrastructure funds and financial organisations) on all aspects of transport projects (airports, roads, railways, ports, parking), utilities (water supply, heating systems, waste disposal) and energy projects. Olga is a Russian and French advocate (a member of the Paris Bar and the Moscow Bar). She speaks fluent English and French.

Every year since 2007, *Chambers Europe* has ranked Olga Revzina in the highest tier of PPP specialists.

## **ALEXANDRA ROSE**

*Addleshaw Goddard LLP*

Alexandra Rose has broad experience in drafting and negotiating commercial and corporate contracts. A particular focus of her work lies in competition law and procurement law. She regularly advises on the bidder side, reviewing and challenging procurement processes.

Mrs Rose deals with a wide range of disputes resulting from contracts in the public sector and is experienced in solving problems occurring during the execution of contracts by negotiation, before ordinary and arbitral courts and by alternative resolution procedures.

Her work is focused on a number of sectors with a special focus on transport and consumer and industrial products.

Mrs Rose also led numerous due diligence projects for mid-cap and major domestic and international clients, and represents clients in Chinese–German cross-border transactions.



**ANA P RUMUALDO FLORES**

*Hogan Lovells BSTL, SC*

Ana Paula Rumualdo is a senior associate with over 15 years of experience, and is a recognised practitioner of public procurement matters. Using strategic thinking, Ana Paula has advised a number of clients in regard to all the stages of a procurement procedure, from analysis of the bidding document to the execution of the contract.

She also has particular experience in data privacy and IT. Her clients appreciate her tailored approach to tackling technology-related issues. Ana has provided several training and talks in the fields of public procurement, technology, data privacy and cybersecurity, and has been published several times.

Before joining Hogan Lovells in 2018, Ana worked in a prestigious boutique law firm focusing on public procurement.

**LOLA SHAMIRZAYEVA**

*Herbert Smith Freehills*

Lola Shamirzayeva is an associate at Herbert Smith Freehills CIS LLP. Lola specialises in advising clients on various infrastructure projects, in particular, in the healthcare sector.

Lola graduated from the National Research University Higher School of Economics (HSE) in 2012 with honours. She is studying for a master's degree in healthcare management and economics at HSE. Before joining the firm, Lola worked in the Moscow office of another international law firm. She speaks Russian, English and Uzbek.

**SIMONE TERBRACK**

*Hengeler Mueller Partnerschaft von Rechtsanwälten mbB*

Simone Terbrack has a broad public law practice with a particular focus on public procurement matters, regulated industries and real estate matters. She advises and represents investors, companies and public entities in public law and regulatory matters. Her practice covers representation in public procurement and review procedures. Ms Terbrack also advises on a broad spectrum of litigation as well as in contract negotiations, restructurings and other transactions. She further substitutes as a notary representative at the Berlin office.

Ms Terbrack studied in Münster (Germany) and is writing her PhD thesis on procurement matters at the Bucerius Law School, Hamburg (Germany). She has worked as researcher and instructor on public procurement law at the Bucerius Law School as well as with several public procurement lawyers. She has published articles and chapters in legal commentaries on a broad range of procurement law issues and regularly provides lectures for clients, lawyers and practitioners. Ms Terbrack was admitted to the German Bar and joined Hengeler Mueller as an associate in 2016.

**EMMANUEL J VELEGRAKIS**

*KPV Legal*

Emmanuel J Velegrakis has been a partner at KPV Legal since 2011. He completed his bachelor's degree (LLB) at the University of Athens, took postgraduate studies in public law

and public economic law at Paris II Panthéon-Assas University in France, and completed his Doctor of Law degree at the University of Athens. He has taught administrative procedural law to candidates for the National School of Justice.

Emmanuel was admitted to the Athens Bar in 2000 and is qualified to plead before the Greek Supreme Courts. He has enhanced practice in providing legal advice and court representation to clients in public procurement and public construction projects award and implementation. His expertise relates to all forms of public contracts, public works contracts, public procurements, service and contracts, concessions and public-private partnerships. As Head of Legal of Hellenic Electricity Distribution Network Operator until 2019, he advised and ran multimillion-euro procurement procedures. He also works with contractors of environmental projects and special technical projects. He possesses a thorough knowledge both practically and scholarly and he has dealt with all administrative and judicial aspects of procurement procedures. Emmanuel is often asked to check the legality of all or certain terms of calls for tenders, has prepared the relevant documents for bidders and assisted clients during the preparation of such documents. He has also attended auctions and public tenders, regularly drafting procedural petitions, appeals and objections to all stages of the competition procedures. Accordingly, Emmanuel advises clients during the performance of public contracts, building, whenever required, the legal basis for claims against contractors and contracting authorities and representing them during the examination of the legal remedies.

## **ASTRID WASER**

*Lenz & Staehelin*

Dr Astrid Waser is a partner in the competition, regulated market and investigation group in Zurich. She specialises in all aspects of public procurement law, competition (antitrust) law, media and telecoms law and compliance. Waser also advises on regulatory, administrative and internal investigations and has long-standing experience in the field of compliance matters. In the field of public procurement, she advises awarding authorities and bidders in preparation of and during the award procedures and represents them before Swiss authorities and courts. She has acted in a large number of high-profile public procurement procedures. Waser is a regular speaker at conferences and seminars.

## **GEOFF WOOD**

*Baker McKenzie*

Geoff Wood is the senior lawyer in the construction team at Baker McKenzie, Sydney. He has over 30 years' experience in the design and construction, and operations and maintenance aspects of major projects. His areas of expertise include all legal aspects of construction, infrastructure, public-private partnerships, water, alliancing and defence materiel procurement.

## **JULIO S ZUGASTI GONZÁLEZ**

*Hogan Lovells BSTL, SC*

Julio Zugasti is an associate who advises on government contracts, helping clients look for opportunities in both state and federal public procurement matters. He has represented foreign and national clients involved with extensive public bids and direct awards at all levels

of government. He has worked with companies in the preparation of public bid proposals through to the awarding of the contract, so he is able to assist clients on the challenges regarding public bid guidelines and public procurement awards.

Julio has experience in working on corporate matters, which helps him to understand opportunities for clients within government contracts and administrative matters. Julio sees how government contracts, anti-corruption issues and general business matters affect one another. Julio has helped clients resolve contract enforcement problems as painlessly as possible, and has been able to improve relationships between clients and public entities.

Julio has advised a worldwide IT company on a major government contract procedure with the Ministry of Finance for a long-term relationship. He has represented various companies in the public procurement procedures regarding Mexico City New International Airport and rail transportation.

Julio is dedicated to giving back to his community and has participated in activities in support of the Community Investment Program of the Mexico City office.

## Appendix 2

# CONTRIBUTORS' CONTACT DETAILS

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Camilla Sanger  
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Thomas A Frick  
*Niederer Krafi Frey*

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Calvin S Goldman QC and Michael Koch  
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Aidan Synnott  
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André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto  
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Giuseppe Andrea Giannantonio and Tobias Steinmann  
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ISBN 978-1-83862-458-3