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Public Procurement & Government Contracts

Contributing Editor
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INTRODUCTION

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Transforming UK Public Procurement

Whilst the UK was a member of the European Union, domestic procurement legislation consisted primarily in the implementation of EU procurement directives, the key aim of which was to ensure that public (and in some cases, private sector utility) contracts were opened up to competition across the EU single market and awarded on the basis of certain principles, including those of transparency, non-discrimination and equality of treatment.

Having now left the EU, the UK intends to amend its procurement legislation so as to reflect better its own priorities, idiosyncrasies and policy objectives. To that end, the government published a Green Paper ("Transforming Public Procurement") in December 2020, inviting comments on a set of proposals for the reform of UK public procurement legislation.

Key amongst the aims of this legislative reform agenda is the desire to simplify, streamline and introduce rules that allow for greater flexibility. At the same time, changes to the domestic procurement legislation must remain compliant with the UK's international law commitments, including the WTO's plurilateral Agreement on Government Procurement (GPA). Whilst these parameters render the broad shape of the new domestic procurement legislation discernible, certain key aspects, such as review procedures and the availability of remedies for breaches of the legislation, remain, for the moment, less clear. These issues are discussed in more detail below.

A simpler and more flexible regulatory regime

That simplification is a key aim of the legislative reform exercise is, perhaps, not surprising. Currently, different sets of regulations apply to the award of public contracts, utility contracts and concession contracts, as well as defence and security contracts. There is no obvious reason as to why this web of distinct regulatory regimes should not be streamlined so as to create a single set of rules for all regulated contract awards. Where necessary, the new legislation can also incorporate provisions so that modified or additional rules apply in relation to specific types of contract awards, such as those that relate to defence and security. Indeed, this is the approach that the Green Paper is proposing.

The new legislation is also likely to do away with the current set of EU law-inherited contract award procedures in preference of aligning domestic legislation with the less structured contract award procedures for which the GPA provides. On that basis, instead of seven tender procedures, the new procurement rules are likely to provide for only three:

- the open procedure for simpler "off the shelf" purchases;
- a new flexible procedure that will permit contracting authorities greater flexibility in structuring negotiations and other aspects of the contract award process; and
- a limited tendering procedure that – as is the case with the current negotiated procedure without prior publication – ill permit direct contract awards in certain circumstances.

The Green Paper also proposes the introduction of a new ground that would justify the use of the limited tendering procedure, namely, where a minister declares that there is a crisis that requires immediate, short-term procurement decisions to be made. When relying on the limited tendering procedure, there would also be an obligation to publish a notice and, except in

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the event of a crisis or extreme urgency, a ten-day standstill period should be observed before entering into the relevant contract.

In addition, the new legislation is likely to simplify and expand the availability of "safe harbours" for the amendment of contracts once they have been concluded. Except for certain de minimis modifications, contracting authorities would also be required to publish a contract modification notice and observe a ten-day standstill period before effecting contract modifications, unless the amendments are made as a result of a crisis or extreme urgency.

Separately, it is the intention that the new legislation should provide for open framework agreements of up to eight years. According to this proposal, framework agreements longer than four years must be re-advertised at least once after the third year by assessing new entrants against the original requirements and evaluation criteria. At the time of re-advertising the framework, existing framework suppliers would be given the opportunity either to remain on the framework on the basis of their original tenders or compete anew for a place on the framework by submitting updated tenders.

Underlying the new legislation would be six interdependent legal principles, namely, the public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination. None of these principles is controversial. At the same time, the express inclusion of the public good as an underlying principle is notable in that it indicates an intention to use public procurement more actively as an instrument in the furtherance of public interest objectives. Accordingly, under current proposals, contracting authorities would be required to assess the public benefits that would accrue as a result of the procurement. In this context, contracting authorities would also be required to have regard to the government's priorities and key outcomes as set out in a National Procurement Policy Statement. Such outcomes could include the creation of new businesses, jobs and skills, improving supplier diversity and innovation as well as tackling climate change.

International law commitments

As noted earlier, any changes to the procurement legislation must maintain compliance with international law obligations, whether these arise under the GPA or the UK's free trade agreements. For example, the UK cannot generally raise the value thresholds that trigger the application of the procurement rules. The reason for this is that these thresholds reflect commitments under the GPA, to which the UK is now a party in its own right.

Equally, with some notable exceptions (including as regards defence and security contract awards), UK procurement legislation cannot reserve the award of public contracts to UK suppliers only. Again, the ability to do so is curtailed by GPA commitments and the requirement to allow suppliers of other GPA parties to participate in most UK public contract award procedures on the same basis as UK suppliers.

If the UK can...

All in all, there is a lot to praise in the Green Paper proposals, the drive towards simplification and the creation of a more flexible regulatory system than that which the UK has inherited from its membership of the EU. That is not to criticise the EU procurement legislation, which owes its complexity – reflected in the number of different procurement legislative instruments as well as the number of, sometimes overlapping, contract award procedures, for example – to its historical context and iterative development.

Equally, what might appear as procedural rigidity in the detailed rules that govern the application

of various contract award procedures is in fact a reflection of the need for the EU to err on the side of more rather than less legislation. This is so as to facilitate compliance among disparate contracting authorities across national borders and promote single market integration by opening up otherwise fragmented national public procurement markets to fair and EU-wide competition.

Such concerns are absent in the context of a national regulatory regime, which, by definition, is easier to review, amend and shape as flexibly or rigidly as national conditions and considerations require.

Thornier issues

At the same time, the effectiveness of a procurement regulatory regime should not be measured by its simplicity and flexibility alone. Equally important is the extent to which the legislation provides robust incentives, in the form of an effective remedies system, for contracting authorities to comply with their regulatory obligations when using public funds at their disposal to award contracts for goods, works or services.

To a large extent, the Green Paper is mindful of these considerations and, amongst other things, proposes that court rules and processes should be reformed with a view to making it easier for bidders, and other affected parties, to defend their rights in the event of a breach of the legislation. To that end, the government would be considering the possibility of a tailored fast-track court system for procurement challenges, the establishment of clear and detailed rules for pre-litigation disclosure and the possibility of reviewing contracting authority decisions by means of written pleadings alone.

Equally relevant and welcomed in this regard is the government's intention to revise the test on the basis of which the courts determine applications for the lifting of the automatic suspension that applies, under certain conditions, to tender procedures following a challenge to an award decision. The application of the existing test has led to a substantial majority of such applications being granted, allowing the contracting authority to award the contract, despite the legal challenge, and limiting the remedy available to a successful claimant to that of the, arguably, less effective remedy of damages.

However, more problematic in this context is the proposal to limit generally (there are certain exemptions) damages awards to legal fees and 1.5 x bid costs, thereby removing the ability of successful claimants to seek damages for loss of profit. Behind this proposal lies the concern that the potential for large payouts can encourage speculative claims from bidders, and the view that such remedy would seem inappropriate where there have been unintentional errors in the carrying out of a procurement process.

It might be arguable that, even if this proposal were to be implemented, this should not make a substantive difference in practice. The reason for this is that it is generally difficult for claimants to obtain damages for loss of profit given the need to demonstrate causation in that, but for the breach, the claimant stood a real chance of being awarded the contract. This has not been possible to establish other than in a small number of cases. In addition, the ability to claim damages more generally has been made even more difficult in recent years, in the light of a court ruling, according to which, damages are only available where the breach is "sufficiently serious".

Despite such difficulties, the risk that a claimant might be able to claim successfully for damages for loss of profit creates an important incentive for contracting authorities to consider carefully their procurement law obligations and seek to maintain legal compliance in the award of public

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contracts. Promoting regulatory compliance in this way helps to ensure that businesses have the necessary confidence in the regulatory system to invest their resources in bidding for public contracts, which in turn leads to more effective competition, more innovative proposals and better value-for-money contracts.

Accordingly, the concern with the substantial curtailing of the right to seek damages for loss of profit is that this will invariably weaken compliance incentives, rendering the risk of having to pay legal and bid costs to a successful claimant merely one of many considerations that a contracting authority takes into account when seeking to assess the costs and benefits of legal compliance in the award of a particular contract.

In light of these risks, it is therefore important to give further due consideration to the ramifications of this proposal and, ultimately, seek to avoid the substantial removal of this remedy becoming the Achilles' heel of what should otherwise be a fair, flexible and modern public procurement regulatory regime.

INTRODUCTION

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Pinsent Masons has one of the largest and most dynamic procurement practices in the UK and Europe. The practice spans all major sectors, including regeneration, defence, transport, energy, water and infrastructure, and advises both regulated procurers as well as suppliers bidding for public or regulated utility contracts. The practice is recognised for its ability to provide practical and commercially focused advice on complex procurements across the UK and abroad. Contentious and non-contentious procurement lawyers in the team work closely together to ensure that clients are provided with innovative strategic advice that anticipates and minimises legal risks. The team covers a diversity of matters, covering all aspects of procurement regulation, including the highly specialised defence sector, utility procurements in the transport, energy and water sectors, major central government procurements as well as local authority, health and education sector procurements. The team also advises clients on all aspects of the World Trade Organization's plurilateral Agreement on Government Procurement.

CONTRIBUTING EDITOR

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

In Austria, the procurement of government contracts is regulated by the Federal Public Procurement Act 2018 (BVergG 2018), the Federal Public Procurement Act for Concessions (*BVergG - Konzessionen*) and the Federal Defence and Security Procurement Act (BVergGVS). On the one hand, the BVergG 2018 implements the Directives 2014/24/EU, 2014/25/EU and 2007/66/EC and therefore covers the legal framework for the awarding of both public contracts from public entities and entities in the utilities sector and on the other hand, it implements the remedies Directives 89/665/EEC and 92/13/EEC to secure minimum review standards for the public and utilities sector. Furthermore, the *BVergG - Konzessionen* transposes the Directive 2014/23/EU thus setting out rules on the award of concessions and the BVergGVS transposes the Directive 2009/81/EC covering the procurement procedures in the defence and security sector.

In addition, there are nine Federal State Acts in Austria, that regulate these appeal proceedings and declare the State Administrative Courts (*Landesverwaltungsgerichte* or LVwG) competent for appeal proceedings for the review of decisions of contracting authorities that are attributable to the federal states or municipalities. For appeal proceedings that fall under the jurisdiction of the Federal Government, the BVergG 2018 regulates the procedure and provides for jurisdiction of the Federal Administrative Court in Vienna (*Bundesverwaltungsgericht* or BVwG).

1.2 Entities Subject to Procurement Regulation

The public procurement regulations generally apply to public procurement procedures of public purchasers, such as the Federal Government, the Federal States, the municipalities and municipal associations (territorial entities). Furthermore, the public procurement regulations cover (all) entities which are controlled, financed, or supervised by territorial entities or other public entities which have been established for the specific purpose of meeting needs in the general interest, which do not have an industrial or commercial character, and which do have legal capacity at least in part (eg, ASFINAG, ÖBB, ORF, public hospitals, universities, etc). Moreover, associations consisting of one or more public entities are also covered by the BVergG 2018.

Furthermore, the public procurement regulations also apply to contracts awarded by purchasers other than public entities engaging in at least one of the utilities activities pursuant to special or exclusive rights granted by an authority having jurisdiction over them.

1.3 Types of Contracts Subject to Procurement Regulation

The procurement regulations (BVergG 2018, BVergGVS, *BVergG - Konzessionen*) cover award procedures for the procurement of public supply contracts, works contracts/works concessions and service contracts/service concessions. However, the (national) procurement rules only apply if certain thresholds are exceeded, that threshold currently being EUR100,000. Contracts below this threshold can be awarded directly without having to follow a specific procedure. In addition, the obligation to initiate an EU-wide tender procedure depends on the respective EU thresholds. These threshold values are:

- EUR5.35 million for works contracts and works concessions;
- EUR214,000 for supply contracts and service contracts;
- EUR139,000 for supply and service contracts awarded by centralised public authorities;

- EUR428,000 for service and supply contracts awarded by utilities; and
- EUR428,000 for service and supply contracts in the defence and security area.

1.4 Openness of Regulated Contract Award Procedure

Generally, the BVergG 2018 also applies to the award of contracts to companies from third countries. Therefore, in principle, all companies, regardless of their nationality or country of origin, have the right to participate in public tenders issued by Austrian public entities and entities in the utilities sector. However, the public procurement regulation provides for the possibility to exclude bidders from participation in procurement procedures who are established in states that are neither party to the GPA nor a member of the EEA.

1.5 Key Obligations

The key obligations under the applicable legislation follow the basic (underlying) principles of public procurement law, namely the fundamental freedoms under Community Law, and the ban on discrimination on the basis of the principles of free and fair competition and equal treatment of all applicants and tenderers. Hence, public procurement contracts shall be awarded in transparent proceedings to qualified, capable, and reliable contractors at reasonable prices.

Any territorial restriction of the group of participants or a restriction of participation to individual professions is inadmissible. These principles are applicable for all procurement procedures (above and below the thresholds mentioned in **1.3 Types of Contracts Subject to Procurement Regulation**) and serve as the main principles and guidelines for the interpretation of the BVergG 2018.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Generally, ie, unless certain exemptions are provided for, any regulated contract award procedure shall be published in certain publication media.

Public procurement procedures above the relevant EU threshold must be published at Union level through the Publications Office of the European Union ("Publications Office") by using the standard forms introduced by Regulation (EU) No 2015/1986 and that can be found online. The specific notice is advertised in the Official Journal of the European Union (OJEU). In addition to publicity at Union level, there is also an obligation to advertise public procurement procedures at the national level in Austria.

This obligation applies both to public procurement procedures above the EU threshold and below the EU threshold. Since 1 March 2019 contracting authorities are obliged to announce public procurement procedures via the Open Government Data-model (OGD-model).

However, contracting authorities are free to additionally publish invitations to tender on their homepage or in other media, such as regional newspapers.

Notice Content

Content wise, contract notices shall include the following minimum information:

- name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority and, where different, of the service

from which additional information may be obtained;
- information where and how the procurement documents are available, type of contracting authority and main activity exercised;
- information whether the contracting authority is a central purchasing body or that any other form of joint procurement is involved, CPV codes;
- information whether the contract is divided into lots, NUTS code for the main location of works, supply or services; and
- a description of the procurement including the nature and extent of works, the nature and quantity or value of supplies and the nature and extent of services.

Where the contract is divided into lots, this information shall be provided for each lot:

- estimated total order of magnitude of contract(s);
- admission or prohibition of variants;
- time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the contract/framework agreement or dynamic purchasing system;
- conditions for participation, including a list and brief description of eligibility and selection criteria;
- information on the type of award procedure; and
- information regarding the contract award criteria, information regarding the bid/tender submission (deadlines, address, language, format, etc), name and address of the review body.

2.2 Preliminary Market Consultations by the Awarding Authority

Contracting authorities are entitled to carry out market surveys in the pre-procurement phase with a view to initiate an award procedure. In this context the contracting authority may, inter alia, consult companies that are potential candidates or tenderers in order to gather ideas for this procedure.

Within the scope of this consultation ("market exploration"), information on the planned award procedure (eg, problem descriptions, schedules) can already be disclosed to the above-mentioned companies. This consultation can also be carried out with third parties (independent experts, authorities or other companies). The information obtained can be used to plan and implement the respective award procedure, provided that this does not distort competition or violate the principles of public procurement.

2.3 Tender Procedure for the Award of a Contract

The public procurement legislation generally provides for a closed catalogue of available procurement procedures. (Public) contracts may be awarded through the following options.

Open Procedures

The open procedure is characterised by the fact than an unlimited number of entrepreneurs is publicly invited to submit tenders.

Restricted Procedures

In the case of restricted procedures (with prior publication), any economic operator may request to participate but only candidates invited to do so may submit a tender. Hence, in this variant of the restricted procedure, the contracting authority pre-selects a limited number of qualified entrepreneurs (either directly or based on a request to participate) to be directly invited to submit tenders.

As a rule, the contracting authority must not conduct any negotiations in the open procedure and in the restricted procedure.

Negotiated Procedures

In the negotiated procedure with prior publication, applicants selected from an unlimited number of entrepreneurs are publicly invited to submit applications to participate. Based on the evaluation of the applications to participate, a certain number of entrepreneurs is selected and invited to submit tenders. In contrast to the open procedure and the restricted procedure, the full scope of the procurement can be negotiated with the tenderers.

In the negotiated procedure without prior publication, the contracting authority directly invites pre-selected candidates of its choice to submit offers and subsequently negotiates with them on the full scope of the procurement.

Direct Awards

The direct award procedure is characterised by the fact that services, works or products are procured directly from a freely selected entrepreneur. As the case may be, procurement units may request binding bids or price indications from one or more entrepreneurs prior to direct award.

By contrast, in the case of a direct award with prior publication, contracting authorities are required to publish the main characteristics of the intended procurement activity (eg, the subject of the procedure, selection criteria) at the beginning of the procedure. However, the subsequent procedure is not regulated and can be freely designed by the contracting authority.

Competitive Dialogues

The competitive dialogue is designed for awarding complex contracts if the technical solutions or the legal and/or financial makeup of a project cannot be defined sufficiently. The competitive dialogue is conducted in several stages and comparable to the negotiated procedure. After the pre-selection of tenderers in a pre-qualification phase, selected candidates are invited to define the best solution for the project in several dialogue phases. Candidates submit their final tenders based on the findings elaborated in the dialogue phase.

Electronic Auctions

A contracting entity may also hold an electronic auction to award a contract. The electronic auction can only be applied after a procurement procedure (such as an open or restricted procedure) has taken place. Before proceeding with the electronic auction, the contracting authority shall make a full initial evaluation of the tenders in the course of a procurement procedure.

All tenderers who have submitted an admissible tender shall be invited to participate in the auction simultaneously by electronic means. Bidders can subsequently optimise their offers in several phases.

Framework Agreements and Dynamic Purchasing Systems

Framework agreements are agreements between one or more economic operators and one or more contracting authorities which are characterised by the fact that the contracting authority can obtain services/supplies/works within the framework agreement by initiating one or several call-offs. However, there is no obligation on the part of the contracting authority to actually award any service, supply or works. Framework agreements shall only be concluded after an open, restricted, or negotiated procedure has been conducted and the respective bidders have been selected.

Since the dynamic purchasing system is a completely electronic process, an unlimited number of entrepreneurs are publicly invited to submit non-binding declarations for the provision of commercially available services. Subsequently,

all economic operators satisfying the selection criteria are invited to submit a bid.

Design and Realisation Contests

Design contests are procedures that serve to provide the contracting authority with a plan or design, in particular in the fields of zoning, city planning, architecture and construction/civil engineering ("design contests") the selection of which is made by a jury on the basis of certain evaluation criteria with or without awarding prizes ("comparative assessment"). Realisation contests lead to a negotiated procedure in which a public service contract is awarded after a design contest has been held.

Innovative Partnerships

The innovation partnership aims at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works. Similar to the negotiated procedure, the innovation partnership is structured in successive phases that follow the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

2.4 Choice/Conditions of a Tender Procedure

As a rule, contracting authorities can, generally, freely choose between the open procedure and the restricted procedure (with prior publication). The use of all other procedures is subject to certain conditions.

The negotiated procedure with prior publication and the competitive dialogue may generally be applied, inter alia, if no tenders or no suitable tenders or no applications have been submitted in response to an open or restricted procedure with prior publication, if the services to be provided do not permit the establishment of contractual specifications as required for the award of a contract by open or restricted procedure, if the subject of the award procedure is the procurement of innovative or conceptual solutions or if the complexity of the contract requires negotiations.

Procurement procedures without prior publication may only be applied in exceptional circumstances (such as extreme urgency or if the specific contract can only be carried out by a particular contractor for certain reasons, such as technical or artistic reasons) due to the associated lack of transparency.

The direct award of public contracts may only be conducted if the estimated contract value stays below certain thresholds (EUR100,000 or EUR130,000 for direct award with prior consultation of public supply and service contracts (in case of public works contracts, the threshold is generally EUR500,000).

2.5 Timing for Publication of Documents

As a rule, all tender documents (including the pre-selection questionnaire, the invitation to tender, the full list of services or the draft contract) shall be freely available, without restriction, after publication of the contract notice.

However, due to the current wording of the law, it is presently unclear whether contracting authorities are also obliged to grant access to the contract and certain other documents with the contract award notice in case of two-stage procedures (eg, negotiated procedure with prior publication or restricted procedure with prior publication).

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

As a rule, contracting authorities shall take into account the complexity of the contract and

the time required for drawing up tenders when setting the procedural time limits. Additionally, the public procurement regulations provide for certain minimum time limits for the receipt of expressions of interest and of tenders. The specific minimum time limit depends on both the specific type of procurement procedure and whether the contract value exceeds or falls below the EU threshold.

Above the relevant EU threshold, the minimum time limit for submitting an expression of interest varies between 15 days (in case of extreme urgency) and 30 days. The minimum time limit for the tender submission varies between ten to 15 days (in cases of extreme urgency) and in regular proceedings between 25 days (restricted procedure and negotiated procedure with prior publication) and 30 days (open procedure).

For award procedures below the EU threshold, shorter minimum time limits apply (eg, 20 days for the submission of tenders in the open procedure).

2.7 Eligibility for Participation in a Procurement Process

As a rule, public procurement contracts shall only be awarded to qualified, capable and reliable entrepreneurs at reasonable prices. Therefore, the regulations provide for a catalogue of eligibility criteria that have to be fulfilled by interested parties in order to participate in a procurement procedure, namely the suitability to pursue the professional activity, economic and financial standing, the technical and professional ability and the reliability/non-fulfilment of exclusion grounds.

The regulations further provide for a closed catalogue of means of proof for the fulfilment of the above-mentioned criteria. Only with regard to the financial and economic capability does the regulation leave the contracting authority some discretion in determining the means of proof required.

2.8 Restriction of Participation in a Procurement Process

Contracting authorities may limit, ie, reduce, the number of qualified bidders in two-stage procedures (namely restricted procedures with prior publication, negotiated procedures with prior publication, competitive dialogues and innovation partnerships) based on selection criteria.

Selection criteria must be disclosed in the tender documents and be objective, non-discriminatory, related to the subject of the contract and proportionate. Usually, certain eligibility criteria (such as the average turnover or previous projects) are applied. However, as a rule, the number of qualified suppliers should generally not fall below three.

2.9 Evaluation Criteria

Once the bids have been submitted, contracting authorities enter the tender evaluation phase, which leads to the award of the contract. When evaluating the tenders, the contracting authority shall evaluate whether the tender complies with all formal requirements (such as compliance of time limits, signature requirements, etc) as well as with the qualification and selection criteria (as the case may be).

As a rule, tenders may not deviate from the requirements set forth in the tender documents and the contract award notice. The remaining bids will be evaluated in accordance with the contract award criteria specified in the tender documents and the contract notice.

MEAT

Contracts may be generally awarded based either on the lowest price or on the most economically advantageous tender/lowest cost (MEAT). In the latter case, further criteria related

to the subject-matter of the contract shall be established, such as quality performance criteria, social criteria or environmental criteria.

However, the public procurement regulations generally favour the MEAT principle. A focus on the pure price competition (lowest cost principle) is generally only permissible if the quality standard of the service has been specified in the service description so clearly and unambiguously in technical, economic and legal terms that the submission of comparable tenders at a defined (quality) level is guaranteed.

Furthermore, the procurement legislation provides for a closed catalogue of situations/procedures where the application of the MEAT principle is mandatory. Pursuant to the public procurement legislation, the contract shall be awarded to the technically and economically most advantageous tender in the following situations:

- a contract shall be awarded for the provision of intellectual services which are to be awarded by negotiated procedure;
- a contract shall be awarded where the description of the performance is essentially functional;
- a public works contracts with an estimated value of at least EUR1 million shall be awarded; or
- the contract is awarded by means of a competitive dialogue, or an innovation partnership.

Finally, criteria used for the selection or qualification of tenderers may not be used as award criteria.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

Selection criteria, qualification criteria and contract award criteria shall be disclosed either in the contract notice or in the tender documents. Furthermore, the contract notice and/or the tender documents shall provide information on the relative weighting of the criteria (including potential sub-criteria).

While the procurement regulations do not explicitly provide for the obligation to disclose the evaluation methodology, both the common practice as well as the relevant case law confirm that the evaluation methodology must be disclosed in the tender documents for reasons of transparency.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Contracting authorities are obliged to notify interested parties who have not been selected for participation in the contract award procedure of the reasons for this decision. The statement of reasons must be sufficiently detailed to enable the unsuccessful bidder to evaluate whether it should initiate appeal/review proceedings. This notification should occur immediately or, at the latest, within one week after an award decision.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Contracting authorities are obliged to inform unsuccessful bidders in writing (email, fax, letter, etc) of the award decision. This information has to provide substantial reasoning (characteristics and relative advantages of the selected tender, characteristics and reasoning why the unsuccessful bidder was not selected as well as the name of the successful tenderer or the parties

to the framework agreement, etc). Furthermore, the notification has to provide information about the end of the "standstill period".

3.4 Requirement for a "Standstill Period"

The public procurement regulations provide for a standstill period between the notification of the contract award decision and the conclusion of the contract of at least ten calendar days (in case of electronic availability of the contract award decision) or 15 days (in case of transmission via postal delivery), respectively. As a rule, any contract award during the standstill period shall be null and void.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

The Austrian public procurement review system is characterised by different authorities on the federal government level and the federal state level. With regard to procurement procedures attributed to the Federal Government, the competent review body is the Federal Administrative Court (BVwG). At the state level, the competent review bodies are the individual State Administrative Courts (LVwG). Both decisions of the LVwG as well as decisions of the BVwG can be appealed before the Constitutional Court (*Verfassungsgerichtshof* or VfGH) and the Supreme Administrative Court (*Verwaltungsgerichtshof* or VwGH) within six weeks after the respective decision has been rendered.

4.2 Remedies Available for Breach of Procurement Legislation

Before the signing of a contract, aggrieved applicants or bidders may apply to challenge and declare specific decisions of the contracting authority null and void. The public procurement regulation provides for an exhaustive list of decisions of the contracting authority against which an appeal may be lodged (such as the contract notice, the tender documentation, the decision to exclude a bidder, the invitation to bid or the contract award decision).

After the signing of the contract, a declaratory procedure (*Feststellungsverfahren*) may be initiated with the aim of establishing deficiencies in the contested award procedure (declaratory decision) and the annulment of an unlawful direct award, as the case may be. If the contract cannot be declared null and void (eg, due to an overriding public interest) the contracting authority can be fined with a penalty of up to 20% of the contract value.

Furthermore, aggrieved applicants or bidders may claim damages before the civil courts if the procurement regulations have been infringed and the contracting authority was to blame for the infringement in question. In principle, the aggrieved companies may claim compensation for the costs of preparing the tender, compensation for participation in a procurement procedure or (alternatively) compensation for lost profits, provided that the bidder would have been awarded the contract if the infringement had not occurred.

However, a declaratory decision by the competent review authority establishing the non-conformity of the procurement procedure/contract award is a mandatory prerequisite and therefore the basis for damage claims before the civil courts. Accordingly, a complainant seeking damages must first obtain a corresponding declaratory decision from the review authority.

4.3 Interim Measures

Since the challenge of a specific decision of the contracting authority does not stop the specific award procedure, applicants must apply for an interim measure (eg to suspend the contract

award procedure, to suspend the standstill period or to suspend the opening of bids) jointly with the respective appeal.

4.4 Challenging the Awarding Authority's Decisions

In order to bring a challenge, an applicant must substantiate its interest in concluding the respective contract and provide proof that they have suffered or are in danger of suffering a loss as a result of the alleged infringement of the award provisions. Therefore, standing must be denied if participation or the submission of a tender is not an option for the contestant.

Consequently, an enterprise that has not submitted a bid has no standing to challenge the award decision. Furthermore, bidders who have been excluded or who must necessarily be excluded have, generally, no standing. Finally, neither subcontractors nor single members of a bidding consortium have standing to file an appeal.

4.5 Time Limits for Challenging Decisions

The time limits for filing a challenge depend on the subject of contestation (tender documentation or another contestable decision of the contracting authority). In general, any separately contestable decision must be contested within ten days after the bidder has become aware of the contested decision. Tender documents shall be challenged at the latest seven days prior to the deadline for submitting applications to participate or the bid submission deadline.

4.6 Length of Proceedings

The (Federal/State) Administrative Courts generally have to rule on a review application within six weeks after the application has been filed. However, in practice, review proceedings take between six weeks and three months, depending on how heavy the workload is at the respective Courts. Procedures aimed at a declaratory decision must be completed within six months of the submission of the respective application.

4.7 Annual Number of Procurement Claims

The average number of procurement claims per year varies significantly depending on the review body.

While the number of review procedures before the Federal Administrative Court amounted to 190 in 2020, the number of public procurement claims filed before the nine State Administrative Courts (*Landesverwaltungsgerichte*) in 2020 amounted to 124 (approximately 14 files per State Administrative Court).

4.8 Costs Involved in Challenging Decisions

The typical costs associated with challenging a decision of an awarding authority depend significantly on:

- the value of the respective contract being tendered;
- the type of award procedure chosen; and
- the competent review body.

Considering these factors, the cost (court fees) for filing an appeal with the court range from EUR324 to almost EUR40,000. Additionally – as the case may be – the cost of applying for interim measures (preliminary injunctions) are to be taken into account in the amount of half of the costs for the appeal, while the court fees are to be reimbursed by the unsuccessful party, with each party having to bear its own lawyers' fees.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

Pursuant to the public procurement regulations, modifications to a public contract after it has been awarded generally require a new procurement procedure, unless a certain (exhaustively listed) exemption explicitly provides for the possibility to change or extend a contract.

The public procurement regulations provide for the following exemptions that make modifications permissible following the award of a contract:

- the subject and circumstances of the modification are provided in the original tender documents in clearly, precisely and unambiguously worded contract amendment clauses;
- the modification covers additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial tender documents provided that a change of the contractor cannot be made for technical or economic reasons;
- the modification has become necessary due to circumstances which a diligent contracting entity could not foresee, provided that the modification of the contract does not alter the overall nature of the contract;
- a new contract partner replaces the undertaking to whom the contracting authority had originally awarded the contract provided that such change of the contract partner is clearly formulated in the contract or the change of the contract partner is caused by legal succession (including takeover, merger, acquisition or insolvency) provided that the new contractor meets the initial eligibility criteria;
- the public contracting authority itself assumes the obligations of the main contractor from its subcontractors;
- the modifications are only minor and neither exceed the relevant threshold nor 10% (service and supply contracts) or 15% (works contracts) of the initial contract value; and
- the modification is not materially different to the originally awarded contract, demonstrating the parties' intention to renegotiate the essential terms of the contract.

5.2 Direct Contract Awards

The public procurement legislation provides for the possibility to directly award a contract if the estimated contract value is below EUR100,000. The legislation provides for the possibility to conduct exclusive negotiations with only one entrepreneur in extraordinary situations, such as extreme urgency, if only a specific entrepreneur can provide the required services due to technical reasons or exclusive rights or the new services consist in the repetition of similar services, and if the contract is awarded by the same contracting authority to the contractor who was awarded the original contract and such a subsequent award has been reserved in the initial tender documents.

5.3 Recent Important Court Decisions

A 2020 Supreme Court Ruling on Incorrect CPV Codes

In its decision of 28 September 2020 (VwGH 28.09.2020, Ra 2020/04/0044), the Supreme Administrative Court deduced the illegality of the entire award procedure due to the indication of an incorrect CPV code in a contract notice. This decision was preceded by the applicant's request for a declaration that the award procedure had been carried out unlawfully. The applicant argued its claim on the basis that, due to the significant deviation of the actual subject matter of the contract from the chosen CPV code, there was no legally effective notice.

The Federal Administrative Court followed the applicant's view and, due to the choice of the

wrong CPV code, found that an award procedure had been carried out without prior publication. In doing so, the Federal Administrative Court referred to the case law on the interpretation of declarations of intent (eg, notices) and the relevant objective value of the declaration for an averagely competent and usually diligent bidder. The Supreme Administrative Court confirmed the legal opinion of the Federal Administrative Court.

It can therefore be concluded from this decision that the indication of an incorrect and misleading CPV materially equals a total absence of a contract notice and that consequently, contracting authorities should not misjudge the importance of a correct choice of CPV.

A 2019 Supreme Court Ruling on Bidding Consortia

In its decision from 26 June 2019 (VwGH 26.06.2019, Ra 2018/04/0161), the Supreme Administrative Court ruled that the opening of insolvency proceedings against the assets of a member of a bidding consortium leads to the mandatory exclusion of the "remaining bidding consortium". The subject matter of the proceedings was an open procedure for the award of a construction contract. The contract was awarded to a bidding consortium, whereby (after the award decision but before the contract was awarded) insolvency proceedings were opened against the assets of one member of the bidding consortium. By order of the *Tribunale di Roma*, the member of the bidding consortium in question was granted a period of time for the final submission of an application for compensation or an application for approval of the debt rescheduling agreement and three persons were appointed as court commissioners to supervise the contractor's activities.

The Administrative Court assumed that the appointment of these court commissioners was indisputably to be regarded as the appointment of an administrator within the meaning of Regulation 2015/848/EU and that this was therefore to be used for the interpretation of when insolvency proceedings were deemed to have been opened. Accordingly, the application of the bidding consortium member was already to be regarded as the opening of insolvency proceedings, since the power of disposal over their assets was at least partially withdrawn from them. The Administrative Court therefore held, in agreement with the Federal Administrative Court, that the opening of insolvency proceedings over the assets of the bidding consortium member had occurred and thus a ground for exclusion was fulfilled.

Even the ruling of the ECJ, according to which the requirements of a legal and factual identity of the economic operator can be "lowered" during the entire course of the procedure in order to ensure adequate competition in a negotiated procedure, as required by Article 54 (3) Directive 2004/17, does not change this according to the Court. Article 54(3) of the Directive would only apply to restricted and negotiated procedures and was therefore not applicable to the open procedure relevant in the present case. In particular, the prohibition of negotiations, which must be observed in the open procedure, speaks against a transfer of the principles established by the ECJ in this case.

Apart from that, the facts of the case were not comparable because the decision of the ECJ concerned the admissibility of the change in the composition of the bidding consortium. In the relevant case, however, the bidding consortium was awarded the contract in unchanged composition - and thus with the participation of an unreliable member.

5.4 Legislative Amendments under Consideration

Currently, no legislative amendments to the procurement legislation are expected.

Schoenherr is a leading full-service law firm providing local and international companies stellar advice that is straight to the point. With 15 offices and four country desks, Schoenherr has a firm footprint in Central and Eastern Europe. Schoenherr's lawyers are recognised leaders in their specialised areas and have a track record of getting deals done with a can-do, solution-oriented approach. Quality, flexibility, innovation and practical problem-solving in complex commercial mandates are at the core of Schoenherr's philosophy. Schoenherr's public procurement team has worked on some of the most complex public procurements and public-private partnership projects in CEE/SEE, across all major industries (such as health, energy, infrastructure and public transport), and is well versed in the economic, legal and industry-related challenges and expectations (such as sustainable and green procurement).

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BELGIUM

Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

In Belgium, public procurement is regulated by EU law and national (implementing) legislation. The EU Directives on public procurement and remedies are implemented into national legislation by:

- the Law of 17 June 2016 on public procurement;
- the Law of 13 August 2011 on public procurement in the defence and security sector; and
- the Law of 17 June 2013 concerning the justification, information and legal remedies for public procurement and certain instructions for works, supplies and concessions.

Several Royal and Ministerial Decrees further implement this legislation:

- the Royal Decree of 23 January 2012 concerning public procurement in the defence and security sector;
- the Royal Decree of 14 January 2013 establishing the general implementing rules for public procurement contracts;
- the Royal Decree of 18 April 2017 concerning placement of public procurement contracts; and
- the Royal Decree of 18 June 2017 concerning placement of public procurement contracts in the utilities sector.

1.2 Entities Subject to Procurement Regulation

The public procurement legislation applies to "contracting authorities"; these are mainly "public authorities", such as the State, regional and local authorities and so-called bodies governed by public law.

Bodies governed by public law meet the following criteria, they:

- are established for the specific purpose of meeting needs in the general interest, not having industrial or commercial characteristics;
- have legal personality; and
- are mostly financed or managed by a "public authority" or another body governed by public law or have an administrative, managerial or supervisory board, more than half of whose members are appointed by a "public authority" or another body governed by public law.

The interpretation of these criteria is subject to a dynamic and evolving jurisprudence by the CJEU and the Belgian State Council.

Certain (private) entities can also be subject to procurement regulation, when the contract's estimated value exceeds the European threshold, the contract is subsidised for more than 50% by a "public authority" and is concluded for works of a civil engineering nature or for services connected to the above-mentioned work (ie, the so-called "subsidised contracts"). In addition to the contracting authorities mentioned above, in the utilities the rules regarding public procurement also apply to "public undertakings", which is any undertaking over which a contracting authority may exercise directly or indirectly a dominant influence, and entities enjoying special or exclusive rights.

1.3 Types of Contracts Subject to Procurement Regulation

Procurement contracts are contracts of pecuniary interest concluded between one or more economic operators and one or more contracting authorities concerning works, supplies and/or services.

The rules regarding publication and in relation to which type of award procedure can be used depend on the estimated value of the contract. The European minimum value thresholds are relevant in this regard. An overview is provided below of the thresholds applicable to "standard" public procurement contracts (eg, not utilities, defence and security sector nor social or other specific services):

- for works contracts – EUR5.35 million;
- for supply contracts – EUR139,000 (for central government authorities) and EUR214,000 (for sub-central contracting authorities); and
- for services contracts – EUR139,000 (for central government authorities) and EUR214,000 (for sub-central contracting authorities).

For public procurement contracts with a value below these thresholds national publication requirements may apply. Public procurement contracts of so-called "limited value", estimated at EUR30,000, are subject to a less stringent regime.

In addition, the public procurement legislation excludes certain type of contracts from its scope of application, eg, services such as legal services, acquisition of real estate, and certain financial services.

1.4 Openness of Regulated Contract Award Procedure

In Belgium, public procurement procedures are in principle open to any interested party from any jurisdiction. The legislation provides that, in principle, "every interested economic operator" is eligible to submit a tender offer or request for participation in a tender procedure. The applicable legislation defines an economic operator as "any natural person or any private or public-law legal entity, or any combination of these entities, including all temporary partnerships of companies that offer works, supplies or services to the market".

1.5 Key Obligations

Like the European public procurement legislation, Belgian public procurement law is based on four basic principles that should guide the contracting authorities:

- equal treatment (and in particular between those that are nationally based and those that are based in another member state of the EU);
- non-discrimination;
- transparency; and
- proportionality.

At any stage of the tender process (and also before or after the tender process), the contracting authorities must ensure that they adhere to these principles. They may not in any way attempt to circumvent public procurement law or to distort competition, eg, by favouring certain candidates/subscribers.

The above principles are clearly visible in the key obligations under Belgian public procurement legislation. These key obligations are divided into two categories: key obligations that apply throughout the procurement process and key obligations that provide an outline of the procurement process.

Key Obligations throughout the Procurement Process

- The contracting authority must take any measure necessary to avoid potential conflicts of interest during the procurement procedure.
- All operators must ensure compliance with all applicable obligations under environmental, social and employment legislation.

- In principle, the contractor will be remunerated by means of a lump sum price (subject to certain exceptions).
- In principle, the contracting authority will only pay for works, deliveries or services after these have been performed and accepted.
- All procurement documents submitted by candidates (such as requests to participate and offers) are strictly confidential as long as the contracting authority has not yet made a decision in this regard.
- As a matter of principle, all exchanges between the contracting authority and the operators must be made in electronic form. This contributes to the transparency of the procedure.
- It is mandatory to estimate the value of each assignment.

Key Obligations That Outline the Procurement Process

- The contracting authority must publish a contract notice in the Official Journal of the EU and the Public Procurements Bulletin (if it reaches the thresholds for European publication) or only in the Public Procurements Bulletin (if the value is lower than the thresholds for European publication). The notice describes the authorities' requirements and the timeline for submitting a request to participate or an offer (depending on the applicable procedure).
- Upon receipt of requests to participate, the contracting authority must evaluate the candidates' requests by applying the selection criteria it has previously disclosed. The purpose is to assess whether the candidates have the required financial standing and technical capacity. The contracting authority must invite the selected candidates to submit an offer or to participate in negotiations or a dialogue (depending on the procedure).
- The contracting authority is obliged to disclose its objective award criteria as well as its valuation method. For public procurement contracts that reach the thresholds for European publication, this in particular means disclosing the weight given to each award criterion.
- Upon receipt of the offers, the contracting authority must evaluate the offers on the basis of the previously disclosed award criteria. It must award the contract to the economically most advantageous offer (this is not necessarily the lowest price but can be based on a value-for-money approach).
- Once it has selected the economically most advantageous offer, the contracting authority must notify all subscribers of its decision. It must apply a standstill period of 15 days as of this notification before signing the contract with the winning contractor.
- After signing the contract, the authority must publish a contract award notice.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Public procurement contracts for which the estimated value exceeds the European thresholds should be published in the OJEU and the National Bulletin of Tenders. In principle, the announcement cannot be published in the Bulletin of Tenders before it has been published in the OJEU.

The contract should be advertised using a Uniform European Procurement Form. The announcement should contain the information specified below, as well as the information in Annex 4 to the Royal Decree of 18 April 2017:

- the contracting authority's identity, address and other relevant details;
- guidance on how to access the tender documents;

- guidance on the contracting authority and requirements for the tender (nature and quantity of works, supplies or services, estimated value and duration);
- the award criteria;
- the requirements to participate in the tender procedure (legal, economic, financial, technical and professional); and
- description of the procedure and its characteristics (type of procedure, language of application) and the deadline for tender applications.

The announcement should consist of a tender announcement, an announcement when the tender will be placed and, if applicable, a preliminary announcement.

In principle, tenders that do not exceed the European thresholds should be published in the National Bulletin of Tenders. The announcement should contain the information as specified above.

2.2 Preliminary Market Consultations by the Awarding Authority

In line with EU legislation, the Belgian public procurement legislation allows a contracting authority to carry out a preliminary market consultation. This consultation has a double purpose. On the one hand, the contracting authority is able to prepare for placement of the contract and keep up to speed with innovations and developments by collecting advice from private and public institutions, independent experts and market actors. On the other hand, the contracting authority can notify enterprises of its plans and requirements.

However, this consultation may not result in preliminary negotiations with certain enterprises or distorting competition, nor can it result in a violation of the principles of non-discrimination and transparency.

2.3 Tender Procedure for the Award of a Contract

There are different procedures under Belgian public procurement legislation, some of which allow for negotiations between the economic operators and the contracting authority. In case of negotiations, the contracting authority is always obliged to guarantee the main principles of public procurement, such as equal treatment of all subscribers.

The open procedure and the restricted procedure are the two default procedures. The use thereof does not need to be justified by the authority. Whenever the authority decides to use any of the other procedures, it must justify this decision in the procurement documents.

Open Procedure

The open procedure entails the publication of a contract notice inviting any interested operator to submit an offer. The subscribers need to submit their offers together with the information needed to assess the fulfilment of the selection criteria. The authority will assess both selection and award in the same phase.

Restricted Procedure

The restricted procedure entails the publication of a contract notice inviting any interested operator to submit a request to participate. At this first phase, the economic operator must submit the information needed to assess fulfilment of the selection criteria. Subsequently, the contracting authority will circulate invitations to tender to the selected candidates. In a second phase, the candidates will need to submit their offer.

Competitive Procedure with Negotiation

The competitive procedure with negotiation can only be used in specific circumstances listed in the legislation. Generally, these circumstances relate to the technical complexity of the assignment. Like the restricted procedure, it consists of

a pre-selection phase (for any interested operator) and an offer phase (for the invited candidates). The contracting authority then negotiates with the subscribers on the basis of their initial offer (and potentially subsequent offers). If the authority has included this possibility in the procurement documents, it may award the contract without conducting any negotiations. There can be no negotiation with regard to:

- the minimum requirements; and
- the award criteria.

There can be no negotiation regarding the final offer.

Competative Dialogue

The competitive dialogue may be used in similar circumstances as a competitive procedure with negotiation. After a pre-selection phase, only the candidates that are invited by the authority may participate in the dialogue phase. A dialogue is conducted between the candidates and the authority to determine the best solutions for the very specific needs of the authority. Any aspect of the contract and assignment may be discussed during this phase.

The dialogue itself can be organised in several phases if the authority has indicated this in the contract notice or the bidding guidelines. After closure of the dialogue, the participants are invited to submit their final offer on the basis of the discussed solutions. The authority may request further clarification of the offers. Such clarification may not cause a modification of the essential elements of an offer or the assignment if that would lead to disruption of fair competition or to discrimination.

Further negotiations can be conducted with the bidder that submitted the offer with the most value for money. The negotiations may not lead to a modification of essential elements or to disruption of fair competition or to discrimination. This procedure is often used in the context of public private partnerships.

Innovation Partnership

The innovation partnership is tailored for the situation where the authority is looking for certain products, services or works that are not yet available on the market. It entails a pre-selection phase after which only the candidates that are invited can participate in the procedure. The authority can select one or multiple partners. The award of the contract is based only on the criterion of the best value for money.

Both the development of the relevant products, services or works and the final purchase thereof form the subject of the procedure. Therefore, the procedure is structured in phases that align with the development process. The phases will be linked to specific goals. The procedure can be stopped or certain participants can be excluded on the basis of (non-achievement of) such goals. The authority will negotiate with the participants regarding their offers, except for the final offer. There can be no negotiation with regard to:

- the minimum requirements; and
- the award criteria.

Simplified Negotiation Procedure with Prior Publication

The simplified negotiation procedure with prior publication can only be used for purchases of goods and services of which the estimated cost is lower than the thresholds for European publication or for works of which the estimated cost is lower than EUR750,000. Any interested operator can submit an offer, which should also contain the information relevant for the pre-selection. The authority may negotiate with the subscribers regarding all offers except for the final offer. There can be no negotiation with regard to the minimum requirements and the award criteria.

The negotiations may be conducted in a phased manner if the authority indicates this in the publication or another procurement document. After the negotiations the authority will invite the remaining subscribers to submit their final offers.

Competitive Procedure without Prior Publication

The competitive procedure without prior publication may only be used in exceptional circumstances. This procedure does not require the prior publication of a contract notice. The specific conditions are listed in the public procurement legislation and mainly relate to low value, extreme urgency, technical specificity, an unsuccessful prior procedure, repeated assignments in the framework of a base project and unusually beneficial terms upon cessation of activities of the contractor.

The authority may negotiate with the subscribers regarding all offers. The award criteria are not negotiable. If the estimated value of the assignment reaches the thresholds for European publication or if the authority has mentioned it in the procurement documents, there will also be no negotiation on the minimum requirements.

2.4 Choice/Conditions of a Tender Procedure

If either of the two standard procedures (the open procedure and the restricted procedure) is used, the choice is at the discretion of the awarding authority. The other procedures can only be used in the specific circumstances listed in the public procurement legislation. In such case, the authority will need to justify its choice in the procurement documents.

2.5 Timing for Publication of Documents

A contracting authority may publish a prior information notice. The period covered by the prior information notice is a maximum of 12 months from the date the contracting authority transmits the notice for publication. A prior information notice cannot substitute a contract notice.

The legislation does not provide for any other deadlines in relation the contract notice. All procurement documents need to be freely, fully and directly accessible without any cost as of the publication date of the contract notice.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The legislation imposes a minimum duration for the candidates to be able to submit their request to participate or their offer. The most important minimum durations are:

- in case of an open procedure, the term for submission of an offer should be at least 35 days as of the send date of the publication of a contract notice; and
- in case of a restricted procedure, the term for submission of requests to participate should be at least 30 days as of the send date of the publication of a contract notice and the term for submission of an offer should be at least 30 days as of the sending of the invitations to tender.

There are exceptions to such rules if the authority has made a pre-notification and in case of urgency.

In addition, all procurement documents need to be freely, fully and directly accessible without any cost as of the publication date of the contract notice.

2.7 Eligibility for Participation in a Procurement Process

In line with the EU legislation on public procurement, the Belgian legislation enumerates certain exclusion grounds (such as bribery, participa-

tion in a criminal organisation etc) for which it is mandatory to exclude the tenderers that have been convicted of those crimes by a final judgment. In addition, the legislation provides for optional exclusion (such as bankruptcy, grave professional misconduct, distorting of competition, etc) for which a contracting authority may exclude a tenderer.

However, in certain instances, the authority can make an exception for overriding reasons relating to the public interest or if the candidate has taken adequate corrective measures (so-called "self-cleaning measures").

In addition, contracting authorities can request certain technical and economic capacity. A tenderer must demonstrate that it meets certain technical and/or economic thresholds in order to be able to participate in the procurement process.

Moreover, for works contracts, the contracting authority can determine that potential contractors must be accredited under national regulation in order to be eligible to be awarded the contract.

2.8 Restriction of Participation in a Procurement Process

In case of a restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnership, the authority may decide to limit the number of participants. In such case, the contract notice should include the objective and non-discriminatory criteria on the basis of which the authority will select the limited number of participants. If the contract reaches the thresholds for European publication, the minimum and maximum number of participants it will select also needs to be published.

In a restricted procedure, at least five participants need to be invited. In the other procedures mentioned above, at least three participants will need to be invited. In any case, the number of participants invited needs to suffice to safeguard fair competition. If the number of candidates that fulfil the selection criteria is not sufficient, the authority may proceed with the procurement and only invite those that do fulfil the criteria.

In the course of the competitive procedure with negotiation, the competitive dialogue and the simplified negotiation procedure with publication, the number of offers or solutions to be negotiated or discussed can be further limited on the basis of the award criteria mentioned in the procurement documents. In the final phase, the number of offers/solutions/candidates must still be sufficient to guarantee an actual competition, in so far as sufficient offers/solutions/candidates fulfil the requirements.

2.9 Evaluation Criteria

The authority must always award the contract to the subscriber with the economically most advantageous offer. This may, at the choice of the authority, be assessed on the basis of:

- price;
- costs (including costs efficiency such as life-cycle costs); or
- the most value for money, which is determined by means of price/cost taken together with qualitative, environmental and/or social aspects that relate to the subject of the procurement.

The award criteria should be included in the procurement documents and should be accompanied by specifications that allow an effective assessment of the information provided by the subscribers against the award criteria.

For contracts that reach the European thresholds, the authority needs to specify the relative weight that is given to each of the award criteria,

except if the award is solely determined on the basis of the price.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

The criteria for selection and the accepted means of proof regarding fulfilment thereof must be mentioned in the contract notice or, if there is no contract notice, in the other procurement documents.

The award criteria and their relative weight as well as the specifications thereof (see higher) must be disclosed in the contract notice or another procurement document (eg, invitation to tender/specifications).

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

For public procurement contracts and concessions reaching or exceeding the European thresholds, the contracting authority should notify each non-selected tenderer, immediately after the selection decision of, amongst other things:

- the reasons they were not selected, by means of an extract from the reasoned selection decision; or
- if the number of selected candidates has been limited based on a ranking, the reasoned selection decision.

The notification should be done by fax, email or via the electronic platform for public procurement procedures.

For public procurement contracts and concessions not exceeding the European thresholds similar notification obligations often apply. However, a case-by-case analysis should be made to determine the exact notification obligations for the contracting authority and the options and time limits for a (non-)selected candidate/ tenderer to request further information and/or documentation.

3.3 Obligation to Notify Bidders of a Contract Award Decision

For public procurement contracts and concessions exceeding the EU thresholds, the contracting authority should notify, immediately after the award decision:

- every tenderer that was not selected of the reasons why they were not selected, by means of an extract from the reasoned award decision;
- every tenderer with an invalid or non-compliant offer of the reasons for excluding its offer, by means of an extract from the reasoned award decision; and
- every tenderer, both chosen and not chosen, of the reasons for the award decision.

The candidates are notified by fax, email or via the electronic platform for public procurement procedures.

Furthermore, if the contracting authority must respect a standstill period (see **3.4 Requirement for a "Standstill Period"**), this notification must also contain:

- detailed information concerning the exact duration of the standstill period;
- the recommendation to alert the contracting authority within the same period, by fax, email or via the electronic platform, if the interested party should commence a suspension procedure; and
- the fax number or email address to which this alert can be sent.

The notification must also mention the legal remedies, applicable time limits and competent review body with explicit reference to the applicable articles of the legislation. If this information is required but not included, the time limit to submit a claim for annulation will only commence four months after the reasoned decision has been notified.

3.4 Requirement for a "Standstill Period"

For contracts exceeding the European thresholds, a minimum standstill period of 15 days from the day of notification of the reasoned award decision to the candidates, participants and tenderers must be respected before closing of the procurement contract. However, the standstill period may be waived if:

- the publication of a contract notice for a contract or concession is not required at EU level;
- the only involved tenderer is awarded the contract and there are no other candidates; or
- the contract is based on a framework agreement.

For contracts not exceeding the European thresholds and which are subject to Belgian publication, a standstill period of 15 days is also applicable if the value of the tender exceeds half of the minimum value of the thresholds for European publication. In addition, a contracting authority can always decide to voluntarily apply the standstill period if the above-mentioned is not exceeded.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

The applicable legislation provides that the following review bodies are competent for reviewing award decisions from contracting authorities:

- the State Council (ie, Belgium's highest administrative court), in so far as the contracting authority is an "administrative authority" in line with the applicable legislation and case law of the State Council; and
- the civil courts if the contracting authority does not qualify as an administrative authority.

The judgments of the civil courts can be appealed on the merits, but the decisions of the State Council cannot.

4.2 Remedies Available for Breach of Procurement Legislation

In principle, for contracts exceeding the European thresholds, the legal remedies are as follows.

- Annulment proceedings: in so far as the decision constitutes a misuse of power, violates the applicable EU and national law on public procurement to the contract, the constitutional, statutory or administrative provision applicable to the contracts, as well as general legal principles, or the procurement contract documents.
- Suspension proceedings: under a procedure of extreme urgency before the Council of State, or under summary proceedings before the civil courts.
- Claim for damages: if the reviewing body finds that both the damage and the causal link between the damage and the alleged violation are proven. Alternatively, damages may also be awarded by the Council of State after a suspension or annulment procedure.

- Contract can be declared ineffective (only possible through civil courts):
  (a) when the contracting authority has concluded a contract without European publication, when this was required; and/or
  (b) when the standstill period was not respected or when it did not wait until the reviewing authority had decided on a claim for suspension of interim measures.

Additionally, the civil courts can impose alternative sanctions by:

- shortening the duration of the contract;
- imposing a fine on the contracting authority.

For contracts not exceeding the EU thresholds, only the annulation procedure, suspension procedure and claim for damages are available, meaning that, in principle, these types of contracts cannot be rendered ineffective. However, if the contracting authority should respect a standstill period, proceedings to have the contract rendered ineffective can also be initiated.

4.3 Interim Measures

Interim measures are available to interested parties, such as suspension proceedings (see **4.2 Remedies Available for Breach of Procurement Legislation**). The contracting authority cannot conclude and/or sign the contract while these proceedings are pending.

4.4 Challenging the Awarding Authority's Decisions

In principle, every entity which has or has had an interest in obtaining a certain contract and has been or could be disadvantaged by a violation of the applicable procurement law, other relevant law and legal principles applicable to the contract and the contract documents is able to initiate a suspension or annulation procedure. This is also the case for the procedure to render the contract ineffective and the above-mentioned alternative sanctions. Claims for damages can be initiated by the entities that have been disadvantaged by a violation of the above-mentioned applicable law and documents.

4.5 Time Limits for Challenging Decisions

In principle, the time limits for challenging an award decision are:

- for the annulment procedure - within 60 days after the notification of the decision. If the mandatory information concerning legal remedies, time limits and reviewing authorities is not included in the notification, the time limit commences four months from notification of the reasoned decision;
- for the suspension procedure - in principle within 15 days from the notification of the decision;
- for damage claims - five years before the civil courts; and
- for a declaration of ineffectiveness - 30 days from the:
  (a) contract award notice, if the contract was not the subject of a contact notice in the OJEU and the Belgian Bulletin of Tenders and the announcement contains the justification for that decision; or
  (b) the contracting authority has notified the involved candidates and tenderers of the closure of the contract and the reasoned decision.

If the contracting authority does not respect these conditions, the time limit is six months from the date of the closure of the contract.

These time limits are identical for contracts above and below the EU thresholds.

4.6 Length of Proceedings

This will depend on the type of procedure, such as annulment, claim for damages, claim for ineffectiveness of the contract or request for suspension of an award decision. Suspension proceedings usually run rather smoothly and are initiated and completed within a matter of weeks, as they follow the format of summary proceedings (before the civil courts) or extreme urgency (before the State Council). The other proceedings, such as annulment, claim for damages or ineffectiveness, take about two years.

4.7 Annual Number of Procurement Claims

The number of procurement claims is not systematically published, nor are the decisions of civil courts. Therefore, it is not possible to provide an average number of procurement claims considered by the review bodies per year. However, most candidates/tenderers do not shy away from launching a claim if the situation warrants it.

4.8 Costs Involved in Challenging Decisions

Generally, the primary costs involved are lawyer and court fees.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

In line with the European legislation on public procurement, the Belgian legislation contains a detailed regime on modifications to contracts during their term (ie, post award).

In principle, no changes are possible without a new procurement procedure, unless they meet the specifications provided for in the applicable legislation.

The most relevant possibilities for modifications without a new public procurement procedure are:

- modifications on the basis of a clear, precise and unequivocal revision clause that was already foreseen in the initial procurement documents;
- additional works, supplies or services, that were not included in the initial procurement, in so far as:
  - (a) a change of contractor is impossible or would lead to a significant inconvenience or rise in cost; and
  - (b) the price increase in relation to the change is not higher than 50% of the initial contract value;
- changes due to unforeseeable circumstances (subject to specific conditions);
- changes for a de minimis amount, being:
  - (a) below the thresholds for European publication; or
  - (b) maximum 10% (works) or 15% (deliveries/services) of the value of the initial assignment; and
- non-material changes (regardless of value).

In certain cases a publication of the modification to the contract will be required.

5.2 Direct Contract Awards

As mentioned above, the authority may opt for the competitive procedure without prior publication. In fact, this procedure can lead to a direct award of the contract. This procedure may only be used in specific circumstances that are described in the law.

This includes the following circumstances:

- the expense to be approved by the authority or the estimated value of the contract is lower than a specific threshold;

- if the time limits of the open procedure, the restricted procedure or the competitive procedure with negotiation cannot be complied with due to extreme urgency caused by unforeseen circumstances, which are not attributable to the contracting authority;
- if no (suitable) requests to participate or tenders have been submitted following an open or restricted procedure, in so far as the original terms of the contract are not substantially changed;
- from a technical point of view or due to exclusive rights (such as IP rights), there is only one operator that can deliver the works, deliveries or services; and
- in the case of extremely beneficial terms, either due to cessation of the activity of the contractor or due to bankruptcy of the contractor.

5.3 Recent Important Court Decisions

There have been a number of interesting court decisions on public procurement in the last year, including the following judgments/topics from the case law of the State Council:

- the case law on the ESPD continues to develop. While the State Council on the one hand finds that not submitting or providing an incorrect statement in an ESPD qualifies as a serious irregularity that cannot be remedied, it also found that an incomplete or illegible ESPD requires the contracting authority to seek further clarifications (27 November 2020 No 249.082);
- a case dated 3 July 2020 found that the use of the negotiated procedure without prior publication for a contract for mouth masks was (prima facie) justified in light of the ongoing public health crisis; and
- in relation to relying on the capacity of another party (ie, in relation to technical and/or financial capacity) the State Council found that support from a linked company (in this case the parent company) cannot be implied.

The necessary documents, demonstrating that the necessary resources shall be made available in relation to the tender (eg through a commitment letter) should be submitted with the request for participation/offer. A tenderer cannot be allowed to subsequently submit the relevant documentation (if it was not provided in the request for participation/offer) as this would constitute an unauthorised change to the request for participation/offer (16 January 2020 No 246.696).

5.4 Legislative Amendments under Consideration

The following, currently contemplated, legislative initiatives should be highlighted:

- to extend the mandatory exclusion grounds to include the most serious crimes under the social penal code, being the crimes of level 3 and 4 (eg, employers that made foreign employees perform work without a work permit, fraudulent manipulation of social balance sheets, non-compliance with a judicial decision to end violence or unwanted sexual behaviour at work, etc); and
- to limit the application of the provision allowing for corrective measures when the contractual balance is disrupted due to unforeseeable circumstances with regard to the impact of COVID-19 on public procurement contracts.

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Trends and Developments

Contributed by:
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2020 was an atypical and interesting year in many aspects for the public procurement sector. In this overview of trends and developments, there will be two main topics of focus ((i) COVID-19, public procurement and the face masks saga; and (ii) the ESPD and "self-cleaning" measures) and some anticipated developments will be considered.

COVID-19, Public Procurement and the Face Masks Saga

The theory and EU Guidance

The COVID-19 pandemic placed the public procurement sector under substantial pressure due to an immense global increase in demand for the same goods and services, causing a disruption of certain supply chains. On 1 April 2020, the European Commission (EC) published its guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (the "Guidance").

In its Guidance the EC highlighted the flexible options available under the EU public procurement framework, such as:

- the possibility to substantially reduce the deadlines to accelerate open or restricted procedure;
- the negotiated procedure without publication or even a direct award could be considered if the economic operator is the only one able to deliver the supplies within the technical and time constraints imposed by extreme urgency; and
- public buyers should also consider looking at alternative solutions and engaging with the market.

In addition, the EC, together with member states, launched joint procurement actions for various medical supplies.

Negotiated procedure

The Guidance specifically focusses on "the negotiated procedure without prior publication", as it allows a contracting authority to acquire supplies and services within the shortest possible timeframe. The EC even makes suggestions on how to approach certain economic operators, including contacting"potential contractors in and outside the EU by phone, e-mail or in person" or sending "representatives directly to the countries that have the necessary stocks and can ensure immediate delivery".

It was mainly the focus on using the "the negotiated procedure without publication" that sparked attention, as the Guidance provides an (indirect) justification for contracting authorities to use this procedure. Although the Guidance reiterates the case law of the European Court of Justice (ECJ) on this point, mainly that all requirements for using this procedure ("the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority") (see ECJ, C-275/08, Commission v Germany, C-352/12, Consiglio Nazionale degli Ingegneri, C199/85, Commission v Italy) must be cumulatively met, are interpreted restrictively and that the use of this procedure remains the exception, the Guidance identifies the COVID-19 pandemic as a situation that meets these criteria. For example, the Guidance states clearly that

the COVID-19 pandemic "has to be considered unforeseeable for any contracting authority".

The specific needs for hospitals, and other health institutions to provide treatment, personal protection equipment, ventilators, additional beds, and additional intensive care and hospital infrastructure, including all the technical equipment could, certainly, not be foreseen and planned in advance, and thus constitute an unforeseeable event for the contracting authorities". In relation to urgency, the Guidance states that "It cannot be doubted that the immediate needs the hospitals and health institutions […] have to be met with all possible speed".

After almost one year of lockdown, the Guidance must be viewed in light of the immediate aftermath of the initial lockdowns in member states and the global health care crisis (eg hospitals having insufficient equipment) sparked by the COVID-19 pandemic. In Belgium, a number of "public" public procurement "incidents" have reinforced the understanding and general support for strong public procurement policies and contracts.

The mechanisms in practice

Right from the start, the Belgium government was, as were many others, faced with urgent issues regarding the lack of protective equipment, specifically in relation to face masks. In 2006, the Belgium government had purchased millions of the much coveted FFP2 protective face masks as a strategic investment, specifically to provide Belgium with a strategic stockpile if faced with a pandemic. However foresighted the purchase, by the time Belgium was in fact confronted with an actual pandemic, the strategic stockpile had been destroyed (partially in 2015 and completely by 2018) due to storage and warehousing concerns.

The destruction of millions of face masks gained public attention at the start of the pandemic. In addition, the fact that Belgium had a strategic stockpile of face masks actually calls in to question one of the requirements for the negotiated procedure without publication. As the Belgian government had already anticipated the need for a strategic stockpile of protective health equipment in the case of a pandemic back in 2005, one could debate whether the need for this type of equipment was "unforeseeable for any contracting authority" and whether the lack of such equipment cannot be "attributable to the contracting authority". Although it is highly unlikely that anyone could criticise governments for not having sufficient protective gear on the eve of the COVID-19 pandemic, it will be more difficult to invoke this type of reasoning in the future.

However, the Belgian government's subsequent purchase of protective FFP2 face masks (ie to replenish those that had been destroyed a few years earlier) did not proceed smoothly. At the beginning of April 2020, news broke that the Belgian government had purchased protective face masks, through a negotiated procedure without publication, for hospital personnel that did not meet the safety requirements to be used in a medical environment. Various new outlets reported that the selected candidate did not have the required experience of medical equipment, and the Belgian government had allegedly, due to time constraints, conducted insufficient verifications to assess whether the candidates could indeed deliver the required face masks. The purchase of sufficient and adequate face masks will remain an issue in Belgium in the coming months. As the demand for face masks picked up, so did the number of companies and individuals that wished to benefit from the sudden rise in demand (and price), which created a sellers' market, flooded by companies and individuals who did not have the right credentials (or intentions). Some of the issues could have been

avoided if, instead of the negotiated procedure without publication, another public procurement procedure had been applied, as publication leads to increased transparency and scrutiny of not only the procedure applied, but also the tenderers themselves. In addition, these examples have demonstrated that the time that is "gained" by not following a public procurement procedure requiring publication, is often lost when the contract must be re-tendered.

Established case law

There is little case law on the use of the "negotiated procedure without prior publication" in light of the COVID-19 pandemic. However, on 3 July 2020, the Belgian State Council (French-speaking chambers) rendered a judgement on this issue. It related to a tender for the purchase of face masks that would be distributed to the Belgian population free of charge. The Belgian State awarded the contract following a "negotiated procedure without publication". The Belgian State launched the procedure at the end of April 2020.

In its appeal against the tender decision, the appellant stated that the contracting authority incorrectly applied the "negotiated procedure without publication". The appellant stated that this procedure was inappropriate because:

- the lockdown and seriousness of the public health crisis became clear on 17 March 2020, which did not coincide with the launching of a procedure at the end of April 2020, as it did not meet the requirement of "extreme urgency" that is required for this type of procedure; and
- it related to a framework agreement, for which the "negotiated procedure without publication" is an inappropriate award procedure as a framework agreement inherently suggests a long-term relationship and future orders, which (according to the appellant) was not compatible with the satisfaction of immediate and urgent needs as suggested by the negotiated procedure without publication.

The Belgian State Council found that as at the start of the COVID-19 pandemic the use of face masks was not widely advocated and even the World Health Organization was initially sceptical in relation to their use, it cannot be concluded that the Belgian State had foregone its claim to "extreme urgency" by launching the procedure at the end of April 2020.

It should be pointed out that in its reasoning, the Belgian State Council also refers to the strategic use of face masks in relation to the exit-strategy out of lockdown, which would now (most likely) be evaluated differently than in July 2020. The Belgian State Council found that the legislation allows for a framework agreement to be awarded through a "negotiated procedure without publication", and also noted that the contracting authority conducted a very broad market consultation (more than 190 economic operators active in the manufacturing and supply of fabrics) and provided a justification for the use of a framework agreement structure, ie that it would allow the contracting authority to appoint various economic operators. Consequently, the Belgian State Council ruled that based on a prima facie assessment of the facts and in light of the ongoing public health crisis, the contracting authority could rely on the "negotiated procedure without publication".

Lessons learned and way forward

In light of the above and the various COVID-19 public procurement issues facing the Belgian contracting authorities in the last year, there is optimism that, while contracting authorities took the Guidance to heart, the Guidance did not lead contracting authorities to "inappropriately" award public procurement contracts through "a

procedure without prior notification" (or at least not more than was the case before).

While undoubtedly more public contracts will have been awarded through the negotiated procedure without prior publication (unfortunately for Belgium no numbers are yet available) in the light of the COVID-19 pandemic, this will most likely prove to have been a "temporary" trend as the events over the past year have also, and often quite painfully, demonstrated the pitfalls of using this procedure.

The ESPD and "Self-Cleaning" Measures

January 2021 marks five years since the introduction of the European Single Procurement Document ("ESPD"). The ESPD was introduced by the EC's implementing Regulation 2016/7 of 5 January 2016 establishing the standard form for the ESPD. In addition, Directive 2014/24 of 26 February 2014 on public procurement introduced the concept of "corrective" measures or so-called "self-cleaning" measures. While the ESPD allows an economic operator to more easily submit its declaration in relation to the applicability of (mandatory and/or optional) exclusion grounds, "self-cleaning" measures allow an economic operator to demonstrate that, even though an exclusion ground applies to it, it has taken the necessary measures to be considered a trustworthy contractor to a contracting authority. Five years after their introduction, the first judgments of the ECJ and the Belgian State Council are providing guidance on the practical application and (initial) pitfalls.

The ESPD is a self-declaration form for public procurement procedures introduced to reduce the administrative burden of participating in a public procurement procedure and to simplify access to cross-border tendering opportunities. The ESPD alleviates an economic operator's administrative burden, because it is no longer required to submit various documents to demonstrate its personal standing to participate in a procurement procedure (eg in relation to the absence of convictions for fraud or human trafficking or lack of tax debts). Instead of submitting various excerpts and/or declarations of honour (whether or not notarised) in relation to the applicable exclusion grounds, economic operators can now prove that they meet these obligations through submitting one single document: the ESPD. Only the tenderer that is awarded the contract will need to provide the underlying documents demonstrating the validity of the assertions in the ESPD.

Together with the ESPD, the option of "self-cleaning" was introduced to provide perspective to economic operators to which exclusion grounds apply. The ESPD includes a section in which an economic operator can state that it has taken "self-cleaning" measures. Such an economic operator has the opportunity, together with its request for participation or offer, to demonstrate that it has taken corrective measures to redeem its past behaviour (that rendered an exclusion ground being applicable to it). Once submitted, the contracting authority will review the "self-cleaning" measures presented by an economic operator and determine whether they suffice to deem the economic operator trustworthy.

Case law of the ECJ and Belgian State Council

On 14 January 2021, the ECJ ruled on a case involving "self-cleaning measures", which was in the form of preliminary questions submitted by the Belgian State Council.

In May 2016, the Flemish Administration (*Vlaams Agentschap Wegen en Verkeer*) published a call for tenders for a works contract. The contracting authority chose to exclude the joint venture comprising RTS Infra BVBA and Norré-Behaegel from the tender process because its mem-

bers had previously committed acts of grave professional misconduct. RTS Infra BVBA and Norré-Behaegel challenged the decision before the Belgium State Council. They claimed that, before being excluded, they should have been allowed to demonstrate that they had taken corrective measures evidencing their reliability, in accordance with the "self-cleaning" measures introduced in 2014 in the Directives on public procurement. The preliminary questions submitted for review were whether:

- Norré-Behaegel should have pro-actively declared that it had taken "self-cleaning" measures to the contracting authority; and
- the "self-cleaning measures" had direct effect. The Belgian State Council referred the Norré-Behaegel Case to the ECJ for a preliminary ruling on whether the 2014 Directives on public procurement allow for a tenderer to be excluded when it has not indicated on its own initiative that it has taken corrective measures and whether the "self-cleaning" measures had direct effect.

The ECJ found that the "self-cleaning" measures had direct effect. It raises a question: if a tenderer has not been upfront in relation to "self-cleaning" measures, should a contracting authority give it the opportunity to present evidence of reliability?

The ECJ ruled that requiring the tenderers to adopt a pro-active approach in relation to providing evidence on "self-cleaning" measures is in line with Directive 2014/24 of 26 February 2014 on public procurement if:

- it is spelled out in a clear, precise and unequivocal manner in the implementing legislation and
- is brought to the attention of the economic operators in the tender documents. Consequently, the requirement of pro-activity should be clear from the tender documentation.

The Belgian State Council is yet to provide a judgment in the underlying case.

ESPD guidance

In addition to the ECJ, the Belgian State Council has in the last five years had a number of opportunities to provide guidance on the use of the ESPD. Below is a short overview of the most relevant guidance provided through the case law of the Belgian State Council.

- The submission of an ESPD is an essential requirement. If a tenderer does not submit an ESPD with the request for participation or offer, this is a serious irregularity that cannot be rectified (ie a contracting authority cannot ask a tenderer to submit an ESPD after the submission deadline to remedy the irregularity) (State Council, 26 July 2019 No 245.239 and 14 August 2018 No 242.220).
- A tenderer must also submit an ESPD for entities on which it relies for fulfilling the requirements regarding economic and/or technical capacity. The failure to submit an ESPD for these types of parties also leads to a serious irregularity that cannot be remedied – even if this is not expressly stated in the tender documents, this requirement is provided for in the public procurement legislation (State Council, 14 August 2018 No 242.220).
- The public procurement legislation allows tenderers that have already submitted an ESPD in the framework of a public procurement procedure to rely on that "existing" ESPD in a "new" public procurement procedure. However, a tenderer should carefully review whether the previously submitted ESPD covers all the requirements requested in the ESPD for the "new" public procurement procedure. As the "new" public procurement procedure may, for example, have different thresholds regarding economic standing etc. A tenderer that did not submit an ESPD that met the requirements of the "new" tender documents

should be excluded, as a new ESPD cannot be submitted, and the lack of an ESPD is regarded as a serious irregularity that cannot be remedied (see case law cited above and State Council, 24 July 2018 No 242.138).
- Inconsistencies between the content of the offer and the ESPD may also lead to the exclusion of a tenderer. If a tenderer states in its offer that it 'may' use, for certain parts of the contract, subcontractors and the tender documents require that you submit an ESPD for these subcontractors, the tenderer must respond positively to the question provided in the ESPD as to whether it will use subcontractors and submit an ESPD for that subcontractor. By indicating "no" to the question whether it will use subcontractors, a standard question in the ESPD, the tenderer will have submitted an incorrect ESPD, which leads to a serious irregularity that cannot be remedied and for which the tenderer is excluded from the tender (State Council, 9 May 2019 No 227.818 and 4 February 2020).
- If a tenderer submits an incomplete (eg only the odd pages of the ESPD had been submitted) or illegible ESPD (the PDF file that included the ESPD was damaged), the contracting authority should provide the tenderer with the opportunity to clarify as the Belgian State Council deems this a purely "material error", which tenderers may clarify without being (automatically) excluded from the tender (State Council, 19 April 2018 No 241.265 and 27 November 2020 No 249.082).
- The case law of the Belgian State Council clearly indicates that the ESPD is subject to scrutiny and should be filled out with the required diligence and care. Even the case law of the Belgian State Council that seems to allow for a more "flexible" approach, ie contracting authorities should request further clarification if an incomplete or illegible ESPD is submitted, does not allow for much room for interpretation when it comes to the ESPD. As the Belgian State Council suggests in a number of its judgments, a tenderer is not allowed to submit a "new" ESPD (eg such as the complete or legible version of the ESPD) that has not been submitted with its initial offer, and not submitting an ESPD is considered a serious irregularity for which a tenderer is to be excluded from the tender. The applicable legislation and its interpretation by the Belgian State Council thus do not allow much room (if any) to actually remedy an incomplete and/or illegible ESPD.
- There is less case law from the Belgian State Council on the application "self-cleaning" measures. However, one case should be mentioned, in which the Belgian State Council found that where a tenderer did not indicate in its ESPD that an exclusion ground applied to it, even though it was in a state of judicial reorganisation, that tenderer had submitted a false statement. In addition, the Belgian State Council found that it is up to the tenderer to take the initiative and demonstrate that it has taken the required "self-cleaning" measures, this is not an obligation of the contracting authority. In the case at hand, the contracting authority had given the tenderer the opportunity to clarify the issue, but instead of coming clean, the tenderer doubled down on its false statement. The Belgian State Council found that the attitude of the tenderer confirmed that it had not demonstrated its reliability (even though an exclusion ground applied to it), quite the opposite (State Council, 29 January 2019 No 243.537).

The Belgian State Council's judgment, in light of the answers provided by the ECJ, is anticipated (see paragraph 15-18).

Practical insights

Based on the above case law, it is clear that the Belgian State Council interprets the requirement to submit an ESPD quite strictly. Tenderers

should always review the tender document in a timely manner to verify whether they require any additional information than that required under the legislation. For example, the tender documents could state that an ESPD must be submitted not only for subcontractors on whom the tenderer relies to meet the technical and/or financial selection criteria, but for subcontractors in general.

If a tenderer is required to submit an ESPD for subcontractors in general (whether they are a relied upon party or not), it is advised that the tenderer requests an ESPD early on in the negotiations with a potential subcontractor, as often while preparing an offer, tenderers will be unsure whether they will use subcontractors in relation to a certain contract, and if there is a last minute change of heart, it is often difficult to obtain an ESPD/correctly completed ESPD or worse it may even lead to a nasty surprise if the potential subcontractor is unable to provide an ESPD.

In addition, ESPDs should be submitted with a required standard of care, as submitting an "erroneous" ESPD leads to the submission of a false statement. Submitting a false statement is in and of itself a ground for exclusion. As the optional exclusion grounds include:

- "serious misrepresentation in supplying information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria"; and
- "the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable".

It is not a far stretch of the imagination to see how submitting a false statement could fit into these categories of exclusion grounds.

Economic operators

In relation to "self-cleaning" measures, economic operators are often hesitant to share information on or even state that they have adopted "self-cleaning" measures. Given the sensitive nature of some of the exclusion grounds, this is not surprising. It should be noted that the ECJ did not provide any guidance on the Belgian State Council's comment that the "self-cleaning" measures include a form of "self-incrimination", which is an issue many economic operators struggle with in practice.

As the Advocate General stated his opinion to this case, "[t]here is nothing to compel an economic operator to participate in a public procurement procedure. If it does, however, it must comply with the rules of that procedure". Meaning that if a tenderer finds that an exclusion ground applies to it, but that it does not necessarily wish to submit an officially signed document stating as much (eg like the ESPD), it can simply opt not to participate. In his opinion, the Advocate General also recognises that there could be room for interpretation, for example in relation to "grave professional misconduct". As this is a broad concept that is open for interpretation, it is not always easy for an economic operator to foresee whether its behaviour qualifies as such.

However, while there are certain situations that are difficult to qualify with certainty, often asking oneself the question is sufficient to report it. In addition, if a situation prompted an economic operator to take certain measures, eg fire certain individuals, introduce new and/or more robust policies, etc (ie take measures that qualify as "corrective" or "self-cleaning" measures) it is likely that the situation could qualify as an (optional) exclusion ground. A careful case-by-case assessment needs to be made, also in light of the tenderer's general public procurement policies and/or strategies, such as statements

submitted in the past, potential consequences for ongoing contracts and/or tender procedures etc.

Although, the ECJ case law above does allow for some flexibility in relation to when underlying evidence must be provided proving that "self-cleaning" measures have been taken. It does not decide the question as to whether there is any flexibility over when an economic operator should state that even though an exclusion ground applies, it has taken "self-cleaning" measures and should be regarded as a trustworthy contractor. In principle, an economic operator makes such a statement in the ESPD submitted with its request for participation (if the procedure requires that an ESPD is submitted), and as has been seen in the case law from the Belgian State Council there are no do-overs when it comes to submitting an ESPD.

On the Horizon

Thus far, 2021 is shaping up to be an equally interesting year in the world of public procurement. It remains to be seen whether the lessons learned from the COVID-19 pandemic will lead to any further guidance from the EC or even regulatory changes in the field of public procurement. One of the public procurement trends that has emerged from the COVID-19 pandemic is the joint tendering by the European Commission together with member states for medical supplies and vaccines, but only time will tell whether this type of procurement (which does not fall under national public procurement legislation) will continue.

The ECJ's judgment in the case between the EC and Austria (C-537/19) in relation to a lease agreement for a building that has not yet been constructed is anticipated. The case relates to the (by now notorious) tension between real estate transactions (outside of the scope public procurement legislation) and public procurement contracts for works (which fall within the scope of public procurement legislation).

In his opinion of 22 October 2020, the Advocate General found that the main purpose of the contract was in fact the construction of a building and that the contracting authority should have applied an award procedure in line with the EU public procurement directives. The Advocate General came to this conclusion because, among other things, the contracting authority had decisive influence over the final plans and the execution of the works, and the conclusion of the contract with the contracting authority was crucial to the construction of the building.

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Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

In Brazil, Law No 8,666/1993 (the Public Procurement Law or PPL) is the main legal framework for the procurement of government contracts. The PPL provides general principles and rules on public procurement, steps and requirements for the contract award procedure, as well as guidelines that shall govern the relationship between the government and private contracted parties.

Depending on the scope of the public procurement process or who is the government contracting authority, other laws may apply, such as the following.

- Law No 8,987/1995: provides general rules for concessions of public works and services, commonly used for self-sustainable infrastructure projects, such as toll roads.
- Law No 10,520/2002: provides rules for an alternative type of procurement process used for the acquisition of common goods and services that the government is used to contracting out on regular basis.
- Law No 11,079/2004: legal framework applicable for public-private partnerships (PPPs). PPP, as defined in this Law, is a type of public concession in which the government engages with a private party with the purpose of providing public services (sponsored PPP) or the rendering of a service to the government itself (administrative PPP), which shall demand, in any case, high investments and a long-term amortisation period. The PPP Law was created with the purpose of attracting a new wave of private investments for projects of high social interest, especially in the infrastructure sector, which, in other conditions, would not be economically feasible for the government.
- Law No 12,462/2011: this law was originally created with the purpose of providing special public procurement rules for works and services related to infrastructure projects for the World Cup FIFA 2014 and the Olympic Games 2016. Afterwards, this law started to be applied for various purposes, such as actions included within the National Growth Acceleration Program (PAC); the National Health System (SUS); prison system; urban mobility; national security; innovation and technology; among others.
- Law No 13,303/2016 and Decree No 8,945/2016: the legal framework for government-owned companies provides specific procurement rules applicable to public companies; mixed-capital companies; and their subsidiaries. This statute allows the government-owned companies to enter strategic partnerships with the private sector with no requirement to launch a prior public bidding process.

These laws are still in force to date and are ordinarily applied as legal grounds for public procurement. However, the Brazilian Federal Senate approved on 10 December 2020 Bill No 4,253/2020 that shall replace the PPL, Law No 10,520/2002, and Law No 12,462/2011 with a new framework for public procurement. See **5.4 Legislative Amendments under Consideration** for further details on this new piece of legislation.

1.2 Entities Subject to Procurement Regulation

Pursuant to the Brazilian Federal Constitution and to rules provided in the PPL, public procurement rules are mandatory to all entities controlled directly or indirectly by the government. In this sense, public agencies of any kind, government funds, public foundations and government-owned companies in all levels of the federation – federal, state, and local – shall comply with public procurement steps and requirements provided in the applicable legislation to engage

in contracts with private parties for the acquisition of goods, works, and services, as well as to proceed with the sale of assets.

1.3 Types of Contracts Subject to Procurement Regulation

As a rule of thumb, all contracts executed by the government or government-controlled entities must abide by public procurement regulation. Accordingly, the government can only contract engineering works, services, provision of goods, or sale of assets after carrying on a competitive public bidding process with the purpose of choosing the most advantageous offer/proposal among those presented by private interested parties.

Nonetheless, the Brazilian public procurement legislation provides for scenarios where the government can move forward with a direct hiring. Those scenarios are as follows:

- waiver – whenever the legislation itself allows government to waive the competitive public bidding and to directly hire a contracting party in specific situations, such as: emergency or public calamity; acquisition of small value products or services; and
- unfeasibility/non-requirement of a bidding process – whenever the circumstances allow the conclusion that a competitive bidding proceeding is unfeasible or incompatible with the purpose of the contract award process.

For more information on direct hiring, see **5.2 Direct Contract Awards**.

Minimum Value Thresholds

With regard to minimum value thresholds, the PPL provides that the government is not required to launch a competitive public bidding process for contracting engineering works or services with a total value of up to BRL33,000 and any other service or purchase with a total value of up to BRL17,600.

Conversely, Law No 13,303/2016 provides minimum value thresholds applicable to government-owned companies, which are not required to launch a competitive public bidding process for contracting engineering works or services with a total value of up to BRL100,000 and any other service or purchase with a total value of up to BRL50,000.

These are typical scenarios of waiver of the public procurement regulation, in which the government and government-owned companies can proceed with a direct hiring.

1.4 Openness of Regulated Contract Award Procedure

A public tender process must serve as a tool for the government to select the most advantageous proposal to meet a certain public need. In this sense, the PPL ensures isonomic treatment among all parties interested in participating in a public tender process, provided that they comply with the conditions and requirements for qualification set forth in the applicable public procurement regulation and those established by the contracting government authority in the public tender documents.

The PPL strictly prohibits government agents to admit, plan, include or tolerate in public tender documents clauses or conditions that may impair, restrain, or frustrate the competitive nature of the process. Regarding participation in a public tender process, the government cannot create different rules for bidders based on their nationality, economic condition, domicile, or any other inappropriate condition that is irrelevant for the proper execution of the object of the contract. In addition, the PPL clearly states that the government cannot establish a discriminatory treatment of commercial, legal or labour

nature among the bidders or give priority or privileges to Brazilian or foreign companies in view of the applicable currency, modality, and locale for payment, except for specific situations when financing from international agencies and multilateral entities is involved.

Nonetheless, the PPL allows the government to apply a margin of preference for manufactured products and services to be rendered by Brazilian companies or in the national territory as a criterion to settle any tie. In this sense, priority to Brazilian companies and national services and goods shall be given if:

- manufactured or rendered by Brazilian companies of domestic capital;
- manufactured in the country; and
- manufactured or rendered by Brazilian companies.

Conditions Provided in Tender Documents

Another relevant feature on the openness of the public procurement processes is about the conditions provided within the tender documents for the participation of foreign companies. Depending on the scope of the procurement process, the government contracting authority may establish that foreign companies can only participate in the tender through a subsidiary duly incorporated in accordance with Brazilian law, which are known as cases of "domestic tender". On the other hand, when foreign bidders can directly participate in the tender, they are required to prepare a sworn translation to Portuguese of any document in foreign language.

On top of that, the PPL requires that in the case of a consortium formed between Brazilian and foreign players, the leadership shall always be given to the Brazilian party.

1.5 Key Obligations

Differently from private contracts, whereby the contracting parties have full autonomy to negotiate all clauses and conditions, those who attend a public procurement process must strictly abide by all terms of the tender documents, with no room for negotiation with the government contracting authority. The PPL provides general rules on the obligations of the government, as well as those of the parties awarded a public contract.

The PPL provides special powers to the government with the purpose of preserving the public interest underlying the public contracts. Among such powers, two are ordinarily of application to private contractors:

- the right of the government to unilaterally terminate the contract due to "reasons of public interest"; and
- the obligation of the contractor to accept any addition or reduction in the scope of a public contract up to 25% of the updated initial amount agreed between the parties and up to 50% in the particular case of restoration of a building or equipment (see **5.1 Modification of Contracts Post-award**).

Termination of Public Contracts

As a rule of thumb, the termination of public contracts shall only be determined after an administrative procedure carried out by the government, ensuring the contractor the rights to full defence. Once a public defence contract is unilaterally terminated without causes attributable to the contractor, the government would have to:

- pay all the amounts due to the contracted parties for the services that have already been performed; and
- immediately step in to perform the object of the agreements, which does not require court authorisation.

Furthermore, the PPL requires the private contractor to maintain, during the whole term of the contract, and in compliance with the obligations undertaken therein, all the qualification conditions required in the tender documents.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

The government awarding authority has to publish a formal notice containing the main features of the public tender process, such as:

- the scope of the contract;
- the evaluation criteria;
- the contract term;
- the date for proposal submission; and
- where the tender documents can be found.

The tender notice shall be published in an official gazette (federal or state gazette depending on the level of the awarding authority) and in a newspaper with a wide audience.

Law No 13,303/2016 allows government-owned companies to adopt a slightly different and more flexible procedure for certain procurement processes in view of the particularities of the intended contract, whereby the contracting company send a request for proposal (RFP) directly to a limited number of pre-selected players without prior publication of a formal tender notice. In cases like this, only the result of the tender process and an extract of the contract are published in the Official Gazette.

2.2 Preliminary Market Consultations by the Awarding Authority

Government awarding authorities can carry out preliminary market consultation before launching a contract award procedure. When the tender scope is of a simple nature, the consultation may consist of simple price research to formulate the price limit that would be paid by the government.

Conversely, when the tender scope is of a complex nature, ie, engineering works or services, as well as concession of public services, the government awarding authority usually hires consultancy services from specialist companies to carry out comprehensive studies (eg, financial, technical, legal, and environmental analysis) with the purpose of defining the basis for the tender process.

2.3 Tender Procedure for the Award of a Contract

The PPL provides the following modalities of tender procedure for the awarding of contracts:

- competitive tender;
- price quotation;
- invitation;
- contest; and
- auction.

Competitive Tender

This is the most relevant and commonly used tender procedure modality. The competitive tender encompasses the following phases:

- preliminary phase, where the awarding authority shall verify that the interested party does not have any impediment to contract with the government, such as a debarment or any conflict of interest;
- qualification phase, where the awarding authority asseses the interested party's financial and technical conditions and capacity; and
- competitive phase, where the proposal submitted by the bidders shall be classified and an auction with the best-classified parties may take place.

The government awarding authority issues an administrative decision after the end of each phase, which can be appealed by all bidders. The awarding authority has the power to postpone the qualification phase to the end of the tender procedure, a scenario where the awarding authority asseses the qualification documents only of the winning bidder.

Price Quote

The government awarding authority analyses only the price offer among interested parties whoe have pre-registered or who have met all the conditions required to register up to the third day before the deadline for submission of the proposals.

Invitation

This is a type of tender procedure limited to interested parties of a certain sector connected with the scope of the contract, whether pre-registered or not before the government awarding authority, which are chosen and invited, in a minimum number of three.

Contest

The government awarding authority launches a competition open to all interested parties intended to choose the best technical, scientific, or artistic work suitable for a predefined purpose.

Auction

A typical tender procedure used by the government awarding authority for the sale of assets to the party who offers the highest bid, equal or higher than the appraisal value.

Additional Laws and Regulations

In addition, Law No 10,520/2002 provides an additional modality of procurement used for the acquisition of common goods and services that the government contracts on a regular basis.

As a rule of thumb, public tender procedures do not have room for negotiations between the government awarding authority and the private party awarded a contract. Parties must strictly adhere to the terms and conditions provided in the public tender documents. However, Law No 13,303/2016 established a positive innovation pursuant to which government-owned companies have more flexibility to negotiate with the awarded party price and other conditions related to the performance of the scope before the contract execution.

Besides, Bill No 4,253/2020 provides for a new modality of tender procedure in which the government awarding authority may engage in discussions with interested parties to collect information required to define not only the price of the contract, but also specific details of the contract scope that could not have been defined by the government itself.

2.4 Choice/Conditions of a Tender Procedure

As referred to in **2.3 Tender Procedure for the Award of a Contract**, the public procurement legislation establishes more than one tender procedure. The choice of which tender procedure shall be adopted for each case depends on particularities of the scope and the corresponding estimated amount involved. The government awarding authority cannot choose the tender procedure at its discretion.

For instance, tenders aimed to contract common goods or services are subject to a simpler tender procedure, with no qualification phase and using lower price as the evaluation criteria. Conversely, for contracting a more complex scope or when the tender refers to the concession of public services, the awarding authority shall use the open competitive procedure, which encompasses phases mentioned in **2.3 Tender Procedure for the Award of a Contract**.

In addition to the legal criteria regarding the scope (see **2.3 Tender Procedure for the Award of a Contract**), the PPL provides the following values for defining the applicable tender procedure.

- For engineering works and services:
  (a) invitation – tenders up to BRL330,000.00;
  (b) price quotation – tenders up to BRL3.3 million; and
  (c) competitive tender – tenders higher than BRL3.3 million.
- For non-engineering works and services:
  (a) invitation – tenders up to BRL176,000.00;
  (b) price quotation – tenders up to BRL1.43 million; and
  (c) competitive tender – tenders higher than BRL1.43 million.

2.5 Timing for Publication of Documents

The legislation provided a minimum timing between the release of the tender notice and the tender procedure, which varies depending on the type of tender, as follows:

- 45 days or more for competitive tenders;
- 15 days for price quotations;
- five days for invitations; and
- eight days for auctions.

In case of any change in the public tender documents, the government awarding authority shall publish a new tender notice and observe the minimum timing between the publication and the tender procedure. In addition, for those tender procedures with a substantial amount involved, the government awarding authority shall promote a public hearing to receive contributions from the interested parties.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The interested parties shall submit their proposal on a specific day provided in the tender invitation.

2.7 Eligibility for Participation in a Procurement Process

The legislation establishes eligibility requirements that shall be met by the interested party. In any scenario, the interested party shall demonstrate that it:

- is a legal entity duly constituted under Brazilian law or foreign law in the case of international contract award procedure;
- has non impediment to contract with the government;
- has no debt with the Federal, State or Municipal tax authority; and
- has no debt with its employees.

Depending on the features of the tender, the awarding authority may establish financial requirements, such as minimum net equity or specific financial rations, and technical requirements, which consist basically in prior experience through attestation or the demonstration of having qualified employees in its workforce.

2.8 Restriction of Participation in a Procurement Process

The public procurement legislation allows the government awarding authority to restrict the competition in specific and exceptional situations. For instance, in tenders aimed at small purchases, where the awarding authority may reduce the competition to three providers, which will be invited to the tender through a request for proposal.

Another situation where the awarding authority can restrict the competition is in the case of

restricted procedures, whereby the tender is targeted to companies preregistered in the government provider list. However, any company may request its inclusion in this list until three days before the tender auction day. Once on the list, the interested party can take part in the tender.

2.9 Evaluation Criteria

The legislation set forth the following evaluation criteria:

- lowest price;
- best technical expertise;
- higher purchase offer when the government is selling something; and, for those tenders aiming to transfer to the private sector the provision of public utilities;
- lowest fee paid by the user; and
- higher offer for the concession award.

As a rule, the awarding authority tends to use the lowest price criteria to contract common goods and services.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

The public tender documents must provide the criteria and other elements that would be used by the government awarding authority to select the winner of the contract award procedure. In this sense, any interested party knows from the beginning of the tender procedure what is necessary to take part in the competition and how the offers shall be evaluated.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The government awarding authority must select the bidders to participate in the contract award procedure according to the requirements and criteria provided for in the tender documents. Any exclusion of participants must be followed with a public decision issued by the government awarding authority with the reasons for the exclusion. In this scenario, the excluded party can request a reconsideration of such a decision to the awarding authority, which may review the decision or confirm it. With the confirmation of the exclusion, the party cannot take part in the contract award procedure anymore and can challenge the administrative decision in court.

3.3 Obligation to Notify Bidders of a Contract Award Decision

The government awarding authority is not obliged to directly notify any of the interested parties about the contract award decision. All formal communications within the public tender procedure shall be made through publication in the official gazette or through the website page of the awarding authority. In this sense, the party that did not win the tender shall be informed by the official statement made widely available by the awarding authority. The official statement shall encompass the criteria that was used to evaluate the offers and the identification of the winning bidder.

3.4 Requirement for a "Standstill Period"

The Brazilian public procurement regulation does not provide a specific "standstill period" between the notification of the contract award decision and the execution of the contract. In practice, the tender documents usually provide a term after the contract award decision in which the winner shall attend the call to execute the contract. Besides, the tender documents may provide precedent conditions to the execution of the contract that should be met by the winner bidder, such as the contracting of a performance bond, payment of the award price, and even the incorporation of a special purpose company

(SPC), especially in the case of concessions of public services to the private sector.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

Any interested party can ask the government awarding authority to reconsider any decision issued during the tender procedure. There is no appeal to a higher authority or a different body: the awarding authority is responsible to review its own decision. After the decision on the reconsideration request, the decision is considered final within the administrative level.

However, the interested party may challenge any administrative decision in the Judiciary or before the Court of Accounts. Both courts have the power to issue injunctions determining the suspension of the whole tender procedure until analysis of the merits of the dispute.

In Brazil, the Court of Accounts is the public entity responsible for auditing government tender procedures and contracts arising therefrom. Please note that the Court of Accounts does not monitor and/or conduct audits over the private contractor, but only regarding the execution of a contract entered with a government entity under its jurisdiction. Each government level in Brazil is audited by a Court of Accounts: the Federal Government and all of federal entities shall respond to the Federal Court of Accounts (TCU), while the State and Local Governments – as well as their entities – shall respond to the State Court of Accounts (TCE, for the Brazilian initials) of the respective State in which they are located. Only the Cities of São Paulo and Rio de Janeiro have a specific Local Court of Accounts (TCM). All the other cities in Brazil shall respond to the corresponding State Court of Accounts of the State where they are located.

The Courts of Accounts are independent government entities responsible for accounting, financial, budgetary, operational and equity control of the corresponding government. Despite of their denomination, the Courts of Accounts are not part of the Judiciary branch. In fact, they are connected to the Legislative branch of each level of government and assist the parliamentarians in controlling and evaluating public accounts and contracts from three perspectives:

- legality, which refers to an assessment of an act or contract in view of the applicable legislation;
- legitimacy, which refers to the legal ability to perform the act or contract; and
- economic, which corresponds to an analysis of the public resources spent and the results obtained by the government.

4.2 Remedies Available for Breach of Procurement Legislation

In case of breach of the procurement legislation, the interested party may claim proper remedies in court to declare null and void the tender procedure or to remedy a breach of the procurement legislation (eg, declaration of annulment of the interested party due to wrongful exclusion from the contract award procedure). Remedies available in the Judiciary Branch are comprised (not exhaustively) of the following: writ of mandamus; action for annulment; indemnification; injunctions; and popular action.

The writ of mandamus (*mandado de segurança*) is the typical lawsuit for challenging any administrative act and decision. The plaintiff is required to prove its claim by means of documentary evidence. Pursuant to Law No. 12,016/2009, the writ must be filed within 120 days of the date of the unlawful administrative decision/act.

Claims for annulment and indemnification may be filed by the bidders for any purpose. In terms

of standing, the applicant needs to prove its participation in the tender procedure and the type of breach incurred by the government awarding authority.

Injunctions can only be obtained in court if plaintiffs establish the following three elements:

- a reasonable likelihood of success in the merits of the case (fumus bonis iuris); and
- imminent, irreparable harm that will result if injunction is not granted (periculum in mora).

The popular action is an appropriate remedy to void administrative acts or contracts causing damage to public (federal, state, or local) assets. The plaintiff thereby does not defend its own right, but certain collective rights associated with a public interest. Any citizen (person who is entitled to vote) may file a popular action to protect, besides the public asset itself, the administrative morality, the environment, and the historical and cultural heritage.

4.3 Interim Measures

The Judiciary Branch and the Court of Accounts may order the suspension of the contract award procedure in case of breach of procurement legislation. The suspension will last until the awarding authority remedies the irregularity identified or until a final decision is taken by the courts.

4.4 Challenging the Awarding Authority's Decisions

The awarding authority issued the following decision under the contract award procedure:

- decide if the bidder complies with the legal, technical and financial requirements provided in the tender invitation; and
- decide which offer best meets the government expectation under the evaluation criteria provided for in the tender invitation.

Any interested party may challenge the awarding authority's decisions even when such a decision does not refer to it. In this sense, one participant may challenge the awarding authority's decisions regarding the qualification classification of other bidders. Besides that, any citizen may challenge the awarding authority's decisions on the Judiciary Branch or Court of Accounts.

4.5 Time Limits for Challenging Decisions

The awarding authority's decision may be challenged under the contract award procedure within five working days from its release. Under the judiciary, the time limits depend on the remedy used by the interested party but it is reasonable to work with an average time limit of five years. After this time limit, even if an irregularity is identified, the judiciary tends to preserve the contract and convict the persons involved in the wrongdoing. The Court of Accounts tends to take a similar approach.

4.6 Length of Proceedings

Pursuant to the PPL, the government awarding authority has five business days to respond to claims/appeals within a public tender procedure. Brazilian law does not provide for a specific time length for administrative proceedings before the Court of Accounts. The length of judicial challenges of a government's decision may vary depending on the complexity of the dispute, the authority responsible for judging the claim, the place of the dispute, among other factors.

4.7 Annual Number of Procurement Claims

There is no official information on the average number of procurement claims filed per year in the public bidding process. Ordinarily, government authorities do not have this kind of statistic control. Nonetheless, experience in dealing with public procurement shows that it is more common than not to have bidders trying to chal-

lenge the awarding government's decision with the purpose of reverting an unfavourable result. Administrative challenges are usually based on the arguments of:

- government's failure to comply with the public procurement regulation and with the specific rules provided in the tender documents; and/or
- an attempt to disqualify competitors by means of identifying flaws in their documentation.

4.8 Costs Involved in Challenging Decisions

No fees are required from a party in challenging an awarding government's decision. Pursuant to the PPL and Law No 9,784/1999, any bidder has the right to challenge administrative decisions within a public bidding process without the assistance of lawyer (although participation of lawyers at this stage is common market practice).

Conversely, judicial challenge of an awarding government's decision requires a licensed lawyer and payment of applicable fees to the Court, which may vary depending on the amount in dispute and the state in which the lawsuit will be filed.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

The PPL provides general rules on how public contracts can be modified after being awarded to the contracted party. Amendments are permissible, with proper justification, in the following cases.

- Unilaterally, by the contracting government, under:
  - (a) qualitative modification – the project or its specifications must be qualitatively modified for better technical adequacy of the scope. In this situation, the contract may be amended up to a maximum of 25% of the adjusted initial amount of the contract, or up to a maximum of 50% in the case of building or equipment refurbishing that requires additional works, services or supplies; or
  - (b) quantitative modification – the amounts specified in the contract have to be adjusted in view of a quantitative increase or decrease of the scope, within the same percentage limits established above; or
- Upon mutual agreement between the parties whenever:
  - (a) replacement of the performance bond is required;
  - (b) it is necessary to modify aspects of the works or the service regime, as a result of a technical verification that original contract terms are no longer applicable;
  - (c) the form of payment has to be modified, as a result of supervening circumstances, provided that the initial value is adjusted and maintained; or
  - (d) for rebalance of the economic conditions of the contract.
- In addition, it is worth mentioning that public contracts can only be amended up to the total term of 60 months, including the original term.

5.2 Direct Contract Awards

Although the rule applicable to the government in terms of public procurement is to contract third parties by means of a competitive public bidding process, the legislation allows direct contract awards. Pursuant to the PPL, the government can proceed with a direct hiring in two situations:

- whenever the legislation itself waives the launching of the competitive public bidding; and
- whenever the circumstances allow the conclusion that a competitive bidding proceeding is unfeasible or incompatible with the purpose of the contracting, which could be named as of exemption to the bidding proceeding requirement. The demonstration of such unfeasibility or incompatibility depends on verification of the following requirements: technical service, notorious expertise of the contractor and singular nature of the services.

In both scenarios – waiver or unfeasibility of a public bidding process – the government is allowed to directly hire a third party to acquire goods and services. The direct hiring is a much more flexible process in which the government is not obliged to observe all the steps of a competitive public bidding process.

Furthermore, Law No 13,303/2016 introduced new rules pursuant to which government-owned companies are allowed to move forward with a direct hiring:

- for direct commercialisation, rendering or execution of products or services by the government-owned companies specifically related to their corporate purpose; and
- to enter strategic partnerships with the private sector, when the choice of the strategic partner is associated with some of its particular characteristics, in relation to defined and specific business opportunities in scenarios where the impossibility of the competitive process is justifiable.

5.3 Recent Important Court Decisions

On October, 2020, the Federal Court of Accounts (TCU) judged an injunction (decision on the merits is still pending) related to the first case involving a friendly handover of a concession of public services governed by Law No 13,448/2017. The TCU had previously suspended the handover of the road concession operated by the concessionaire Via040 to the National Agency for Land Transportation (ANTT) in view of alleged irregularities identified by the auditing staff. Afterwards, the Court authorised ANTT to move forward with the proceeding. The judges of the Court emphasised the benefits of the friendly handover processes as an alternative for the federal government to unlock relevant investments in infrastructure projects, especially those provided within concession agreements impacted by some sort of financial crisis in the last years.

The friendly handover process avoids the declaration of forfeiture of the concession agreements and the application of penalties to the shareholders of the concessionaire, such as the prohibition of participating in new public tender procedures.

In addition, the Brazilian Supreme Court ratified the right of concessionaires to be compensated by the government in cases of takeover of the concession. The Supreme Court judged on 5 March 2021 a case involving LAMSA, the operator of a local road system in the City of Rio de Janeiro, which was compelled by the local government to hand over its concession before the contractual term without any compensation.

5.4 Legislative Amendments under Consideration

Pursuant to the Brazilian Federal Constitution, all levels of government have the power to create legislation on public procurement matters. The Brazilian National Congress has power to create new general rules on public procurement for the federal level, which are applicable to the state and local governments. State and local governments can also create their own public procurement regulation, provided that the gen-

eral rules contained in the federal legislation are duly respected.

Bills under Consideration

Currently, there are several bills under consideration in the Brazilian National Congress, as well as in the state and local legislative bodies, that can modify the public procurement regulation. As mentioned in **1.1 Legislation Regulating the Procurement of Government Contracts**, the Brazilian Federal Senate approved on 10 December 2020 the Bill No 4,253/2020 that will replace the PPL, Law No 10,520/2002, and Law No 12,462/2011 with a new federal framework for public procurement. Except for the criminal section, this new piece of legislation shall not impact the public procurement regime for government-owned companies, which continue to be governed by their own statute provided in Law No 13,303/2016.

Recent Amendments

Bill No 4,253/2020 is the most relevant legislative amendment to the public procurement regulation in the country in the last 20 years, insofar as most stakeholders in the market consider the PPL an outdated legal framework. Only presidential sanction is pending for the bill to become law. If the President decides to veto any part of the text, then the Brazilian National Congress shall analyse the veto and decide whether to keep it or to reject it before sending back the final text to the President for promulgation of the new law.

Once turned into law, the new legal framework shall establish relevant innovations and improvements on public procurement. For instance, the regulation provides for a new form of procurement called "competitive dialogue", in which the government will be able to interact and develop different alternatives to meet public needs after selecting a pool of interested parties based on certain technical and objective criteria. After the phase discussions, the selected bidders will have to submit their final proposals. This form of procurement tends to be extremely useful for the government in situations where either the intended solution depends on adapting the options available on the market or the public authority responsible for the procurement process does not know how to define the specifications that will sufficiently meet public needs.

Other Innovations

Other relevant innovations within the new public procurement framework are, among others, as follows:

- analysis of the qualification requirements of only the winning bidder after the phase of price judgment;
- a risk matrix between the parties will become a mandatory clause in all public contracts;
- contracts for continuous services and periodic supply of goods can be extended for a maximum contractual term of ten years; and
- arbitration shall be an option for dispute resolution in public contracts.

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Law and Practice

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CONTENTS

1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Public procurement in the EU is principally regulated by means of the domestic implementation of certain directives, including:

- Directive 2014/23/EU on the award of concession contracts (the "Concessions Directive");
- Directive 2014/24/EU on public procurement (the "Public Sector Directive"); and
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal sectors (the "Utilities Directive").

The three directives are collectively referred to below as the "2014 Procurement Directives".

Separately, Directive 2009/81/EC regulates the award of certain contracts in the fields of defence and security (the "Defence Directive"), whilst Regulation 1370/2007/EC regulates the award of certain public passenger transport services by rail and road.

In addition to the obligations that arise under the legislation referred to above, the Court of Justice of the European Union (CJEU) has established that the award of a contract for goods, works or services that falls outside the scope of EU procurement legislation (because, for example, the relevant value threshold is not met) may, nonetheless, be subject to obligations under the principles that emanate from the Treaty on the Functioning of the EU (TFEU) (the "Treaty Principles"). That would be the case where the contract is of certain cross-border interest, that is to say that, in view of its nature, value or place of performance, the contract is of interest to a supplier in another EU member state.

The Treaty Principles include non-discrimination, equal treatment, transparency and proportionality. Compliance with these principles would generally require the carrying out of a sufficiently advertised procurement process based on objective criteria.

Review procedures and remedies for breaches of obligations under the 2014 Procurement Directives and the Defence Directive are dealt with under:

- Directive 89/665/EC on the application of review procedures to the award of public contracts; and
- Directive 92/13/EC on the application of review procedures to the award of contracts in certain regulated utility sectors (collectively, the "Remedies Directives").

The Remedies Directives have been amended on numerous occasions, including by Directives 2007/06 and 2014/23. In addition to the remedies available at national level, the European Commission may take action against member states in the CJEU in relation to any alleged breach of EU legislation. In that context, the European Commission has brought a number of infringement proceedings in relation to breaches of EU procurement legislation.

EU bodies, including the European Commission, have procurement-related obligations based on the obligations to which member states are subject under the Public Sector Directive and the Concessions Directive. The relevant rules are set out in Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

Unless otherwise specified, the sections below relate to the application of the Public Sector Directive, which is the legislation under which

most regulated contracts are procured in member states. Accordingly, references to "the legislation" should be construed as references to the Public Sector Directive. The reference to EU procurement law should be deemed to refer to the legal instruments mentioned above that create procurement-related obligations on member states.

1.2 Entities Subject to Procurement Regulation

EU procurement law obligations arise in relation to the award of certain contracts by "contracting authorities", a term that is broadly defined and captures the overwhelming majority of public bodies. In addition, certain utility companies operating in the water, energy, transport and postal services sectors are subject to procurement regulation to the extent that they award contracts for the purposes of their utility activities. Such utility companies will be subject to procurement legislation to the extent that they are "contracting authorities" or "public undertakings" (a term that captures entities over which a member state exercises a dominant influence) or carry out their regulated utility activity on the basis of "special or exclusive rights" granted by a competent authority.

In the interest of simplicity, this chapter will use the term "contracting authority" to refer to any entity that has an obligation to carry out a procurement process under EU procurement law.

1.3 Types of Contracts Subject to Procurement Regulation

In principle, EU procurement law applies to the award of contracts for pecuniary interest that are concluded in writing between one or more contracting authorities and one or more economic operators and that have as their object the execution of works, the supply of goods or the provision of services.

The term "pecuniary interest" means, broadly, consideration (whatever its nature). According to the case law of the CJEU, the provision of goods, works or services in exchange for the full, or even partial, reimbursement of costs can be sufficient for pecuniary interest to be established.

The award of works or services concession contracts (above certain value thresholds) is also regulated. Concession contracts involve consideration that 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 European Commission reviews and, if necessary, revises the value thresholds that trigger the application of the procurement rules every two years, primarily so as to ensure that these continue to correspond to the thresholds established in the context of the Agreement on Government Procurement (GPA), the plurilateral World Trade Organization agreement that governs access to the procurement markets of its signatory parties. The current thresholds have been in place since 1 January 2020.

The Public Contract Directive applies when the value of a works contract meets or exceeds EUR5.35 million. The value threshold for goods and most services contracts is EUR214,000 (or EUR139,000 for most procurements by central government bodies). The value threshold for social, educational, cultural and certain other types of services contracts (which are subject to a lighter form of regulation than other types of regulated contracts) stands at EUR750,000.

The Utilities Directive applies when the estimated value of a works contract meets or exceeds EUR5.35 million, or EUR428,000 for goods and most services contracts. The value threshold for

services contracts for social and certain other types of services stands at EUR1 million.

The Concessions Directive applies when the estimated value of a works or services concession contract meets or exceeds EUR5.35 million. The same value threshold triggers the application of the Defence and Security Public Contracts Regulations 2011 (DSPCR 2011) for the purposes of works contracts. The value threshold for goods and services contracts under the DSPCR 2011 is EUR428,000.

The above figures are exclusive of VAT.

1.4 Openness of Regulated Contract Award Procedure

Under the legislation, access to contract award procedures is guaranteed, and remedies for breaches of the legislation are available, to economic operators from:

- the European Economic Area (EEA), that is, the EU member states, Iceland, Norway and Liechtenstein;
- a GPA state (other than an EEA state) but only in relation to procurements that are covered by the GPA; and
- other countries with which the EU has a bilateral agreement but only in relation to procurement covered by that agreement.

While generally most regulated contract award procedures in EU member states are open to all economic operators, there is no obligation on a contracting authority to consider the application or the tender of an economic operator from a country that is not covered under one of the above categories (a third-country economic operator). In addition, in the event that there is a breach of the legislation, a third-country economic operator would not be afforded protection (including access to remedies) under the legislation.

The UK ceased being a member of the EU on 31 January 2020. However, under the Withdrawal Agreement that sets out the terms of the UK's exit from the EU, EU law continued to apply to, and in, the UK until 31 December 2020 (the transition period). Accordingly, during the transition period, EEA economic operators will continue to have access to regulated procurements in the UK, as will economic operators from GPA member countries or countries with which the EU has a bilateral agreement, subject to the terms of those arrangements. Equally, UK economic operators will be deemed to constitute EU economic operators for the purposes of EU procurement legislation and EU law more generally during this period.

1.5 Key Obligations

Where the legislation applies, contracting authorities must, in general, meet their contractual requirements for goods, works and services by means of an advertised competitive contract award process that is based on objective, relevant and proportionate criteria. Underlying the legislation are the key obligations to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. These obligations are relevant even before the procurement process has commenced, so that, for example, the carrying out of a preliminary market consultation or the design of the procurement process must be consistent with these obligations. Equally, even after the procurement process has concluded with the signing of a contract, there is a prohibition on making substantive modifications to contracts, so as not to breach the above obligations.

Separately, the legislation prohibits contracting authorities from designing a procurement with the intention of excluding it from the legislation's scope or artificially narrowing competition.

In terms of the steps that a contracting authority must take in carrying out an advertised competitive contract award process, these would depend on the procurement procedure used, but as a general guide they would include:

- advertising the contract by means of the publication of a contract notice in the Official Journal of the EU (OJEU), describing the requirement and inviting expressions of interest (within appropriate timescales that are set out in the notice);
- determining whether an economic operator that has expressed an interest has the necessary legal and financial standing as well as relevant technical and professional abilities to perform the contract;
- inviting a shortlist of qualified economic operators, selected on the basis of objective and non-discriminatory rules and criteria, to submit tenders or carry out negotiations before submitting tenders (with potentially multiple rounds of negotiations and bidding taking place before submission of final tenders);
- evaluating the tenders submitted on the basis of pre-disclosed objective award criteria that must be linked to the subject matter of the contract, so as to determine the tender that is the most economically advantageous;
- notifying the contract award decision to all economic operators that have submitted a tender (and also, in certain cases, to those who participated in earlier stages of the competition);
- observing a standstill period of a minimum of ten clear calendar days (depending on the method used for the communication of the award decision), during which time the contract cannot be concluded;
- concluding the contract only after the expiry of the standstill period (if there is no legal challenge to the contract award decision before then); and
- advertising the contract award by means of a contract award notice in the OJEU.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Contract award procedures must be advertised in the OJEU using the online Tenders Electronic Daily. National publication can only take place following publication of a contract notice in the OJEU. However, if 48 hours elapse after confirmation of the receipt of the notice by the EU Publications Office and the notice has not yet been published, contracting authorities are entitled to publish at a national level.

The advertisement of a contract must be made using standard online forms. These generally require the publication of the following information:

- the identity, address and other relevant details of the contracting authority;
- details as to how to access the procurement documents;
- a description of the procurement and the contracting authority's requirements, including the nature and quantity of works, supplies or services, the estimated value and duration of the contract;
- the award criteria;
- the conditions for participation, including any legal, economic and financial, technical and professional requirements; and
- details as to the procedure, including the type of procedure, and the time limit for receipt of tenders or requests to participate.

The standard form used for the advertisement in the OJEU of a contract regulated by the Public Sector Directive may be accessed here.

2.2 Preliminary Market Consultations by the Awarding Authority

The legislation expressly permits contracting authorities to carry out preliminary market consultations with a view to preparing the procurement and informing the market of their procurement plans and requirements. In carrying out such consultations, contracting authorities may seek or accept advice from independent experts or authorities, or from market participants. Such advice may be used in the planning and conduct of the procurement procedure, provided this does not have the effect of distorting competition and does not violate the principles of non-discrimination and transparency.

Where an economic operator has advised or has been involved in some other way in the preparation of the procurement process, the contracting authority is obliged to take appropriate measures to ensure that competition is not distorted as a result of the participation of that economic operator in the subsequent process. Such measures must include communicating to all other participants in the competition any relevant information exchanged with that economic operator in the context of preparing the procurement process and the fixing of adequate time limits for the receipt of tenders.

Where there are no means of ensuring the equal treatment of all economic operators, the economic operator who has been involved in the preparation of the process must be excluded from the procedure (but only after the economic operator in question has been given the opportunity to prove that its prior involvement is not capable of distorting competition).

2.3 Tender Procedure for the Award of a Contract

The Public Sector Directive provides six procedures that may be used for the award of a contract.

Open Procedure

The contracting authority invites interested parties to submit tenders by a specified date. The process does not involve a separate selection stage, in that the tenders of all economic operators that meet the qualitative criteria for participation in the process must be evaluated and the contract awarded to the bidder with the most economically advantageous tender. Negotiations are not permitted under this procedure.

Restricted Procedure

The contracting authority considers applications from interested parties and invites a minimum of five qualified applicants (determined on the basis of objective and non-discriminatory rules and criteria) to submit tenders. The contract is awarded to the bidder who has submitted the most economically advantageous tender. Negotiations are not permitted under this procedure.

Competitive Procedure with Negotiation

The contracting authority considers applications from interested parties and invites a minimum of three (though two might be permissible in specific circumstances) qualified applicants to negotiate the contract with the contracting authority. Negotiations may involve successive bidding rounds, so as to reduce the number of tenders to be negotiated. Final tenders cannot be negotiated.

Competitive Dialogue

The contracting authority considers applications from interested parties and invites a minimum of three (although two might be permissible in specific circumstances) qualified applicants to conduct a dialogue with the contracting authority with a view to identifying the solution or solutions capable of meeting its needs. A competitive dialogue may take place in successive stages in order to reduce the number of solutions to be discussed. There can be no substantive discussions following the submission of final ten-

ders, although these may be clarified, specified and optimised at the request of the contracting authority. Limited (non-substantive) negotiations may also take place after the bidder with the most economically advantageous offer has been identified, with a view to finalising the terms of the contract.

Innovation Partnership

This aims at setting up a partnership between a contracting authority and one or more economic operators for the development of an innovative product, service or works meeting the contracting authority's minimum requirements. At the conclusion of the innovation phase, the contracting authority can purchase the resulting products, services or works without the need for a new procurement process, provided that these correspond to the performance levels and maximum costs agreed between the contracting authority and the participants. The actual process for setting up an innovation partnership is based on the procedural rules that apply to the competitive procedure with negotiation.

Competitive Procedure without Prior Publication

In certain limited and narrowly defined circumstances, the legislation permits member states to allow contracting authorities to award contracts without first having to advertise the requirement. Such cases include where there is an extreme urgency (not attributable to the contracting authority) or where the requirement can only be met by a particular economic operator as a result of technical reasons or the existence of exclusive rights (see further **5.2 Direct Contract Awards**).

In line with all other aspects of a procurement process, the conduct of negotiations (where this is permitted) is subject to the obligation to treat economic operators equally and without discrimination. Among other things, this means that the contracting authority cannot disclose the confidential information of one bidder to the other bidders without the former's agreement. Any such agreement cannot take the form of a general waiver. Instead, consent may only be granted with reference to the intended disclosure of specific information.

Where the competitive procedure with negotiation is used, negotiations are not permitted once final tenders have been submitted. However, where the competitive dialogue procedure is used, final tenders may be clarified, specified and optimised at the request of the contracting authority. Limited (non-substantive) negotiations may also take place after the identification of the most economically advantageous tender, with a view to finalising the terms of the contract.

2.4 Choice/Conditions of a Tender Procedure

The legislation permits the conduct of an open or restricted procedure at the discretion of the contracting authority. The use of the other procedures, as outlined in **2.3 Tender Procedure for the Award of a Contract**, is only permissible where specific conditions are met.

The competitive procedure with negotiation and the competitive dialogue can be used only where one of the conditions below applies:

- the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- the contracting authority's needs include design or innovative solutions;
- the contract cannot be awarded without prior negotiation because of specific circumstances related to its nature, complexity or financial and legal make-up or because of risks attaching to them;

- the technical specifications cannot be established with sufficient precision by the contracting authority; or
- in response to an open or restricted procedure, only irregular or unacceptable tenders were submitted.

As noted earlier, the innovation partnership, which also involves negotiations, may be used where there is a need for the development of new products, services or works, whilst the use of the negotiated procedure without prior publication is considered an exceptional procedure that can only be used in limited and narrowly construed circumstances (see also **5.2 Direct Contract Awards**).

2.5 Timing for Publication of Documents

The legislation generally requires contracting authorities to offer online unrestricted and full direct access to the procurement documents from the date of the publication of the contract notice in the OJEU (although certain exemptions apply).

The definition of the "procurement documents" in the legislation is broad and essentially captures all documents that are relevant to the carrying out of a procurement process, including the contract notice, the technical specifications, an invitation to tender or negotiate, any document that describes the requirements or the rules of the competition and the proposed conditions of contract. Although the wording of the legislation does not clarify this issue, it is arguable that this obligation applies only in relation to documents that are capable of publication at the start of the process. However, this interpretation has yet to be confirmed by the courts. In view of the uncertainty over this issue, it is not unusual for contracting authorities to issue some of the procurement documents as drafts at the start of the process and re-issue these in a final form at a later stage of the process.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The legislation sets certain minimum time limits, but these vary depending on which procedure is used and whether certain conditions are met.

Open Procedure

As a general rule, the minimum time limit for the receipt of tenders is 35 days from the date on which the contract notice was sent to the OJEU for publication. However, this time limit may be shortened to 30 days where the contracting authority accepts the submission of tenders by electronic means and to a minimum of 15 days in certain circumstances, including where the requirement is urgent.

Restricted Procedure and Competitive Procedure with Negotiation

The minimum time limit for receipt of requests to participate in the process is generally 30 days from the date on which the contract notice was sent to the OJEU for publication. This period may be reduced to a minimum of 15 days if the requirement is urgent. The minimum time limit for the receipt of tenders (or initial tenders in the case of the competitive procedure with negotiation) is 30 days from the date on which the invitation is sent. This limit may be shortened to between 10 and 25 days in certain circumstances, including where the requirement is urgent.

Competitive Dialogue Procedure and Innovation Partnership

The minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is sent to the OJEU.

Irrespective of any minimum time limits permitted by the legislation, contracting authorities

have an obligation to take into account the complexity of the contract and the time required for drawing up tenders when fixing the time limits for the receipt of tenders and requests to participate.

2.7 Eligibility for Participation in a Procurement Process

In determining whether interested parties might be eligible for participation in a procurement process, contracting authorities may only take into account a candidate's suitability to pursue a professional activity, its economic and financial standing, and its technical and professional ability.

The legislation sets out detailed rules as to how these criteria may be taken into consideration at the selection stage of a procurement process and the type of evidence that contracting authorities may ask applicants to provide, so as to prove compliance with specific requirements in this regard. In this context, contracting authorities have an obligation to ensure that any selection requirements they impose are related and proportionate to the subject matter of the contract.

Separately, the legislation requires contracting authorities to consider whether applicants have committed certain offences that would normally require their exclusion from the competition (the mandatory exclusions). Contracting authorities may also exclude, or may be required by a member state to exclude, from the competition interested parties that find themselves in certain situations (the discretionary exclusions).

The exclusion period is five years from the date of the economic operator's conviction in relation to mandatory exclusions, and three years from the date of the relevant event (a reference that case law has interpreted as the date when the wrongful conduct was established) in relation to discretionary exclusions. The right or obligation to exclude is limited to a maximum of three years where discretionary grounds for exclusion apply and to five years where the grounds for exclusion are mandatory. In both cases the legislation permits a longer or shorter exclusion period if this is set by final judgment.

An economic operator that finds itself in one of the circumstances that require or permit disqualification may avoid this if it can demonstrate to the satisfaction of the contracting authority that it has taken appropriate "self-cleaning" measures.

2.8 Restriction of Participation in a Procurement Process

When using one of the competitive procedures other than the open procedure, contracting authorities may restrict participation in a competition to only a small number of qualified applicants. The legislation requires that the decision as to which applicants should be shortlisted must be made on the basis of objective and non-discriminatory criteria or rules, which must be disclosed at the start of the process.

The legislation requires the shortlisting of a minimum of five applicants when using the restricted procedure and a minimum of three when using the competitive process with negotiations, the competitive dialogue and the innovation partnership. However, where the number of applicants meeting the relevant requirements is below the minimum number set in the legislation, the contracting authority may continue with the procedure by inviting the applicants that meet the minimum conditions for participation, provided that there is a sufficient number of qualifying applicants to ensure genuine competition.

2.9 Evaluation Criteria

A contracting authority must award the contract to the bidder with the most economically advan-

tageous tender, from the point of view of the contracting authority. The tender that is the most economically advantageous must be determined by reference to price or cost alone, or the best price-quality ratio, which must be assessed on the basis of criteria that are linked to the subject matter of the contract. These may include qualitative, environmental or social aspects. The cost element may also take the form of a fixed price or cost, on the basis of which, bidders then compete on quality criteria only.

The criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority (which would be the case if, for example, the criteria were not clearly defined). The criteria must also ensure the possibility of effective competition, enabling an objective comparison of the relative merits of the tenders. They must also be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

The selection criteria, including the grounds for exclusion as well as the objective and non-discriminatory criteria or rules on the basis of which the contracting authority will determine the qualified applicants that will be invited to participate in the competition, must be disclosed at the start of the process. Equally, the award criteria and their weightings must be disclosed in the procurement documents that are published at the start of the process.

Over and above the specific obligations in the legislation that relate to the disclosure of selection and award criteria, the case law of the CJEU has clarified that a contracting authority must disclose all elements to be taken into account in the evaluation (which are likely to affect the preparation of tenders) including sub-criteria and their weightings.

In practice, and in order to limit the risk of non-compliance in this context, contracting authorities in many member states tend to disclose the full evaluation methodology at the start of the procurement process, or, at the very least, well in advance of the submission of tenders, allowing a reasonable opportunity for bidders to take account of the methodology when preparing their submissions.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The legislation does not create an explicit obligation on contracting authorities to inform unsuccessful applicants of the decision to reject their application to participate in a competition and the reason for that decision in a timely manner.

Instead, the legislation provides that, where the contracting authority has not informed an applicant of its decision to reject its application and the reasons for that decision at an earlier stage in the process, the contracting authority must do so before commencing the standstill period that must precede the award of the contract (see further **3.4 Requirement for a "Standstill Period"**).

In practice, contracting authorities choose to inform unsuccessful applicants of their rejection and the reasons for this without undue delay, not least so as to limit the risk of a challenge against that decision at a later stage in the process.

Separately, the legislation provides that where an unsuccessful applicant requests in writing information about the reasons for the rejection of its request to participate in the competition, the contracting authority is required to provide this information as quickly as possible and in any event within 15 days from receipt of the written request.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Bidders must be informed about the contract award decision as soon as possible after that decision has been made. In notifying bidders of that decision, the contracting authority must specify:

- a summary of the reasons for the decision, including the relative advantages and characteristics of the successful tender;
- the name of the successful tenderer; and
- confirmation of when the standstill period (see **4. Review Procedures**) will expire.

The notice communicating the contract award decision is normally sent electronically, although facsimile and "other means" are, in principle, also permissible.

In certain circumstances, the contracting authority also has an obligation to notify the contract award decision to rejected applicants, as well as to bidders that might have been eliminated at earlier stages of the competition.

3.4 Requirement for a "Standstill Period"

The relevant legislation requires the contracting authority not to conclude the contract before the expiry of a standstill period, following the notification of the contract award decision to bidders. The length of that period depends on the means of communication used to notify the contract award decision. Where all bidders have been notified of that decision electronically, the standstill period must be a minimum of ten clear calendar days.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

It is for member states to determine which body or bodies should be responsible for review procedures. At the same time, the Remedies Directives require that a review body that is not judicial in character must always give written reasons for its decisions.

In addition, any allegedly illegal measure taken by a non-judicial review body or any alleged defect in the exercise of the powers conferred on it must be capable of judicial review or review by another body that is a court or tribunal within the meaning of Article 267 of the TFEU and independent of both the contracting authority and the review body.

A party that has concerns about the validity of a contracting authority's decision (and irrespective of whether or not it has standing to bring a challenge under procurement legislation) may complain to the European Commission. The European Commission is not obliged to pursue that complaint further, but if it does, this may ultimately lead to infraction proceedings, under Article 258 of the TFEU, against the member state of the contracting authority for breach of an EU law obligation.

4.2 Remedies Available for Breach of Procurement Legislation

Member states must ensure that review procedures available for a breach of the legislation include provision for powers to:

- take interim measures, including measures to suspend a contract award procedure or the implementation of a contracting authority decision, with a view to correcting the alleged infringement or preventing further damage to the interests concerned;
- set aside, or ensure the setting aside of, decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; and
- award damages to persons harmed by an infringement.

Where damages are claimed on the grounds that a decision was taken unlawfully, the relevant legislation also allows member states to require first the setting aside of the contested decision.

Separately, member states must ensure that a contract is considered ineffective by a review body independent of the contract authority where:

- the contract was awarded without the prior publication of a notice in circumstances where one was required;
- there has been a breach of the automatic suspension or standstill obligations depriving the claimant of the possibility to pursue pre-contractual remedies and this is combined with an infringement of the procurement legislation that has affected the chances of the claimant to obtain the contract; and
- in certain circumstances (under the Public Sector Directive), there has been a breach of requirements for the award of contracts under a framework agreement or a dynamic purchasing system.

It is for member states to decide whether the consequences of a contract being rendered ineffective should be the retrospective or prospective cancellation of contractual obligations. If the latter, this must also be accompanied by a fine that must be effective, proportionate and dissuasive.

4.3 Interim Measures

As noted in the previous section, member states must ensure that review procedures include provision for powers to take interim measures.

In addition, when a body of first instance, which is independent of the contracting authority, reviews a contract award decision, member states must ensure that the contracting authority cannot conclude the contract before the review body has decided either an application for interim measures (to lift the prohibition on concluding the contract) or the claim.

The relevant legislation permits member states to require that a complainant first seeks review with the contracting authority. In that case, member states must ensure that the submission of such an application for review results in the immediate suspension of the possibility to conclude the contract. This suspension must last at least until after the expiry of ten calendar days, with effect from the day following the date on which the contracting authority has sent a reply by electronic means.

4.4 Challenging the Awarding Authority's Decisions

A breach of the legislation is actionable by any economic operator that is owed a duty under the legislation and that has been, or risks being, harmed by an alleged infringement of the legislation. As noted in **1.4 Openness of Regulated Contract Award Procedure**, a contracting authority owes a duty of compliance with the legislation to economic operators from (i) the EEA, (ii) a GPA state (other than an EEA state), or (iii) a country with which the EU has a bilateral

agreement, but in relation to (ii) and (iii), only to the extent that the procurement in question is covered by the GPA or that agreement, respectively.

4.5 Time Limits for Challenging Decisions

The relevant legislation requires a claim seeking the remedy of "ineffectiveness" to be made within a period of six months starting from the day following the date of the conclusion of the contract. Where the contracting authority has published a contract award notice in the OJEU, or has informed the relevant economic operator of the conclusion of the contract and provided a summary of the reasons leading to the award of that contract, the period for bringing a claim is shortened to 30 days from the date of publication of the contract award notice, or the date on which notice of the conclusion of the contract (together with a statement of reasons) was provided to the relevant economic operator.

As regards the limitation period that may apply to claims for other types of remedies, this is for member states to decide, subject to certain conditions. These include a requirement for the minimum time period to be ten calendar days starting from the day after the date on which the decision was notified electronically to a tenderer or candidate, or, where a decision is not subject to any specific notification requirements, ten calendar days from the date of the publication of the decision concerned.

Separately, in Case C–406/08, Uniplex, the CJEU concluded, among other things, that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

4.6 Length of Proceedings

All member states are required to ensure that decisions taken by contracting authorities in relation to regulated contracts are reviewed effectively and, in particular, as rapidly as possible. At the same time, the length of proceedings varies greatly between member states. National review systems where alleged breaches of procurement law are dealt with (in the first instance) by specialist tribunals or boards tend to deal with claims more quickly than court-based review systems.

4.7 Annual Number of Procurement Claims

The number of claims varies between more than a thousand to fewer than ten per year, depending on the member state.

4.8 Costs Involved in Challenging Decisions

The costs vary greatly between member states, with court-based review systems likely to be more costly.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

The 2014 Procurement Directives incorporate provisions that regulate the modification of contracts, following their award. These prohibit substantial modifications. In brief, a modification will be deemed substantial when it:

- renders a contract materially different in character from the one initially concluded;
- introduces conditions that, had they been part of the initial procurement procedure, would have:
  - (a) allowed for the admission of other candidates than those initially selected;
  - (b) allowed for the acceptance of an offer

other than that originally accepted; or
(c) would have attracted additional participants in the procurement procedure;
- changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract;
- extends the scope of the contract considerably; or
- involves the replacement of the original contractor (unless "safe harbour" provisions apply – see below).

At the same time, the relevant legislation incorporates certain provisions that specify the conditions under which a modification would not be deemed to constitute a substantive modification, and, as such, would be permissible (generally referred to as the "safe harbour" provisions). These rules differ in certain respects, depending on whether the contract is subject to the Public Sector or the Utilities Directive or whether a concession contract is awarded by a contracting authority in the exercise of an activity that is not regulated under the Utilities Directive. Briefly, modifications would not be deemed to be substantive where they:

- have already been provided for in the original procurement documents in clear, precise and unequivocal review clauses, and provided that these do not alter the overall nature of the contract;
- relate to the provision of additional requirements by the original contractor that are outside the scope of the original procurement, but where a change of contractors is not possible for economic or technical reasons and where it would cause significant inconvenience or substantial duplication of costs for the contracting entity and the value of the modification does not exceed 50% of the value of the original contract (this value rule does not apply to utility procurements);
- have become necessary as a result of circumstances that a diligent contracting authority could not foresee and the modification does not alter the overall nature of the contract and the value of the modification does not exceed 50% of the value of the original contract (this value rule does not apply to utility procurements);
- are limited to the replacement of the original contractor with a new one in certain circumstances, including where this is the result of corporate restructuring, and the new contractor meets the original selection criteria and this does not entail other substantial modifications and is not aimed at circumventing the rules;
- are not "substantial" within the meaning of the legislation (as described above); and
- are of a value that is below the relevant value threshold for the application of the rules, and less than 10% (for services or supplies) or 15% (for works) of the value of the original contract, and provided that there is no change to the overall nature of the contract – the value must be calculated cumulatively if there are successive modifications.

The second and third safe harbour provisions also require the publication of a "modification of contract" notice in the OJEU.

5.2 Direct Contract Awards

As noted earlier in this chapter, the legislation permits member states to allow contracting authorities to award contracts without having to advertise the requirement in the OJEU and conduct a competitive tender process in certain limited circumstances, including where:

- no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open or restricted procedure, provided

that, among other things, the initial conditions of the contract are not substantially altered;
- where the requirement can be met only by a particular economic operator as a result of technical reasons or the existence of exclusive rights;
- it is strictly necessary to make the direct award for reasons of extreme urgency brought about by events unforeseeable by the contracting authority and the time limits for the open, restricted or competitive procedure with negotiation cannot be complied with;
- in so far as is strictly necessary, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, it is not possible to comply with the time limits for the open or restricted procedures or the competitive procedures with negotiation; and
- additional supplies are necessary, and a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance, and where certain other conditions are met.

5.3 Recent Important Court Decisions

In Remondis Gmbh v Abfallzweckverband Rhein-Mosel-Eifel (Case C-429/19), a reference for a preliminary ruling, the CJEU provided important guidance on the application of the exemption under the Public Sector Directive for contracts that establish or implement co-operation between two or more contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common.

The districts of Mayen-Coblenz, Cochern-Zell and the town of Coblenz entrusted the performance of waste disposal tasks to an association that they controlled jointly. The association then entrusted 80% of its municipal waste disposal operations to private undertakings. The remaining 20% was undertaken by the district of Neuwied under an agreement with the association that, among other things, provided for the reimbursement of the district's costs. The claimant, in the main proceedings, argued that this agreement gave rise to a public contract that had to be put out to tender.

In its decision, the CJEU noted that the joint participation of all the parties to the co-operation agreement was essential to ensure that the public services they had to perform were provided. This condition could not be deemed to be satisfied where the sole contribution of certain contracting parties went no further than a simple reimbursement of costs. The contracting authorities intending to conclude an (exempt) co-operation agreement had to establish jointly their needs and the solutions to be adopted. By contrast, that stage of assessing and establishing needs was, as a general rule, unilateral in the case of the award of a normal public contract. In the latter case, the contracting authority did no more than launch a call for tenders setting out the specifications that it had itself drawn up.

In this instance, the documents did not indicate that the conclusion of the agreement was the culmination of a process of co-operation between the association and the District. Instead, the sole purpose of the agreement at issue appeared to be that of acquiring a service in return for the payment of a fee. The fact that the fee was limited to the reimbursement of costs was immaterial. As such, the court held that the contract at issue would not be covered by the exemption for co-operation between contracting authorities.

5.4 Legislative Amendments under Consideration

The EU is not currently contemplating any substantive changes to its public procurement legislation.

However, a White Paper on foreign subsidies was adopted by the European Commission on 17 June 2020 that could have an impact on public procurement if the proposals are subsequently adopted in legislation.

The White Paper puts forward several modules aimed at addressing the distortive effects on competition caused as a result of subsidies granted by third countries. Module 3 sets out proposals to address the potentially distortive effects of foreign subsidies in the carrying out of EU public procurement procedures.

Under the proposals, where a review by the relevant supervisory authority confirms that an economic operator has received a foreign subsidy, the contracting authority would determine whether that subsidy has distorted the public procurement procedure. If so, it would be required to exclude this economic operator from the ongoing procurement procedure. The existence of a foreign subsidy could also result in the exclusion of the subsidised bidder from future public procurement procedures for a maximum period of three years.

Pinsent Masons has one of the largest and most dynamic procurement practices in the UK and Europe. The practice spans all major sectors, including regeneration, defence, transport, energy, water and infrastructure, and advises both regulated procurers as well as suppliers bidding for public or regulated utility contracts. The practice is recognised for its ability to provide practical and commercially focused advice on complex procurements across the UK and abroad. Contentious and non-contentious procurement lawyers in the team work closely together to ensure that clients are provided with innovative strategic advice that anticipates and minimises legal risks. The team covers a diversity of matters, covering all aspects of procurement regulation, including the highly specialised defence sector, utility procurements in the transport, energy and water sectors, major central government procurements as well as local authority, health and education sector procurements. The team also advises clients on all aspects of the World Trade Organization's plurilateral Agreement on Government Procurement.

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ISRAEL

Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

The following legislation regulates the procurement of government contracts in Israel:

- the Mandatory Tenders Law, 1992 (the Mandatory Tenders Law);
- the Mandatory Tenders Regulations, 1993 (the Mandatory Tenders Regulations or the Regulations);
- the Municipalities Regulations (Tenders), 1987 (the Municipalities Regulations (Tenders));
- the Contracts Law (General Part), 1973;
- the Contracts (Remedies for Breach of Contract) Law, 1970;
- the Municipal Ordinance (New Version), 1964;
- the Mandatory Tenders Regulations (Contracts of Institutions of Higher Education), 2010;
- the Mandatory Tenders Regulations (Defence Establishment Contracts), 1993;
- the Mandatory Tenders Regulations (Preference for Israeli Made Goods), 1995; and
- the Law for the Promotion of Competition and Reduction of Concentration, 2013.

Aside from the general legislation pertaining to all public contracts, sector-specific compliance is embedded in the following statutes:

- the Municipalities Regulations;
- the Mandatory Tenders Regulations (Contracts of Institutions of Higher Education), 2010;
- the Mandatory Tenders Regulations (Defence Establishment Contracts), 1993; and
- the Mandatory Tenders Regulations (Preference for Israeli Made Goods), 1995.

1.2 Entities Subject to Procurement Regulation

The application of procurement legislation to entities is rooted in two sources: tender law and municipal regulations. In section 2(a) of the Mandatory Tenders Law, a "public body" is defined as the state and any government corporation, religious council, health fund and institution of higher education.

The local authorities issued the Municipalities Regulations (Tenders), in terms of which the duty to conduct tender procedures (subject to specific circumstances) is incumbent upon all local authorities in Israel.

Entities that are not included in section 2(a) of the Mandatory Tenders Law and do not constitute local authorities are not directly required to conduct tender procedures. However, the Supreme Court has previously held that even public entities that are not directly subject to the Mandatory Tenders Regulations are bound by the general principles of public procurement, although this is not expressly stipulated in either the law or regulations.

According to section 1B(a) of the Regulations, it is preferable that a public body conduct public tenders to the extent that provision is made so that a public body shall opt to contract by way of a regular public tender, even where it is permitted under the Regulations to contract other than by way of a regular public tender. Accordingly, even a public body that is exempt from tendering should still follow this procedure.

However, pursuant to section 1B(d) of the Mandatory Tenders Regulations, if a public body elects to contract other than by way of tender, such decision shall be made in accordance with the Regulations after examining the feasibility of conducting a tender and in so far as this is justified and reasonable in the circumstances of

the case. Therefore, a public body not having to conduct a tender process would be subject to the fulfilment of certain conditions.

In this regard, section 3 of the Mandatory Tenders Regulations sets out numerous grounds on the basis of which a public authority may be exempt from tendering. These grounds are subject to factors such as the value of the contract, its subject matter or whether or not the contract requires urgent execution. Since not contracting by way of tender is subject to both statutory and subjective criteria, there is no automatic rule that exempts public bodies from the tender process.

1.3 Types of Contracts Subject to Procurement Regulation

According to section 3(1) of the Mandatory Tenders Regulations, a contract entered into by a Ministry for the execution of a transaction involving goods or land, for the execution of work or for the purchase of services, does not require tendering where the contract encompasses one of the following.

- A contract having a value not surpassing ILS50,000. However, in any consecutive period of 12 months, the Ministry may not contract with a specific party, absent a tender, pursuant to this section 3(1), for a sum totalling in excess of ILS100,000, including contracts concluded within such 12-month period as continuation contracts (as defined in section 3(4) of the Regulations) of a contract originally entered into pursuant to this section.
- A contract involving a transaction whereby conducting a tender can result in significant harm being caused to the security of the State, its foreign relations and economy, public security or a professional or trade secret of the Ministry if the value of the contract does not exceed ILS2.5 million. (Such contract would necessitate the approval of the Attorney General or their designate.)

Likewise, according to section 34 of the Regulations, which specifically refers to government companies, a contract entered into by a government company for the execution of a transaction involving goods or land, for the execution of work or for the purchase of services, does not require tendering, if it similarly encompasses one of the following:

- a contract whose value does not exceed ILS200,000, if the counterparties thereto are companies whose annual volume of contracts is valued to be in excess of ILS1 billion or a contract whose value does not exceed ILS600,000; or
- a contract of a government company in privatisation supervision, as defined in the Government Companies Law, 1975, whose annual volume of contracts is valued to be in excess of ILS2,080,000, provided that the contract value does not exceed ILS3 million.

Falling below the financial threshold is not the only criterion that would dispense with the procurement process. In fact, there are other instances where the procurement process is not required, such as in respect of contracts entered into by the Bank of Israel involving the printing of currency or imports by the defence establishment that are funded by foreign military financing.

1.4 Openness of Regulated Contract Award Procedure

As a general rule, the Mandatory Tenders Law specifies that the tender process shall be equally open to any person (or entity), without discrimination between the participants and potential bidders. Nevertheless, it is clarified that any distinction or other pre-condition for participation in the tender, which is required due to the

nature or essence of the tender shall not be deemed as prohibited discrimination. Accordingly, in the vast majority of the tender (and pre-qualification) procedures for public procurement and government contracts, a participant or any member thereof, including interested parties in such member, directors or managers thereof, and including individuals, shall not be residents or nationals of a country which does not have diplomatic relations with the State of Israel. In addition, in some of the tenders and pre-qualification procedures for public procurement and government contracts, the participant itself must be duly incorporated in, or a resident of, the State of Israel.

1.5 Key Obligations

Firstly, it is mandatory for a public body to conduct a tender when holding a tender process and the possibility of obtaining an exemption from doing so is an exception (section 2 of the Mandatory Tenders Law). When a public body conducts a tender or makes an individual approach following a tender, it must do so in a transparent, fair, and equitable manner – given the circumstances of the case – to ensure maximum benefits are garnered for the public body (section 1A of the Mandatory Tenders Regulations). Moreover, the public body is duty-bound to act in good faith, which duty is imposed on it by virtue of case law and is also obliged to act with clean hands. In addition, the Tender Committee must act in the absence of a conflict of interest, and in the strong belief that the Tender Committee and those acting on its behalf have no connections to any of the potential bidders in the tender. With regard to some of these duties – namely, where the public body invites a bidder to participate in the clarification process – they must be done in coordination with the Tender Committee and documented in minutes maintained by the Tender Committee.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

The Mandatory Tenders Regulations mandate the prior publication of regulated contract award procedures (viz, a public tender).

- Publication – where a Ministry wishes to enter into a contract that mandates a public tender, the Tenders Committee shall publish a notice to that effect in a widely circulated newspaper, in an Arabic-language newspaper and on the website. The notice on the website shall be published in Hebrew and in Arabic. The notice shall be published a reasonable time before the deadline for the submission of bids.
- Information to be disclosed – the notice regarding the holding of a public tender shall set out, inter alia:
  (a) the nature of the proposed contract and a description of its subject, including any option to expand the scope of the contract;
  (b) the term of the proposed contract, including any option for extending its term;
  (c) the preconditions, if any, for participation in the tender;
  (d) the reasons, if any, for the rejection of a bid in a tender involving the purchase of manpower-intensive work or services;
  (e) the time and place where additional details and the tender documents can be received, and where payment, if any, for the tender documents may be made;
  (f) the deadline and place for submitting bids; and
  (g) the fact that the tender is: a negotiated tender, a tender with a prequalification stage, a tender with a two-stage evaluation, a public tender with additional competitive features, a dynamic automated tender or an expedited automated tender, as applicable.

2.2 Preliminary Market Consultations by the Awarding Authority

The Tenders Committee may elect to issue a preliminary request for information which it deems necessary for the purposes of launching the contract award procedure. Such request is nonetheless subject to compliance with the following: (i) the request shall be made publicly; (ii) the receipt of information and holding of discussions with those responding to the request ("respondents") shall be done in a fair and equitable manner; (iii) the Tenders Committee shall document any information received and discussions held with respondents; (iv) a response to a preliminary request for information shall not constitute a condition for participation in the actual tender, shall not confer on a respondent an advantage merely because they responded to the request, and shall not obligate such respondent's inclusion in the tender or contracting with him in any other manner; and (v) the information received is subject to the mandatory disclosure regulations.

2.3 Tender Procedure for the Award of a Contract

Section 1A(a) of the Mandatory Tenders Regulations requires that public bodies hold either a tender or a specific invitation process pursuant to a central tender, as transparently as possible in the circumstances of the case and on a fair and equitable basis, ensuring maximum advantages for the public body. Moreover, subsection (b) thereto states that a public body that opts to contract other than by way of tender pursuant to the Regulations, shall conduct the procedure as closely as possible according to the principles required for holding a tender. The reason for the preference for the aforementioned procedure – as reflected in both the legislation and case law – is the necessity for good governance, the implementation of the principle of equality, and in order to ensure the greatest possible inclusion of bidders.

The Regulations set out various other types of procedures that may be utilised by the awarding authorities, including a restricted public tender or a closed tender, or the granting of an exemption from the tender procedure based on the unique requirements relevant to the particular tender process.

According to section 7(a) of the Mandatory Tenders Regulations, negotiations can be conducted as part of a tender process, only if provisions allowing these negotiations are embedded in the tender documents.

In such circumstances, section 7(c)(2) of the Regulations requires that subsequent to the Tender Committee determining the final group of bidders, it shall engage in negotiations with every bidder so as to confer on each of them a fair and equitable opportunity in so far as their bids are concerned. Primarily, the negotiations should be conducted as set out below:

- in a manner ensuring the recordal of minutes that accurately reflect the content of the negotiations;
- in the presence of the legal adviser who is a member of the Tender Committee or his or her representative; and
- without there being any contact between a member of the Tender Committee or anyone on his or her behalf and any of the bidders, except by way of documented negotiations.

Additional conditions for the negotiations are set out in subsections 7(c)(3) to (6) of the Regulations, which prescribe as follows:

- Any action done in the framework of the negotiations, including the application to the bidder, any exchange of words and documents and the contents of the negotiations, shall be recorded in minutes.

- At the conclusion of the negotiations, every bidder in the final group of bidders shall be entitled, on a date to be determined by the Tender Committee, to submit a final bid to the tender box. If a bidder does not submit an additional bid, its first bid shall be deemed the final one.
- Following the submission of the final bids, no further negotiations shall be conducted with the bidders.
- The Tender Committee shall examine all the bids, including the bidders' first bids, and shall reach a decision.

Furthermore, complex bids must be recognised from the perspective of practicality in the process of the negotiations by promoting the success of the "best and final" submission. In accordance with this approach, the tender procedure will usually comprise two separate bidding phases. In the first phase, all qualifying financial proposals are opened and assessed. The price is then raised, which, in turn, triggers the second phase, in which only the proposals that meet the higher price will be considered. In practice, this additional negotiation process may be carried out among several bidders either in an open meeting with the bidders or through an online submission.

2.4 Choice/Conditions of a Tender Procedure

The Tender Committee of the awarding authority may determine that a tender be conducted as one with a prequalification stage, as a tender with a two-stage evaluation, as a public tender with additional competitive features, as a framework tender or as a combination of such tendering mechanisms, based on the nature of the contract and subject to the fulfilment of certain conditions as prescribed in the definition for the specific type of tender earmarked in the Regulations.

2.5 Timing for Publication of Documents

The Tender Committee shall allow for perusal of the tender documents comprising, inter alia, all of the following:

- the terms of the tender, including conditions for participation in the tender;
- the text of the bid of the participant in the tender, except if the Tender Committee has decided, for reasons to be recorded, that there is no room in the circumstances of the case for including such text;
- the text of the contract, including a timetable and payment terms, as well as detailed plans relating to implementation of the contract;
- if a guarantee is required – the type of guarantee, its terms, amount and duration;
- the criteria according to which the winning bid is to be chosen;
- any document or other information required in the opinion of the Tender Committee for the fair and proper conduct of the tender and to ensure acceptance of the bid that confers maximum advantage on the Ministry, including a mandatory requirement for the receipt of any document or information relating to the qualifications, experience or ability of the bidder; and
- if it is intended to prepare an estimate of the contract value – the existence of an estimate and the significance of such estimate for the tender process.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

No specific time limit is imposed but it is determined by law that the Tender Committee shall not consider bids that are not deposited in the tender box by the stated deadline for submission of the relevant bid.

2.7 Eligibility for Participation in a Procurement Process

As a general rule, the Mandatory Tenders Law determines that the tender shall not include a threshold condition for the participation of a bidder in the tender, unless such condition is required in view of the character or nature of the tender.

In this regard, section 2A(b) of the Mandatory Tenders Law establishes that if the tender publisher decides to specify stringent conditions for potential participants' eligibility in comparison to the conditions set out in the Schedule to the Mandatory Tenders Law, such determination must be explained within the tender documents. Among such conditions are seniority, previous experience, financial robustness and scope of production or supply.

In addition, section 6 of the Mandatory Tenders Regulations determines that the participation in a tender shall be conditional upon the following:

- registration in any registry required under law and obtaining the required permits under law for contracting purposes under the tender;
- compliance with any official Israeli Standard (if applicable);
- obtaining all required permits under the Public Entities Transactions Law, 1976 (which determines that any transaction entered into between a public entity (ie, the State of Israel, a funded body (supported by the State), a public institution and a publicly traded company in Israel) and an Israeli resident for the sale of an asset or the supply of services to the public entity, shall be conditional upon the submission to the public entity of all approvals attesting to proper bookkeeping practices on the part of such Israeli resident in accordance with the Income Tax Ordinance [New Version], 1961 and Value Added Tax Law, 1975); and
- compliance with applicable laws regarding employees' rights.

Pursuant to such section, it is also possible to mandate additional preliminary conditions for the participation in the tender, such as previous experience, scope of work, credentials, etc.

2.8 Restriction of Participation in a Procurement Process

There are various ways to limit the number of bidders participating in a procurement process including:

- by conducting a closed tender process (in accordance with section 4 of the Mandatory Tenders Regulations and pursuant to the procedure set out in section 16A thereof);
- by means of a referral from a supplier list (in accordance with section 3A of the Mandatory Tenders Regulations and pursuant to the procedure set out in section 16A thereof); and
- pursuant to a restriction made on a conditional basis that, although the tender may appear to be open to any potential body to submit a bid, there is a practical factor that distinguishes between entities that are eligible to participate in the tender and those that are not. This option may only be rendered possible in circumstances where the conditions imposed by the authority do not contradict the requirements and nature of the tender.

2.9 Evaluation Criteria

The criteria for selection of the bid that would confer maximum advantages on the tender holder are, wholly or partially:

- the price proposed or requested, as applicable;
- the quality of and any special features pertaining to the goods or the land, the work or the service proposed, and their suitability for the tender holder;

- the bidder's credibility, qualifications, experience, expertise and areas of specialisation;
- recommendations about the bidder, if required under the tender conditions, and the degree of satisfaction with the performance of previous contracts;
- the due compliance with special requirements laid down by the tender holder; and
- the bidder's conduct with respect to the preservation of employee rights, including the existence of a written negative opinion or a negative audit report in this respect by a Ministry with which the bidder contracted during the three years prior to the deadline for submission of the relevant bid.

The criteria for selection of the bid shall be determined in advance and the tender holder may not add further criteria after the tender is published.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

Pursuant to sections 17(b)(5) and 22(b) of the Regulations and by virtue of case law, the Tender Committee is obliged to include amongst the details in the tender documents each of the criteria, the secondary tests and the relative weight to be given for selection of the winning bid as well as the manner for evaluating the foregoing.

Thus, section 22(c) provides that the Tender Committee must detail in the tender documents the relative weight of each criterion and of the secondary tests to be established in fulfilment of such criterion. It must also detail the relative weight conferred on the various bids, based on the price that is proposed or requested, as applicable, as opposed to the quality scoring, and the manner for evaluating the quantity component as opposed to the quality component.

Generally, the tender documents are published at the beginning of the tender. Upon conclusion of the tender, the unsuccessful bidders can ask the Tender Committee how the scores for all the bids were distributed, as is usually done in practice.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Under the law, the Tender Committee must notify all bidders who participated in the tender of the results of the tender. Within the ambit of announcing the results of the tender, there is no obligation on the part of the Tender Committee to give reasons for its decision. However, after receiving the results of the tender, any unsuccessful bidder may review the decision of the Tender Committee in order to understand the reasons behind its decision.

3.3 Obligation to Notify Bidders of a Contract Award Decision

According to section 21(d) of the Mandatory Tenders Regulations, every participant in a tender shall be notified of the results of the Tender Committee's final decision.

According to section 21(e) of the Mandatory Tenders Regulations: "Any participant may, within 30 days from the date of delivery of the notice, peruse the minutes of the Tender Committee, its correspondence with the bidders, the professional opinions that were prepared at its request, the position of the committee's legal adviser and the winning bid in the tender, and receive a copy of these documents".

Notwithstanding this entitlement, the provision of information may exclude parts of the decision or the bid, the perusal of which could – in the opinion of the Tender Committee – reveal a

trade or professional secret or harm the State's security, foreign relations, economy or public security. Furthermore, a legal opinion that was prepared in the framework of legal advice given to the Tender Committee, including an examination of possible alternatives to an action or decision of the Tender Committee or an assessment of the prospects and risks resulting from such decisions in future legal proceedings, will also not be disclosed.

To the extent that a bidder does not request the procurement file within 30 days, the bidder will not be barred from perusing the documents and may do so by exercising its rights in accordance with the Freedom of Information Law, 1998, by submitting an appropriate request for this.

A late decision by a bidder to exercise such right of perusal will make it more difficult to prepare the appropriate request and may cause delays in the submission thereof.

3.4 Requirement for a "Standstill Period"

The Regulations are silent as to whether notification should be made before or after the contract with the successful bidder is concluded. Nonetheless, it is inevitable that notification to an unsuccessful bidder be provided after signing the contract for award of the tender with the successful bidder, as doing so will impede any possible attack on the Tender Committee's decision.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

The Court for Administrative Matters is the authority to which review applications are addressed. There is no intervening authority in this regard and, accordingly, any remedies to be granted will be awarded solely by said Court.

A judgment handed down in relation to either an administrative petition or administrative action can be appealed to the Supreme Court. Additionally, administrative proceedings are sometimes conducted in a civil court, for example, a private tender (as opposed to a public tender), a claim relating to a contract that was awarded following a tender, and certain types of financial claims against an authority.

Furthermore, tenders are often urged to be handled by district courts – for example, municipal company tenders.

4.2 Remedies Available for Breach of Procurement Legislation

For any infringement of the procurement rules, bidders may claim for damages. However, damages arising from infringement of the procurement rules – especially when the relief sought amounts to damages for loss of profits – are particularly difficult to attain. Aggrieved tenderers will have to obtain an interim order, launch an application to set aside the award and only then proceed to institute an administrative action. In the administrative petition appeal of Ports Authority v Tzomet Engineers, Planning, Coordination and Projects Administration Ltd, PD 59(2) 145, the judge held that expectation damages should be awarded only in cases of bad faith on behalf of the contracting authority – an element that is difficult to prove. Moreover, the courts for administrative matters have adopted – as a rule – the strict limitation in respect of damages claims as set out in the administrative petition appeal of The Broadcasting Authority v Katimora Ltd, Supreme Court Judgments 2007(3) 2403 (2007). This often results in the aggrieved tenderer not having an opportunity to put forward the merits of the case before it is dismissed on procedural grounds.

Furthermore, the court's decision following the completion of a review application regarding

defective conduct on the part of an authority in a tender process – either in relation to the successful bidder or in relation to actions carried out by the Tender Committee itself – may result in the cancellation of the tender procedure or in the cancellation of the winning bid and, by default, the cancellation of the contract with the successful bidder that came about by virtue of that tender procedure.

4.3 Interim Measures

There are tenders that contain provisions prohibiting the possibility of submitting claims for temporary relief. In addition, in the case of tenders in which the contract is carried out over time (such as a tender for services), even without an automatic suspension of the tender procedure, the service provider can be substituted as long as the court has accepted its claims and the applicant was announced as the second successful bidder (under the successful bidder) and named as such by the authority from the outset.

4.4 Challenging the Awarding Authority's Decisions

In accordance with the law, any bidder participating in a tender process, including a potential bidder, is entitled to apply to the court and contest the decision of the Tender Committee. This right will apply regardless of whether the application arises from a preliminary decision to make changes to the tender provisions, or from significant decisions regarding the rejection of bids, the transition from one stage to another in the tender process or a decision on a winning bid.

The ability to contest the Tender Committee's decisions will be subject to the tender provisions that relate to the applicable stage of the tender (eg, there are tenders that only allow for a decision to be challenged once the winner of the tender has been selected). In addition, the relevant tender stage will also determine the nature of the remedies that can be applied for in appealing the Tender Committee's decision (eg, there are tenders that prohibit the submission of applications seeking temporary relief, which may have the effect of delaying or suspending the continued conduct of the tender procedure). Naturally, contesting a decision of the Tender Committee will also be subject to delays.

An aggrieved tenderer that wishes to file an administrative petition is likely to go through several stages, the first of which – to prevent the contract from being awarded and executed by the successful tenderer – is the application for an interim order. The court may grant an interim order simply to preserve the status quo during the trial, subject to the fulfilment of the following three requirements:

- the aggrieved tenderer must show an arguable cause of action against the contracting authority;
- the aggrieved tenderer must show that it is likely to suffer irreparable harm if the interim order is refused; and
- the aggrieved tenderer must convince the court that, on the balance of probabilities, the harm that it will suffer should the interim order be refused will be greater than the harm that the contracting authority would endure if the relief applied for was awarded.

4.5 Time Limits for Challenging Decisions

According to the Courts for Administrative Matters Regulations, 2000 (section 3), an administrative petition must be lodged within 45 days of the date of publication of the contracting authority's contested decision, the date on which the contested decision was presented to the petitioner, or the date when it became known to it. Notwithstanding this, even an aggrieved tenderer that lodges an administrative petition within this statutory time limit still runs the risk of its petition

being denied on the basis of "objective circumstances", which would then mark the petition as being lodged in delay, despite the fact that the delay may have originated from circumstances over which it had no control.

4.6 Length of Proceedings

Once successfully lodged, the proceedings will be subjected to the normal duration in which a decision is generally rendered except in an instance of urgency. In the ordinary course, the duration will depend on the frequency of interim applications and decisions as well as whether or not witnesses are required. In an urgent matter, the aggrieved tenderer will have to prove the urgency prior to trying the merits of its case and, assuming its urgency plea succeeds, the court will likely expedite its decision.

As a general rule, administrative procedures are usually dealt with much more expeditiously than other civil cases as they do not involve the usual submission of pleadings, nor are the parties afforded the opportunity to cross-examine each other. Instead, examination is conducted by the court.

4.7 Annual Number of Procurement Claims

Israel is a country in which litigation proceedings are widespread. This fact, coupled with the considerable number of tenders that are conducted each year, has resulted in a large volume of procurement claims being considered or adjudicated before the relevant review body. No official public record or statistic exists in this regard, but it is probably fair to say that at least dozens of procurement claims are instituted annually.

4.8 Costs Involved in Challenging Decisions

For an administrative procedure, the costs involved would include attorneys' fees as well as court fees – both of which are estimated to total approximately ILS2,000. Of course, this amount does not include the cost of legal representation for filing the petition and conducting the litigation, which would largely depend upon the scope of the petition, the character and nature of the tender, the issues underlying the petition and the law firm hired to provide the services.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

According to section 8A of the Mandatory Tenders Regulations, subsection 11 thereto includes (as one of the powers of the Tender Committee) the ability to "approve a material change in the terms of a contract that was concluded pursuant to a tender". To this extent, amending a contract without initiating a new procurement procedure generally requires the approval of the Tender Committee. Assuming that such approval is not granted and the requested amendment is material, it is probable that a new procurement procedure will need to be initiated.

Notwithstanding this, once the tender stage has been concluded and the project is in the contract stage, there are certain circumstances in which the contract can be changed or adjusted without initiating a new procurement procedure. This is especially relevant when it comes to long-term contracts that may encounter circumstances that could not have been foreseen from the outset. Naturally, the ability to amend the contract will be subject to the rules of administrative and contract law.

In addition, public authorities that are governed by their own specific pieces of legislation will not be bound by the provisions of the Mandatory Tenders Law or the Regulations. For example, as set out in the Definition section of the Regulations, a "public body" specifically excludes the

defence establishment from its ambit. Therefore, when an amendment to a concluded contract is required by an authority that is governed by specific legislation, section 8A must be read in line with the relevant applicable legislation.

5.2 Direct Contract Awards

About 30 exemptions from mandatory tendering are listed in the Regulations, with the primary exemptions being:

- a contract having a value not surpassing ILS50,000;
- a contract that needs to be entered into urgently in order to prevent substantial damage;
- a contract involving a transaction whereby conducting a tender is liable to cause significant harm to the security of the State, its foreign relations and economy, public security or a professional or trade secret of a Ministry;
- a continuation contract the terms of which are identical to or more favourable than the initial contract with the customer; or
- a contract involving a transaction with a resident of a foreign country or a transaction which is to be implemented in a foreign country.

5.3 Recent Important Court Decisions

In the past year, several significant decisions have been rendered by the Supreme Court on the subject of tender law, including:

- Administrative Appeal 7293/20 Pangea DW v Israel Airports Authority (24.1.2021) – Pangea DW filed an administrative appeal with the Supreme Court challenging the Israel Airports Authority's decision in which Omega – Institute for Modern Teaching Ltd – was declared as the successful bidder in a tender for performing COVID-19 tests at Ben Gurion Airport. The court disqualified Omega from being awarded the tender, in light of it having failed to satisfy the threshold conditions related to the required previous experience of a bidder in the tender. The court ordered that the matter be returned to the Tender Committee for it to decide how to proceed with the tender. S. Horowitz & Co. represented Pangea DW in this appeal.
- Administrative Appeal 3597/20 4A Desalination Ltd. v the Ministries of Energy and Finance and the Water Authority (19.8.2020) – an administrative appeal was filed with the Supreme Court, relating to a tender published by the Ministries of Energy and Finance together with the Water Authority for the "Finance, Design, Construction, Operation, Maintenance and Transfer of a Sea-Water Desalination Facility" for a period of 25 years (known as Sorek B). This is the largest and most complex project of its kind in the world and its value is estimated to be ILS5–6 billion. S. Horowitz & Co. represented IDE Technologies, one of the bidders, in this appeal.

5.4 Legislative Amendments under Consideration

As far as the authors are aware, no proposals are under consideration by the legislator to change the existing legislation.

S. Horowitz & Co. was founded in 1921 and is one of Israel's largest firms. Many of the firm's lawyers are multilingual and have qualified and practised in locations including the USA, England and South Africa. S. Horowitz & Co. is the only Israeli member of Lex Mundi, the leading global network of independent law firms.

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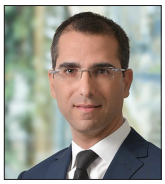
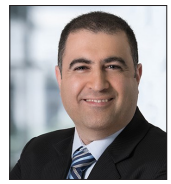
Uriel Prinz is a partner at S. Horowitz & Co. Uriel is a commercial litigator with extensive experience acting for clients on a broad range of complex corporate and commercial cases, with a particular focus on tenders and administrative law, construction, engineering and infrastructure-related disputes, energy sector disputes, technology and telecommunication sector-related disputes, and class actions. Uriel regularly handles the full range of aspects involved in construction, projects and tender-related disputes. He has been involved in many of Israel's largest BOT, PFI and PPP tenders. He has broad experience in successfully contesting and defending clients in cost overrun disputes, EPC contractual disputes, tender and government procurement disputes, and disputes concerning a wide variety of building and design defects.



Lior Mimon has outstanding expertise and extensive experience in tenders and administrative law, as well as administrative and civil litigation and commercial law. Lior represents and provides ongoing legal counsel to large leading government and private entities in a wide range of complex tenders and procurement procedures reaching billions of NIS, mainly in the field of energy and infrastructure, including the PPP and BOT method. Within his work, Lior provides ongoing legal counsel to tender committees, throughout all stages of the tender process, from drafting and editing the tender documents, to managing contacts with bidders, providing ongoing legal oversight and representation in court regarding the tender results.



Shlomi Delgo is a partner at the firm who advises on a broad range of corporate and commercial transactions, with a particular focus on corporate law, M&A, joint ventures, private equity, corporate governance, equity investments, shareholder disputes, corporate structuring, construction and development, energy and infrastructure, real estate, insolvency and tenders and government procurement contracts. In his tender and government procurement practice, Shlomi acts for bid vehicles, consortia and investors, as well as sponsors and issuers of tenders, at all stages of the tender process. He has extensive experience advising on procurement strategy, prequalification documents and drafting of tender documents, as well as advising clients throughout the entire tender process.

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KENYA

Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Broadly, the Constitution of Kenya, 2010 provides the general principles that govern the procurement process in Kenya.

More specifically, the process of procurement of government contracts in Kenya (public procurement) is regulated by the Public Procurement and Asset Disposal Act, No 33 of 2015 (the "Act") and the attendant subsidiary legislation, the Public Procurement and Asset Disposal Regulations, 2020 (the "Regulations") (both referred to as the "Procurement Laws").

1.2 Entities Subject to Procurement Regulation

The Procurement Laws apply to all State organs and public entities which utilise public money for purposes of procurement, ie, national government or a department thereof, county governments or a department thereof, parastatals, the Judiciary, public institutions and companies owned by a public entity, etc.

1.3 Types of Contracts Subject to Procurement Regulation

The Act applies to all state organs and public entities with respect to any contract for an acquisition by way of purchase, rental, lease, hire purchase, licence, tenancy, franchise, or by any other contractual means for any type of works, assets, services or goods or any combination thereof, and includes advisories, planning and processing in a supply chain system.

The Procurement Laws also apply to contracts for the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a State entity by any means including sale, rental, lease, franchise, auction or any combination thereof.

The Procurement Laws apply regardless of the value of the contract, that is, there is no de minimus which would result in exclusion or exemption from the Procurement Laws. However different procurement methods may apply dependent on the value, or the nature of the goods, services and works.

Permitted Public Procurement Methods

Procuring entities are permitted to utilise any of the following methods under the Act:

- open tender;
- two-stage tendering;
- design competition;
- restricted tendering;
- direct procurement;
- request for quotations;
- electronic reverse auction;
- low value procurement;
- force account;
- competitive negotiations;
- request for proposals; and
- framework agreements.

Notably, public procuring entities are permitted to utilise the low value procurement method where the estimated cost of the goods, works or services being procured per item per financial year is below the applicable threshold matrix of KES50,000 for goods and services and KES100,000 for works.

1.4 Openness of Regulated Contract Award Procedure

A tenderer is eligible to bid for a contract in procurement, only if the person satisfies a set of criteria which includes the requirements that:

- the tenderer has the legal capacity to enter into a contract for procurement or asset disposal;

- the tenderer is not insolvent, in receivership, bankrupt or in the process of being wound up;
- the tenderer, if a member of a regulated profession, has satisfied all the professional requirements;
- the procuring entity is not precluded from entering into the contract with the tenderer due to an order by the Director General of the Public Procurement Regulatory Authority;
- the person and their sub-contractor, if any, is not debarred from participating in procurement proceedings for compliance reasons listed in the Act;
- the tenderer has fulfilled their tax obligations;
- the tenderer has not been convicted of corrupt or fraudulent practices previously; and
- the tenderer is not guilty of any serious violation of fair employment laws and practices.

As regards the jurisdiction of the tenderers, the Procurement Laws do not prohibit tenderers from other jurisdictions. However, there are certain provisions which provide that preference shall be given to:

- firms where Kenyans are shareholders; or
- manufactured articles, materials and supplies partially mined or produced in Kenya or, where applicable, assembled in Kenya.

Additionally, preferential treatment may apply to the procurement of goods, services or works under any bilateral or multilateral agreements between Kenya's government and any other foreign government, agency, entity or multilateral agency.

Finally, the Act permits procuring entities to give preference to tenderers so as to enable disadvantaged persons (enterprises in which a majority of the members or shareholders are youth, women, persons with disability) more access to government contracts as is required in the Procurement Laws.

1.5 Key Obligations

Obligations for Procuring Entity

The key obligations under Kenyan procurement laws include:

- constitutional obligations – procurement procedures are required to be conducted in a manner that is fair, equitable, transparent, competitive and cost-effective;
- obligations to minorities and disadvantaged persons – the Act requires that at least 30% of government procurement opportunities be set aside for the youth, women and persons with disability;
- advertisement obligations – accounting officers are required to make an invitation to tender to all eligible bidders in line with the requirements of the Act as regards the details of the advertisement including but not limited to the contact details of the procuring entity and the manner in which the tender document is to be filled out and submitted for evaluation;
- procedural obligations – a procuring entity's head of procurement is obliged to provide a professional opinion no the proceedings, alongside the evaluation report submitted by the evaluation committee, for purposes of advising the accounting officer of the legality of the process; and
- reporting obligations – the head of procurement of a procuring entity is also under an obligation to maintain a list of the entity's suppliers, contractors and consultants for its procurement needs.

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2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

A procuring entity is under an obligation to take such steps as are necessary to bring the invitation to tender to the attention of those who may wish to submit tenders. In connection with this, if the value of the goods, works or services exceeds certain prescribed thresholds for advertising, the procuring entity will be under an obligation to advertise the tender in the state portal, or on its own website, or publish a notice in at least two daily newspapers of nationwide circulation. If the value of the goods, works or services is below certain prescribed thresholds for advertising, the procuring entity will be under an obligation to advertise the tender in the state portal as well as in a prominent place reserved for this purpose within its premises.

An invitation to tender should contain the following information:

- the name and address of the procuring entity;
- the tender number assigned to the procurement proceedings;
- a brief description of the goods, works or services being procured including the time limit for delivery or completion;
- an explanation as to how to get the tender documents, including the amount of any fee;
- an explanation of where and when the tenders shall be submitted and where and when the tenders shall be opened;
- a statement that those submitting tenders or their representatives may attend the opening of the tenders;
- applicable preferences and reservations pursuant to the Act;
- a declaration that the tender is only open to those who meet the requirements for eligibility; and
- requirement of serialisation of pages by the bidder for each bid submitted.

2.2 Preliminary Market Consultations by the Awarding Authority

Preliminary market consultations are implicit with respect to use of the following procurement procedures:

- restricted tendering;
- low value procurement;
- force account procurement;
- framework agreements; and
- specially permitted procurement by the National Treasury and community participation.

2.3 Tender Procedure for the Award of a Contract

The Act prescribes various tender procedures which may be used for procurement of goods, works and services, in different circumstances. Notably, open tendering shall be the preferred procurement method, with alternative procurement procedures available where permitted under the Act and prescribed conditions are met.

Alternative procurement procedures include:

- two-stage tendering;
- design competition;
- restricted tendering;
- direct procurement;
- request for quotations;
- electronic reverse auctions;
- low value procurement;
- force account;
- competitive negotiations;
- request for proposals;
- framework agreements; and
- specially permitted procurement.

Negotiations are permissible under the direct procurement method provided that the Act

is adhered to. An ad hoc evaluation committee appointed in accordance with the Act may negotiate on terms which include price, terms of contract, terms of delivery and scope of work or service.

Negotiations are also permissible in the procurement of consultancy services (Part X of the Act). In this instance the accounting officer of the procuring entity may negotiate with the person who submitted the successful proposal and may request and permit changes to the form of contract that had been supplied as part of the tender/bid documents. If the negotiations with the person who submitted the successful proposal do not result in a contract, the accounting officer may negotiate with the second person who submitted the proposal that would have been successful had the successful proposal not been submitted.

Finally, competitive negotiations are permissible where:

- there is a tie in the lowest evaluated price by two or more tenderers;
- there is a tie in highest combined score points;
- the lowest evaluated price is in excess of available budget; or
- there is an urgent need that can be met by several known suppliers

2.4 Choice/Conditions of a Tender Procedure

The choice of procurement procedure is not at the sole discretion of the procuring entity. The Act sets out the default procurement procedure for goods, works and services (open tendering). The Act permits use of alternative procurement procedures only where various criteria set out for use of those particular procurement procedures have been satisfied.

2.5 Timing for Publication of Documents

The obligation imposed by legislation is that the standard tender documents contemplated by the Act to be developed by the Public Procurement Regulatory Authority (the "Authority") and to be used by procuring entities shall bear references to, among other matters, procurement requirements, provision for dates and signatures of authorising officers.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The time limits for each procurement process are prescribed in the tender documentation issued by the procuring entity.

2.7 Eligibility for Participation in a Procurement Process

A person is eligible to bid for a contract in procurement if that person satisfies the following criteria:

- the person has the legal capacity to enter into a contract for procurement;
- the person is not insolvent, in receivership, bankrupt or in the process of being wound up;
- the person, if a member of a regulated profession, has satisfied all the professional requirements;
- the procuring entity is not precluded from entering into the contract with the person;
- the person and their sub-contractor, if any, is not debarred from participating in the procurement by reason of the preferences and reservations provisions of the Act or Regulations;
- the person has fulfilled their tax obligations;
- the person has not been convicted of corrupt or fraudulent practices; and
- the person is not guilty of serious violation of fair employment laws and practices.

A procuring entity is bound to ensure that its tender documentation contains a mandatory requirement of preliminary evaluation criteria specifying that the successful bidder shall:

- transfer technology, skills and knowledge through training, mentoring and participation of Kenyan citizens (to be evidenced by a local content plan in this connection); and
- reserve at least 75% employment opportunities for Kenyan citizens for works, consultancy services and non-consultancy services, of which not less than 20% shall be reserved for Kenyan professionals at management level.

2.8 Restriction of Participation in a Procurement Process

A procuring entity may use restricted tendering if any of the following conditions are satisfied:

- competition for the contract, because of the complex nature or specialised nature of the goods, works or services is restricted to prequalified tenderers who qualified pursuant to a prequalification procedure undertaken by a procuring entity in accordance with the Act;
- the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of goods, works or services to be procured;
- there is evidence to the effect that there are only a few known suppliers of the whole market of the goods, works or services;
- an advertisement is placed, where applicable, on the procuring entity website regarding the intention to procure through limited tender.

Where the procuring entity utilises restricted tendering as per bullet point two, the entity shall invite tenders from at least ten persons selected from the list they are under an obligation to maintain in accordance with the Act.

Where the procuring entity utilises restricted tendering by reason as per bullet point three, the entity shall invite tenders from all the known suppliers of goods, works or services.

2.9 Evaluation Criteria

Generally, tenders will be evaluated on the basis of the criteria set out in the tender documents: the Act requires that such criteria shall be, to the extent possible, objective and quantifiable.

Where the tender is for professional services, there will be regard for the selection method adopted by the procuring entity (the default of which is the quality and cost-based selection method) as well as the statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered. Alternate selection methods in a tender for professional services include, quality-based selection, least cost selection, consultants' qualification selection, individual consultants' selection, fixed budget selection and single source selection.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

There is an obligation to disclose the technical and financial evaluation criteria. These criteria are to be contained in any tender documents to be used by a procuring entity in a procurement process.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Where expressions of interest have been invited, the procuring entity is under an obligation to notify participants in writing of the results of the expression of interest. There is no express provi-

sion in the Act or the Regulations making it an obligation for the procuring entity to set out within such notification the reasons that informed the expression of interest results.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Before the expiry period during which tenders must remain valid, the procuring entity is under an obligation to notify in writing the person submitting the successful tender that their tender has been accepted. Simultaneously, all the unsuccessful bidders shall be notified in writing of the contract award decision (together with reasons – related only to their specific bid – on their lack of success).

A successful bidder in accordance with the Act is one who meets any one of the following as specified in the relevant tender document:

- the tender with the lowest evaluated price;
- the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where the request for proposals method is used;
- the tender with the lowest evaluated total cost of ownership; and
- the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an act of parliament which provides guidelines for arriving at applicable professional charges.

3.4 Requirement for a "Standstill Period"

The Act provides for a standstill period of 14 days as from notification of the contract award decision, provided always that the execution of the contract shall be signed within the tender validity period.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

Review of Awards

The Public Procurement Administrative Review Board (PPARB) has been granted the mandate under the Act to deal with any administrative reviews of procurement proceedings regarding the award of any government contract.

Review of PPARB Decisions

The Act enables persons aggrieved by the decisions of the PPARB to appeal further to the High Court and further to the Court of Appeal, should the legal circumstances permit any such further appeal.

4.2 Remedies Available for Breach of Procurement Legislation

Remedies from the PPARB

The remedies available to aggrieved parties at the PPARB include any of or a combination of:

- annulment of any violating conduct by the accounting officer or the procurement proceedings in their entirety;
- quasi-judicial orders for anything to be done or redone in the procurement proceedings to ensure compliance with the law;
- substitution of decisions of the PPARB with any invalid decision made by the accounting officer of the procuring entity;
- quasi-judicial orders for the payment of costs as between contentious parties; and/or
- quasi-judicial orders for the termination of procurement proceedings and the commencement of a new procurement process.

4.3 Interim Measures

Under the Act, a challenge from an aggrieved candidate at the PPARB triggers the immediate suspension of the contract award for a period of 14 days following notification of the appeal to

the PPARB as well as 14 days following the decision of the PPARB to allow for any subsequent appeal to be filed by an aggrieved party.

The PPARB Secretary is required to notify the accounting officer of the procuring entity of the pending review and the suspension of the procurement proceedings so as to ensure that no contract is signed by the successful candidate during the pendency of the procurement proceedings.

4.4 Challenging the Awarding Authority's Decisions

To have standing to request a review of an award before the PPARB, a party must produce evidence that they either:

- bought a tender document with the intention of bidding; or
- submitted a tender document.

4.5 Time Limits for Challenging Decisions

An aggrieved tenderer is required to file an appeal to the PPARB within 14 days of the award citing a breach of duty on the part of the procuring entity while ensuring to indicate the sections of the law that have been breached in the procurement process.

4.6 Length of Proceedings

The PPARB is required under statute to conduct and complete its review within 21 days of its receipt of the request for review. Similarly, the High Court, and any subsequent appeal through the Court of Appeal, is required to determine the appeals within 45 days of the filing of the relevant appeal. These timelines may, however, be affected by the ordinary delay experienced in the court system.

4.7 Annual Number of Procurement Claims

In recent years, the volume of procurement claims has been as follows:

- 2020 – 161 procurement claims;
- 2019 – 147 procurement claims; and
- 2018 – 169 procurement claims.

It is estimated that there are, on average, roughly 150 claims per year before the PPARB, excluding the matters that are contested further at the High Court or the Court of Appeal. It is impossible to determine how many matters proceed on appeal to the superior courts from decisions from the PPARB due to the lack of a register of pending court proceedings in Kenya.

4.8 Costs Involved in Challenging Decisions

The Regulations, at the Fifteenth Schedule, mandate the applicable filing fees for instigating a review of an award by a procuring entity. The filing fees for reviews by the PPARB are calculated on a graduating scale based on the value of the tender in question. Generally, filing fees for a review before the PPARB will depend on the ascertainable value of the contract under bid and will range from a minimum of KES5,000, for filing a preliminary objection, to a maximum of KES250,000 for unquantifiable tenders as well as for tenders that exceed KES50,000,000.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

Amendments to procurement contracts already awarded are permissible provided that the amendment has been approved in writing by the respective tender-awarding authority within a procuring entity as from 12 months after the date

of signing the contract and shall only be considered if the following conditions are satisfied:

- any price variation is based on the prevailing consumer price index obtained from the Kenya National Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;
- any quantity variation for goods and services does not exceed 15% of the original contract quantity;
- any quantity variation of works does not exceed 20% of the original contract quantity;
- any price or quantity variation is to be executed within the period of the contract; and
- any cumulative value of all contract variations does not result in an increment of the total contract price by more than 25% of the original contract price.

It is worth noting that the Regulations distinguish between a variation and amendment of a contract entered into following a tender award. An amendment is defined in the Regulations as a change to the terms and conditions of an awarded contract whereas a variation is defined as a change to the price, completion date or statement of requirements of an awarded contract.

5.2 Direct Contract Awards

Procuring entities may utilise direct procurement as long as the intention is not to avoid competition and provided that one of the following requirements have been satisfied:

- the goods, works or services are available only from a particular supplier or contractor, or a particular supplier;
- the supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;
- unforeseen circumstances such as war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical;
- owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;
- the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardisation or because of the need for compatibility with existing goods, equipment, technology or services; or
- for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares well with known prices of goods, works or services in the circumstances.

5.3 Recent Important Court Decisions

Recent Landmark Decisions

In a recent forum Webb Fontaine Group FZ – LLC v Public Procurement and Administrative Review Board & 3 others [2020] eKLR before the Court of Appeal, the appellant sought to have an award overturned on account of a purported illegality in the procurement proceedings. The PPARB had ruled prior that it lacked jurisdiction to hear the matters due to the appellant's delay in lodging a complaint as against the tendering process undertaken which resulted in the complaint being time bound. The appellant then proceeded to the High Court by way of a Judicial Review application which was also dismissed by the court on account that such an appeal would involve the Court delving into the merits of the decision in a manner to suggest that it was sitting on appeal of the decision itself which is not within its ambit.

Still being dissatisfied with the decision of the High Court, the appellant proceeded further to the Court of Appeal seeking to overturn the order of the High Court which preserved the award of the tender as is. The Court of Appeal, in dismissing the final appeal, found that any Request for Review ought to be filed within the time limits pronounced in the Act. The Court of Appeal held that where time limits have lapsed, the PPARB was correct in finding that it lacked the jurisdiction to hear any contentions over an award, particularly as the Act does not provide for an extension of this time. This further precluded the High Court from having the jurisdiction to hear the appeal before it brought by the appellant.

The significance of this decision lies in the importance of complying with time restrictions in the procurement process as the Procurement Laws do not provide for the extension of time under any circumstance. Any delay in contesting an award beyond the time permitted in the legislation will inevitably lead to a lack of forum through which to lodge any such complaint.

5.4 Legislative Amendments under Consideration

On 25 February 2021, the Cabinet Office in the Executive Office of the President released a press statement announcing, among other matters, that the Cabinet is to transmit to the Parliament for due consideration various bills, among them a Public Procurement and Asset Disposal (Amendment) Bill, 2020 (the "Bill"), as a priority be passed in its legislative programme for the year 2021. One of the key amendments in the current version of the Bill seeks to address issues pertaining to the delay in payments to local contractors and suppliers by the national and county governments. The Bill seeks to introduce payments by way of an Irrevocable Bank Guarantee so as to ensure that contractors are remunerated in a timely manner.

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CMS Daly Inamdar Advocates is a leading Kenyan law firm and is the Kenyan member firm of CMS, a leading global law firm, which has over 75 offices in over 43 countries, and over 4,800 lawyers. CMS Daly Inamdar Advocates is an independent, full-service Kenyan law firm that engages in corporate, commercial, property, litigation and arbitration practice. The firm comprises more than 30 lawyers and is one of the oldest and most reputable law firms in Kenya, with offices in Mombasa and Nairobi. The firm's team comprises experienced lawyers, several of whom are specialists in their fields. The firm's core practice areas are admiralty and maritime law, capital markets, company secretarial services, corporate and commercial law, energy, infrastructure, mining, employment, environmental law, finance, fintech and banking, foreign direct investments, insurance, intellectual property, litigation and dispute resolution, mergers and acquisitions, private client, property and real estate, and tax law.

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MACAU

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Macau law does not have general statutes governing the procurement of government contracts. Despite some general provisions in the Administrative Procedure Code, the matter is governed by different statutes that regulate the different government contracts and contract procedures, as detailed below.

- Decree-Law No 57/99/M, gazetted on 11 October 1999, which approved the Macau Administrative Procedure Code (MAPC), prescribes the general provisions applicable to public contracts (inter alia, public construction works contracts, public construction works concession contracts, public services concession contracts).
- Decree-Law No 122/84/M, gazetted on 15 December 1984, provides the regime of the expenses to be incurred with construction works and procurement of goods and services by the government, including the public departments with administrative autonomy, as well as the regime of the contract procedure to be followed for each type of expense. Decree-Law No 63/85/M, gazetted on 6 July 1985, provides the regime applicable to the public tender when such is required for the procurement of goods and services pursuant to Decree-Law No 122/84/M. The revision of these two decree-laws is currently under public consultation, as outlined in **5.4 Legislative Amendments under Consideration**.
- Law No 3/90/M, gazetted on 14 May 1990, provides the basis of the regime and procedure for the concession of public construction works and public services.
- Law No 14/96/M, gazetted on 12 August 1996, provides the obligation of the concessionaires of public construction works and public services to make public on an annual basis their respective balance sheet, the management report and the opinion of the supervisor or the supervisory board.
- Decree-Law No 74/99/M, gazetted on 8 November 1999, provides the regime of the public construction works contract, including the rules governing the negotiation of the contract, the applicable administrative procedures and the execution of the contract. According to this decree-law, the price of a public contract – ie, the consideration to be paid to the contractor – can be set out using two different regimes, global price or series of prices, which can be combined in the same construction works in respect of the different contractors involved and/or for tasks of a different nature.
- Dispatch No 52/GM/88, gazetted on 23 May 1988, establishes the procedure for the purchase of real estate assets by the public administration services.
- Dispatch No 66/2006 of the Secretary for Economy and Finance, gazetted on 20 November 2006, establishes instructions for the economic classification of income and expenses.
- Administrative Regulation No 6/2006, gazetted on 1 November 2006, establishes the financial regime of the public administration services.

1.2 Entities Subject to Procurement Regulation

The Macau government, public departments with administrative autonomy, autonomous services and funds are subject to procurement regulation.

1.3 Types of Contracts Subject to Procurement Regulation

The procurement of goods and services, the concession of public construction works and public services are subject to special statutes on procurement regulation.

In general, the minimum value thresholds serve as indicators to determine the type of procedures to be used in the public procurement procedures.

Based on the current law, when the public works contract is estimated to exceed MOP2.5 million, or the estimated cost for the acquisition of goods and services exceeds MOP750,000, the awarding authority shall organise the procurement by public tender. The revision of these minimum value thresholds has recently been proposed, as outlined in **5.4 Legislative Amendments under Consideration**.

1.4 Openness of Regulated Contract Award Procedure

For public works contracts, only entities registered in the Official List of Public Works Contractors of the Land, Public Works and Transport Bureau are admitted as tenderers; entities not established in Macau and that are not registered in the Official List of Public Works Contractors are only admitted in limited situations prescribed in the law and must evidence their registration as public works contractors in their own territory, for equivalence purposes.

With regard to procurement of goods and services by the government, there are no legal prerequisites for eligibility to bid on public sector opportunities, without prejudice to the requisites set out in the tender programme.

Please refer to **2.7 Eligibility for Participation in a Procurement Process** on the general requisites of eligibility for concessionaires of public construction works or public services.

1.5 Key Obligations

Public procurement is guided by the following general principles: legality, impartiality, competition, equal opportunities, responsibility, stability, and transparency and publicity.

In particular, under Law No 14/96/M, gazetted on 12 August 1996, the concessionaires of public construction works and public services are obliged to make public on an annual basis their respective balance sheet, the management report and the opinion of the supervisor or the supervisory board.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

In general terms, as a consequence of the general principle of publicity applicable to administrative procedures, the decision to start a public procurement procedure that is to be carried out in the form of a public tender is subject to announcement in the Macau Official Gazette, as well as in two of the most-read newspapers in Macau, one in Portuguese and the other in Chinese.

Pursuant to Decree-Law No 63/85/M, the opening of a public tender for the procurement of goods and services shall be announced in the Official Gazette, with details as to the awarding entity, the public service responsible for the tender, the nature of the goods and services being procured, the base value of the tender (if declared), the place and time for the examination of the tender specifications and tender programme, the deadline for the submission of tender proposals, the provisional bond to be provided by the bidders to participate in the tender and the entity where such bond shall be deposited, and the place, day and time of the public act of the tender.

Further to the decision to open a public tender, Law No 3/90/M prescribes the mandatory announcement in the Macau Official Gazette for

the following actions in respect of the concession of public works and public services:

- the decision to waive the public tender procedure;
- the decision to cancel a public tender already opened;
- the decision not to award the contract to any of the bidders; and
- the decision to suspend (*sequestro*) or terminate the concession, as well as the concession contracts.

2.2 Preliminary Market Consultations by the Awarding Authority

Macau law does not prevent the awarding authority from collecting market information prior to the decision to start contract award procedures, it being prudent to collect as much information as it deems necessary to organise the tender and protect the public interest in the best possible manner.

The collection of market information may be relevant to assess the type of contract procedure to be followed by the awarding authority.

2.3 Tender Procedure for the Award of a Contract

The MAPC provides four general procedures for soliciting proposals from potential contractors, which are applicable with minor adaptations to the different types of contracts executed by the government. According to the MAPC, except where a special regime establishes differently, the government can only solicit proposals (i) by public tender, (ii) by limited public tender by prior qualification, (iii) by limited public tender without prior qualification, or (iv) by direct negotiation (*ajuste directo*):

- Decree-Law No 122/84/M provides that the government can solicit proposals by public tender, by limited public tender by prior qualification, or by direct negotiation;
- Law No 3/90/M provides that there must be a public tender for the concession of public construction works of buildings or facilities for public use or public services, except in the case that the public interest recommends the concession by means of direct negotiation;
- Decree-Law No 74/99/M provides that the government can solicit proposals by public tender, public tender limited by prior qualification, limited public tender without prior qualification and, where expressly allowed in the law, by direct negotiation; and
- Dispatch 52/GM/88 provides that the government can solicit proposals for procurement of real estate assets by direct negotiation, prior consultation or tender.

Tender Procedures

Public tender

The procedure to contract by public tender comprises the following steps:

- the decision from the government to use this kind of procurement procedure and the preparation of the tender programme and respective specifications;
- the announcement of the opening of the tender;
- the request by the bidders/bidders for clarifications on the contents of the tender programme and specifications;
- the submission of proposals by the bidders;
- the provision of a provisional guarantee by each of the bidders to guarantee the performance of the obligations undertaken in the respective proposal;
- the opening of the proposals and respective acceptance or rejection;
- the awarding of the contract to the winning bidder;
- the provision of a performance guarantee by the contractor to guarantee the performance

of its obligations pursuant to the concession contract; and
- the signing and announcement of the concession contract.

Limited public tender by prior qualification

The procedure to contract by limited public tender by prior qualification is regulated by the same rules as the public tender, with the particularity that only bidders who were pre-selected by the government based on the verification of certain requirements and conditions (technical, professional, economical and financial) can submit a proposal. After such initial verification, the government must select a minimum of three bidders and invite them to submit their proposals. The contract is awarded to the bidder who submits the proposal with the lowest price.

Limited public tender without prior qualification

A limited public tender without prior qualification procedure is regulated by the same rules as the public tender, with the particularity that only the bidders invited by the government can participate in the tender and submit proposals. The government must invite a minimum of three bidders to participate in the tender. The tender announcement is substituted by an invitation sent to the selected bidders with all the information required by law, including the deadline for the submission of proposals and the criteria for the awarding of the contract (ie, the lowest price).

Direct negotiation

The procedure to contract by direct negotiation can be used by the government when the procedure of public tender is not mandatory or has been (legally) waived. The procedure starts with the prior inquiry of at least three specialised entities with domicile/registered office or representation in Macau, being the prior inquiry waived in the situations expressly mentioned in the law, as per example cases involving internal or external public security. A prior inquiry must be in written form when the amount of expense to be incurred by the government is above MOP15,000 for the acquisition of goods and services or above MOP150,000 for construction works.

Furthermore, the three procedures are differentiated by the eligible bidders: while public tenders are open to all entities that verify the requisites provided for in the law, limited public tenders are restricted either to the entities that verify the special requisites determined by, or to the entities invited by, the administration. As a general principle, the procedure of direct negotiation requires prior consultation of at least three potential contractors.

Each of the aforementioned procedures has minor adjustments in Decree-Law No 74/99/M (applicable to public works contracts), and Decree-Law No 122/84/M and Decree-Law No 63/85/M (applicable to goods and services procurement).

Revision of these minimum value thresholds was recently proposed, as outlined in **5.4 Legislative Amendments under Consideration**.

Restrictions on conduct of negotiations

As a general rule, the contract is awarded to the bidder who submits the proposal with the lower price, subject only to the verification by the winning bidder, and by its respective proposal, of all the requirements prescribed in the tender specifications. Furthermore, the draft contract is not subject to negotiation between the parties: the bidder may challenge it only on grounds of discrepancy in respect of the tender programme and tender specifications.

There is, however, no general provision in Macau law preventing the awarding authority from – in consideration of the particulars of the deliver-

able and/or the existence of various awarding criteria – prescribing in the tender specifications that (some) bidders be called for a negotiation before the award is made.

A final bidding procedure may also take place if the best price is offered by more than one bidder. Any such bidding will take place verbally and in the presence of all such bidders. If none of the bidders improves its price, the awarding authority is entitled to choose one of them at its discretion.

In a public tender for construction works, the awarding authority and the winning bidder may negotiate further certain amendments to the proposal provided that the new agreed solutions are not part of the proposals submitted by another bidder.

Furthermore, the negotiation in the case of a direct negotiation is subject to prior inquiry procedures, as mentioned above.

2.4 Choice/Conditions of a Tender Procedure

The situations where the awarding authority may choose between two types of tender are expressly prescribed in the law. The option for a limited tender usually exists when the value of the award exceeds a certain amount (eg, MOP7.5 million for the provision of goods or services), when the services or goods to be provided require special technologies, or when the construction works are complex and shall be performed in special circumstances. In such situations, the option between the public tender or the limited tender is not completely discretionary, as the administration must at all times act in the best manner possible to pursue and protect the public interest.

The waiver of tender (either public or limited) may only be determined by the awarding authority for reasons of public interest and if certain conditions require so, including the protection of public safety, the urgency of the procedure caused by sudden natural catastrophes or the protection of certain intellectual property rights.

In the particular case of the procurement of real estate, it is the Financial Services Bureau that must assess the most adequate procedure (direct negotiation, prior consultation or tender) and submit its proposal to the awarding authority.

As outlined in **5.4 Legislative Amendments under Consideration**, the revision of the aforementioned minimum value thresholds has recently been proposed.

2.5 Timing for Publication of Documents

The legislation does not impose mandatory deadlines for the publication of procurement procedure-related documents.

The deadlines for the bidders or interested entities to exercise certain rights in the context of tenders are expressly set forth either in the law or in the tender programme.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

Pursuant to Decree-Law No 63/85/M, the deadline for the submission of proposals in the context of a tender for the procurement of goods and services shall be between 15 and 180 days, as determined in the tender programme considering the nature and the relevance of the goods or services being procured, counted from the tender announcement.

In respect of a tender for public construction works, Decree-Law No 74/99/M provides the following:

- if the procedure is organised in the manner of a public tender, the tender announcement must determine the deadline for the submission of proposals, which shall be between 20 and 90 days, considering the volume and complexity of the works, counted from the tender announcement;
- if the procedure is organised as a limited tender with prior qualification, the entities that are eligible under the selection criteria shall have not less than 25 days to submit their application and the pre-selected bidders shall have not less than 40 days to submit their proposal (final time limits are determined by the awarding authority); and
- if the procedure is organised as a limited tender without prior qualification, the selected bidders shall have not less than five days, as determined by the awarding authority, to submit their proposal.

2.7 Eligibility for Participation in a Procurement Process

The specific criteria that parties must meet in order to be eligible to participate in the procurement procedures depend on the nature of the contract to be awarded. The specific statutes of certain public contracts prescribe (in more or less detail) some criteria and where the law does not provide or does not detail them, they must be prescribed in the tender documents.

Law No 3/90/M prescribes the general criteria for an entity to be eligible as a concessionaire of public construction works or public services: suitability (ie, appropriateness), technical and financial capacity. It also prescribes that when the concessionaire is a commercial company, it must have its registered office and main management in Macau and its main business must be the activity the concession for which is to be granted.

As a general rule, pursuant to Decree-Law No 74/99/M, only entities registered in the official registration as public works constructors of the works referred to in the tender programme are eligible to participate in procedures for the award of public construction works contracts. Entities not registered may participate if such is permitted by international agreements applicable to Macau on the adjudication of construction works contracts, or when the particulars of the construction works demand so. It also prescribes that the interested party does not owe the Macau Financial Services Bureau any taxes liquidated in the previous five years and that it has no debts vis-à-vis the Social Security Fund.

2.8 Restriction of Participation in a Procurement Process

Please refer to **2.4 Choice/Conditions of a Tender Procedure** as to the situations where the awarding authority may organise the procurement procedure in the manner of a limited tender (with or without prior qualification). The existence of a shortlist can be determined on the basis of special qualifications, capacity or experience being required to provide certain goods or services, or to execute certain works, and/or considering the contract to be awarded.

The minimum number of qualified suppliers that must be invited to participate in a contract award procedure (organised in the manner of a limited tender with or without prior qualification) is three.

The procedure to contract by direct negotiation also starts with the prior inquiry of at least three specialised entities.

2.9 Evaluation Criteria

Without prejudice to the provision of other criteria in the tender programme, the contract for the provision of goods and services must be awarded to the best proposal in terms of price and/or

the deadline for the provision of such goods or services.

The contract for the execution of public construction works shall be awarded to the proposal that best guarantees the good technical execution of the project, factoring in the price, the deadline for the execution of the works, the using cost, the profitability or the technical value, etc.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

Following the announcement of the opening of the tender, the tender programme and specifications must be disclosed and made public on the website of the awarding authority; the hard copy is made available for public consultation at the awarding authority's premises. The criteria, evaluation methodology and other relevant elements are disclosed altogether in the tender programme and specifications (*caderno de encargos*).

As referred to in **2.1 Prior Advertisement of Regulated Contract Award Procedures**, the tender programme and specifications are disclosed following the publication of the announcement of the tender in the Official Gazette and in local newspapers.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Pursuant to Decree-Law No 63/85/M and Decree-Law No 74/99/M, in the procedures by public tender, following the time limits for submission of proposals, a public act takes place for the opening and acceptance of the proposals, which is processed by the commission designated by the awarding authority and comprises the following:

- the commission prepares a list of admitted parties according to the order of submission of the proposals, and the list is read out;
- the commission then analyses the qualification of the tenderers and prepares a list with the bidders admitted and not admitted to the tender; and
- after that, the commission opens the proposals and analyses each of the proposals to decide on admission.

The interested parties who have not been included in any of the lists can file a claim against the decision of the commission; the commission then has to decide immediately on the merits of the claim.

In a limited public tender by prior qualification, the awarding authority will notify the parties who have met the prior (technical, professional, economical or financial) requisites and invite them to submit their proposals.

In a limited public tender without prior qualification, only the parties invited by the contractor can participate and submit their proposals.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Within 90 days from the opening of the proposals, if the bidders do not receive any contract award communication, they do not need to keep their proposal and have the right to take back the provisory guarantee. If none of the bidders requests the restitution of their provisory guarantee in this period, the period is extended until one of them requests this, up to 180 days. At the end of this period, the awarding authority shall return the provisory guarantee to the non-selected bidders.

The awarding authority will notify the selected bidder to provide the final guarantee. Only after such definitive guarantee is provided by the selected bidder will the authority notify the non-selected bidders of the decision to award the contract.

3.4 Requirement for a "Standstill Period"

The selected bidder is legally obliged to enter into the award contract after the awarding decision has been made. However, if the selected bidder does not provide a definitive guarantee in a timely manner, without reasonable cause, the awarding decision will expire and the awarding authority will keep the provisory guarantee.

Pending an administrative appeal against a decision of the tender commission in the context of procurement procedures of either the provision of goods and services or public construction works, the awarding authority cannot issue the awarding decision.

Without prejudice to the possibility of the appellant/interested party requesting the suspension of the awarding decision, as a general rule the submission of a judicial appeal (*recurso contencioso*) or of an action on administrative contracts (*acção sobre contratos administrativos*) does not suspend the effects of the awarding decision.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

In general terms, the awarding authority's decisions (eg, not to admit a bidder or to award the contract) may be reviewed, either by the awarding authority in the context of an administrative claim (*reclamação*), by the immediate superior of the awarding authority in the context of a hierarchical appeal (*recurso hierárquico*), or by the court in the context of a judicial appeal and, subject to particulars, an action on administrative contracts (*acção sobre contratos administrativos*) set forth in Article 113 and following the Administrative Litigation Procedure Code (*Código de Processo Administrativo Contencioso*, or the CPAC).

Paragraph 3 of Article 113 of the CPAC allows the affected entity to start an action on administrative contracts to request both the annulment of a decision taken by the awarding authority during the award procedure (a pre-awarding decision) and the revocation of the contract or compensation for damages, provided that the judgment of those requests is strictly connected or relies substantially on the judgment of the same facts and/or the application of the same legal provisions.

In procurement procedures for the provision of goods or services by tender, the decisions of the tender commission, in the context of the public act for opening and acceptance of proposals, must first be challenged by means of a claim to the commission and, if this is rejected, to the awarding authority.

In a procurement procedure for public construction works, the bidders must challenge the decisions or omissions (eg, the decision not to admit a bidder/proposal) first by means of an administrative claim submitted directly to the awarding authority.

4.2 Remedies Available for Breach of Procurement Legislation

If there is a relevant breach of the procurement legislation, the awarding authority's decision may be revoked on grounds of its invalidity, including the decision not to admit a certain bidder/proposal or the decision to award the contract.

The entities affected by the awarding authority's decision (eg, the bidders whose proposal was wrongfully not admitted) may also claim compensation for damages.

4.3 Interim Measures

An administrative act performed in the context of a contract award procedure (eg, the awarding decision) may be suspended provided that (i) the performance of such act is likely to cause damages of difficult repair to the applicant or its interests, (ii) the suspension does not cause serious damage to the public interest that is pursued with the performance of such act (this does not apply when the damages caused by the immediate performance of the act are disproportionately higher), and (iii) there is strong indication of the illegality of the appeal submitted against the act (Article 120 and following of the CPAC).

Upon being notified of the request for the suspension of the act, the authority shall immediately cease or discontinue its performance, except if, within three days, it acknowledges in writing that the non-immediate performance of the act will cause significant damage to the public interest, detailing the grounds for such averment.

The performance of the act in breach of the above may entail civil, disciplinary and criminal action to the authority and the individuals involved.

4.4 Challenging the Awarding Authority's Decisions

In general terms, the claim and the administrative appeal can be submitted by the entities vested in the interests or the rights affected by the authority's decision.

The judicial appeal may be submitted by the entities whose interests were damaged by the decision or that have direct, personal and legitimate interest in the success of the appeal, the holders of the right of popular action (*direito de acção popular*), the public prosecutor and the legal entities in respect of the acts that may affect the rights and interests they must protect.

With the exception of paragraph 3 of Article 113 of the CPAC (explained above), the action on administrative contracts with the purposes of revoking the contract awarded on grounds of the invalidity of a pre-awarding act of the awarding authority may only be challenged by the entities affected by such act if they have successfully challenged the same by judicial appeal first.

4.5 Time Limits for Challenging Decisions

There are different time limits to challenge the awarding authority's decision, depending on the nature of the procurement procedure and the challenging mechanism to be followed.

In general terms, except where special statutes provide otherwise:

- the time limit to submit a claim is 15 days counted from the announcement of the act in the Official Gazette (if such publication is mandatory), or the notification (if the publication is not mandatory), or from the knowledge of the act;
- the time limit to submit an administrative appeal is 30 days;
- the time limit for the judicial appeal ranges from 30 to 365 days, depending on the residency of the appellant or the decision under review (express or tacit), counted from the date of the publication (when mandatory) – there is no time limit to challenge a decision on the grounds of its nullity; and
- the time limit for an action on administrative contracts to challenge the validity of the contract (including on grounds of the invalidity of a pre-awarding act) is 180 days.

There are some situations where the special statutes provide different time limits:

- in procurement procedures for the provision of goods and services by tender, the decisions taken by the tender commission in the public act of opening and acceptance of proposals shall be challenged to the awarding authority by means of a hierarchical appeal during the act (although the brief of the appellant may be sent in writing within the next ten days); and
- in procurement procedures for public construction works, the claim against the decisions or omissions of the awarding authority shall be submitted within ten days from the knowledge of the act – if the claim is denied and the awarding authority is subordinated to a superior, the interested party has ten days to appeal to the superior (*recurso hierárquico*).

4.6 Length of Proceedings

The law provides time limits for the awarding authority or its superior to decide the claim or the administrative appeal (20 or 30 days, respectively, in procurement procedures for public construction works), after which it is deemed to be rejected (*indeferimento tácito*).

There are no mandatory deadlines for the court to make a decision on a judicial appeal. The duration of such proceedings varies with multiple factors, such as the complexity of the matter, the number of parties involved, the incidents raised by them and the workload of the judges. However, the judicial appeal of pre-awarding decisions in procurement procedures of public construction works contracts, continuous supply contracts and services contracts for purposes of immediate public benefit are of an urgent nature; they are not suspended during court holidays, and must be decided in seven days after all the other procedural formalities are completed.

4.7 Annual Number of Procurement Claims

There is insufficient publicly available information to provide an accurate figure for the annual number of procurement claims in Macau. However, it is noted that, according to the information announced by the Commission Against Corruption (*Commissariado Contra a Corrupção*, or CCAC), in 2017, 15 complaints were filed related to the procurement of goods and services. The CCAC annual report for 2019 does not provide detailed information regarding procurement complaints.

4.8 Costs Involved in Challenging Decisions

The submission of claims or hierarchical appeal is generally not subject to the payment of administrative costs.

A judicial appeal is subject to the payment of court fees of between MOP880 and MOP26,400, as determined by the court depending on the complexity of the matter and the overall processing of the proceedings.

The court fees of an action on administrative contracts vary with the value of the award and/or the damages petitioned (eg, if they accrue to MOP3 million, the applicable court fees are MOP19,400) and any incident, appeal or other action of the parties therewith may be subject to the payment of further fees.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

The MAPC prescribes a general right for the administration to unilaterally modify the contents of a public contract, provided that such modification respects the object of the contract and the equilibrium of the obligations of the par-

ties, as well as the right to unilaterally terminate a public contract for reasons of public interest, without prejudice to the contractor's right to be compensated.

DL 74/99/M allows, within certain limits, the modification of the construction works plans, by the initiative of the awarding authority or the contractors, as well as the contractor's right to the revision of the contract when the circumstances under which the parties have decided to contract have been changed by virtue of abnormal and unexpected circumstances, resulting in a significant increase in the execution of the works.

Contractors to public contracts of another nature are also vested in such right (to the modification of the contract on grounds of ulterior change of circumstances) by virtue of the general provision of Article 431 of the Macau Civil Code.

5.2 Direct Contract Awards

Please refer to **2.3 Tender Procedure for the Award of a Contract**, on the procurement procedures by direct negotiation, and by limited tender.

5.3 Recent Important Court Decisions

Having already lost the court battle to overturn the lapse of its 25-year land concession term in 2018, Polytex Import and Export Company Limited, the Macau-based affiliate of Hong Kong's Polytec Asset Holdings Limited, saw its final bid at receiving compensation from the Macau government come undone after Macau's Administrative Court rejected its USD3.1 billion damages claim in April of last year. This decision was within a string of lawsuits filed against the Macau SAR after it decided to declare the lapse of provisional land concessions, and reclaim several plots of land, on grounds of expiry of the concessions. Although Polytex initially filed to appeal against the above-mentioned decision, it was announced later in the year that Polytex was seeking to withdraw the appeal.

5.4 Legislative Amendments under Consideration

The public procurement rules and procedures in Macau at the moment are spread among the different statutes that regulate the different types of contracts that can be entered into with/by Macau public entities. Thus, the government is preparing a bill with the goal of simplifying, updating and enhancing the public procurement legal regime.

The new bill will:

- set the principles applicable to public procurement procedures;
- detail and regulate the different types of procedures that may be adopted by the adjudicator; and
- define the rules for the participation of bidders and the bidding process, and the criteria to be considered on adjudication.

Further to the simplification of the regime, the new bill will also, inter alia:

- expand the applicability of the public procurement rules to the execution of leasing contracts (of movable and immovable property);
- introduce a new procedure for public procurement (competitive negotiation); and
- enhance the rules for the constitution and work of the tender commissions.

The goal of the continuing revisions to the public procurement regime is to increase publicity and transparency, and to promote fair competition.

However, as the works for the new bill progress, an amendment to Decree-Law No 122/84/M has recently been proposed, in order to update the existing minimum value thresholds that deter-

mine the type of procedures to be used in the public procurement procedures. According to the proposed wording, the following amendments would come into effect:

- procurement by public tender would be organised when the public works contract is estimated to exceed MOP15 million, or the estimated cost for the acquisition of goods and services exceeds MOP4.5 million;
- when procurement by direct negotiation is possible, written prior inquiry shall be required when the amount of expense to be incurred by the government is above MOP900,000 for construction works or above MOP90,000 for the acquisition of goods and services; and
- limited tender thresholds would also be updated so as to make this option available when the award exceeds MOP45 million.

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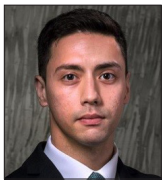

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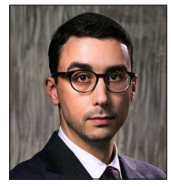

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Trends and Developments

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Brief Overview of Land Laws and Leasehold Concessions

The Macau Special Administrative Region (the "Macau SAR") was originally 17 square kilometres in size. While at the time of the 1999 handover to the People's Republic of China it had a population of about 430,000 people, according to data published by the local Statistics and Census Service that population surpassed 680,000 people at the end of 2020. The region's reduced territory, coupled with a very high population density, originated a dire need to regulate the use of the existing land, as well as to search for ways to obtain more space.

Both such needs increased alongside the exponential economic growth that the Macau SAR experienced in the early 21st century, in particular after the liberalisation of the gaming industry, which quickly turned Macau into the world's biggest gambling hub. The increasing inflow of tourists demanded further accommodation, attractions and infrastructure, as well as related tourism services.

In order to counter this size limitation, the Macau SAR turned to land reclamation methods so as to claim new land from the Pearl River Delta, which has allowed it to progressively expand to its current 32 square kilometres and enabled the development of additional real estate.

Regulation first came in the form of Law No 6/80/M, gazetted on 5 July 1980 and aimed at establishing effective legal policies of disposal and use of undeveloped, state-owned land. This law was revoked and replaced by Law No 10/2013 (the "Land Law"), pursuing – essentially – the same objectives.

Among the various forms of land grant from the Macau SAR government to private entities, the most common is the leasehold concession (*concessão por arrendamento*), which may be defined as a form of temporary grant of undeveloped land that entitles the concessionaire to the right to develop and care for the new land in accordance with the correspondent concession contract.

The Land Law differentiates two phases of the concession with the purpose of mitigating idle land cases: leasehold concessions are initially granted on a provisional basis for a limited period of time not exceeding 25 years ("provisional concession") and may ultimately become definitive ("definitive concession"), provided that the concessionaire fulfils its obligations in a good and timely manner.

The concessionaire is typically bound to certain undertakings regarding the use and development of the land within a specific timeframe ("development period" or "*prazo para aproveitamento*"), which, by definition, is shorter than the concession period, as defined in the concession contract.

For instance, with regard to the concession of land for construction of real estate, the concessionaire will undertake to complete the construction and obtain the use permit (*licença de utilização*) of the building(s). The issuance of the use permit within the agreed development period constitutes what is referred to as proof of

development (*prova de aproveitamento*) before the relevant authorities.

Proof of development (as applicable) allows for the conversion of the concession from provisional to definitive. From this moment onwards, the concession will be automatically renewed for additional periods of ten years at a time.

It is when the concessionaire fails to develop the land on or before the term of the development period (or, in any event, on or before the term of the provisional concession period), or fails to fulfil or to guarantee the timely fulfilment of any other terms of the concession within the provisional concession period, that a debate (or a dispute) regarding the eventual expiry of the leasehold concession or other related rights may arise.

Expiry of Land Concessions: Sanction versus Preclusion

Typically, there are two legal standpoints regarding the expiry of provisional land concessions:

- expiry as sanction (*caducidade-sanção*), which occurs when the concessionaire does not obtain proof of development within the development period, or fails to meet any other agreed deadline within the provisional concession period, due to misconduct or default of its obligations; and
- expiry as preclusion (*caducidade-preclusão*), which occurs when the concessionaire fails to obtain proof of development within the provisional concession period (which, again, may not exceed 25 years), regardless of the reasons thereof and even regardless of such failure having been caused by an action or by an omission by public authorities.

While the declaration and enforcement of the former (ie, *caducidade-sanção*) is consensual among concessionaires, the Macau SAR administration and the courts, the same cannot be said with regard to the latter (ie, *caducidade-preclusão*). In fact, in administrative and judicial proceedings, various land concessionaires have supported that, prior to declaring the expiry of the concession, the Macau SAR administration should ascertain whether the non-performance was due to a reason not attributable to the concessionaire, or if the lack of development stemmed from unforeseeable circumstances, from a force majeure event, or even, exclusively or not, from public authorities' fault.

However, both the Macau SAR administration and the courts consistently reiterate that when the expiry is declared on the basis of the term of the concession's deadlines for the development of the land, this declaration is based on preclusion (*caducidade-preclusão*), and therefore failure to develop the land according to the concession contract and within the agreed deadline(s) is, in and of itself, the only fact relevant to ascertain the legality of the decision that declares the expiry of the land concession. Hence, any other facts and potential reasons for non-performance by the concessionaire should be deemed as irrelevant.

The Macau SAR administration and the courts further stress that, as a general rule, the 2013 Land Law does not allow the administration to renew provisional land concessions beyond their original term. Although it may be argued that there were no significant changes brought by the new Land Law on this matter, the position adopted by the Macau SAR administration from 2015 onwards saw various concessionaires having their land reverted to the state's hands.

Consequently, it comes as no surprise that the termination of leasehold concessions on the grounds of expiry has prompted legal battles over the past years, as pointed out by the recently published investigation report of the

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Commission Against Corruption of the Macau SAR (CCAC), which took on 74 idle land-related case files where the leasehold concession had lapsed between 2015 and 2020 due to the non-fulfilment of the agreed terms by the end of the provisional concession period.

As reported in the CCAC's investigation, several of the concessionaires from these 74 case files filed for litigious appeal against the declaration of expiry issued by the chief executive of the Macau SAR regarding at least 21 land plots and, in every case, the appeal was later dismissed by the courts.

Recent Developments: Compensation Claims

Seeing that the Macau SAR courts have consistently dismissed all appeals regarding the termination of existing concession agreements based on the declaration of expiry at the term of either the development period or of the provisional concession period under the above-mentioned grounds, in the past couple of years concessionaires followed a different route and filed lawsuits claiming damages from the state.

In some cases, concessionaires alleged that, with its own actions and/or omissions, the administration had contributed to the non-performance of their development obligations and of the agreed deadlines.

In the litigation surrounding Polytex Import and Export Company Limited's Pearl Horizon project, widely covered by the media, a USD3.1 billion compensation claim filed by the concessionaire was dismissed by the courts. Although the claim was not judged based on its underlying merits, as the state's acquittal was achieved on the grounds of an alleged waiver of any rights to compensation granted by the concessionaire in favour of the Macau SAR, the company recently relinquished its right to appeal. Several other compensation proceedings are pending trial and therefore we are yet to know what position the Macau SAR courts will uphold; ie, whether any compensations will be awarded and, in that case, upon the verification of which requirements.

An additional layer of complexity is added in the case of concessions for the construction of housing units where off-plan marketing had already started, or even where promissory agreements had been already signed prior to the expiry. In those cases, the declaration of the concession's expiry not only hurts the concessionaire's own interests, but also those of the units' promissory purchasers. As a result, such as what happened in the above-mentioned Pearl Horizon litigation, some of the promissory purchasers filed suits on their own (independent from those filed by the concessionaire), requesting that the Macau SAR be sentenced to indemnify all losses that such expiry had caused them.

Among these promissory purchasers, some chose to withdraw their lawsuits in light of Law No 8/2019, gazetted on 23 April 2019, which ultimately would allow them to purchase other housing units to be especially developed on the government's own initiative with special conditions with regard to price and taxation, among others. In this context, the concession of the land plot of the ill-fated Pearl Horizon project was recently granted to Macau Renovação Urbana, S.A., a public urban renewal company, and, in accordance with Law No 8/2019, some of the housing units this company will be developing on the site may be acquired by the same promissory purchasers, their price to be determined with reference to the one originally agreed with the previous developer.

Since its approval, Law No 8/2019 has proved to be a viable resource for the people affected to seek some relief for the losses resulting from cases of land concession expiry.

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Other Rights to Be Claimed

For different reasons and under different particular circumstances, some concessionaires opted to waive their land concession rights after the administration undertook to compensate them with another land grant. Even though the administration may not have yet vested such interested parties with new land concession rights, the chances of enforcement litigation increase as time goes by.

Closing Notes

In light of the aforesaid, and taking into consideration these case files and the standpoints included therein, it is likely that more may follow suit, in the form of compensation and/or enforcement claims.

Moreover, one will have to wait to see if the concessionaires will be able to demonstrate the role they argue the administration played in the progress of the licensing procedures of the now-lapsed concessions and, should it happen, which criteria will be followed by the courts to assess and calculate the consequences arising therefrom.

As the current position of the Macau SAR administration and the courts with regard to the expiry of land concessions has been widely publicised and is known by all players, concessionaires have been more cautious in complying with the legal and contractual deadlines imposed on provisional land concessions recently, thus an avalanche of new litigation regarding the legality of decisions declaring the expiry of such concessions not being expected.

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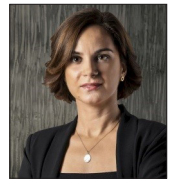

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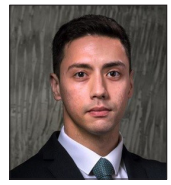

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MEXICO

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CONTENTS

1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Mexico has three basic hierarchical levels of government: federal, state and municipal. The Mexican Constitution generally requires a public bid process for all asset acquisitions and leases, services and public works agreements, to ensure the best conditions available for government entities in terms of price, quality, financing and other circumstances.

Mexico's numerous international treaties with procurement chapters guarantee access on a most-favoured-nation basis to vendors from other countries. These treaties have equal status to federal laws.

Federal Level

At the federal level, the two most important government procurement laws are the *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* ("Acquisitions, Leases and Public Services Law") and the *Ley de Obras Públicas y Servicios Relacionadas con las Mismas* ("Public Works and Related Services Law") (jointly referred as the "Procurement Laws"). The Procurement Laws empower the heads and/or governing bodies of government entities to issue specific policies, standards and guidelines (commonly known as "Pobalines") applicable to their contracts, which of course must be consistent with the Procurement Laws. Entities such as the Mexican Social Security Institute have their own regulations or Pobalines that are significant bodies of regulation in addition to the Procurement Laws.

State Level

At the State level, governments have all enacted their own laws on government procurement. These laws are all similar in structure and content to the Procurement Laws. Differences tend to be minor, such as requirements of a local domicile. However, depending on the specific treaty, State governments may not be subject to national treatment requirements of free trade agreements in the same way and to the same extent as is the federal government. Conversely, in those cases where the treaties do apply to state and local governments, local legislatures may not be as familiar with national treatment requirements and therefore, the state legislation may not conform to these obligations. Depending on the size of the potential contracts involved, foreign nationals may not have challenged non-conforming legislation. So before determining that a state public procurement process is not open to foreign participants, products or services, potential bidders should review the relevant provisions of treaty law. As a specific example, the national treatment provisions of the US-Mexico-Canada Agreement (USMCA) generally do apply to state and local governments. Given the relative size of contracts available and the general similarity of state procurement laws to the federal, this article will focus on the federal legislation.

Government Procurement

The laws that establish autonomous government entities, such as Banco de México or the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI), include carve-outs from the Procurement Laws in matters of government procurement. They establish their own guidelines and procedures, and the Procurement Laws apply only in matters not regulated in their provisions. These autonomous entities may also be exempted from national treatment requirements. This is the case, for example, with the USMCA. This is generally based on the concern that foreign suppliers may compromise the Mexican government's core functions as regulator (economic or otherwise) and/or arbiter of justice.

General Exemptions

The law also provides a general exemption for those entities that have their own laws governing procurement. As an example, the productive state-companies (EPE) such as Petróleos Mexicanos (Pemex) and its subsidiaries, and the Federal Electricity Commission (CFE) have special regulations for their processes of acquisition, leases and contracting of services and works. Their regulations determine the principles and rules for its procurement processes, but empower the boards of directors of these entities to issue the specific guidelines that must be followed in procurement matters. Those guidelines are the General Contracting Provisions for Pemex and its Subsidiary Companies and the General Provisions Regarding Acquisitions, Leases, Contracting of Services and Execution of Works of the CFE and its Subsidiary Production Companies. In general terms, these provisions are similar to those found in the Procurement Laws. However, the boards of directors of the productive state-companies have more discretionary powers to determine specific powers to regulate their internal processes.

In contrast to the exemption that EPEs have from the Procurement Laws, they are generally covered by the trade agreements with procurement chapters (including the USMCA), and therefore must abide by national treatment standards. This may be explained by the economic importance of these activities for access by trading partners, as well as in part by the fact that they may not be considered core government functions.

One significant exception to the general rules is that some subsidiaries of these EPE are generally not subject to the same rules as the national subisidiaries. This is potentially a large loophole in the regulation and transparency of government procurement in Mexico. For example, although the Pemex procurement law covers its Productive Subsidiary Companies (*empresas productivas subsidiarias*), of which there are seven, the Affiliated Companies (*empresas filiales*), of which there are dozens, are left out of this regime even though they are also exempted from the Procurement Laws.

Finally, there is a special regime for construction projects and the provision of public services that involve infrastructure provided by private entities: the Law of Public-Private Associations. For these, the Procurement Laws would only apply only in matters not regulated in its provisions.

1.2 Entities Subject to Procurement Regulation

The entities subject to the Procurement Laws are the entities of the federal public administration, including:

- secretaries (ministries or departments);
- legal counsel of the President;
- decentralised entities;
- state-owned companies;
- public trusts; and
- attorney general's office.

Generally, all federal agencies are subject to the Procurement Laws, except those that have their own procurement laws, as discussed in **1.1 Legislation Regulating the Procurement of Government Contracts**.

States and municipalities are directly subject to the Procurement Laws only on projects that involve monies from the federal government. Otherwise, they apply their local regulations.

1.3 Types of Contracts Subject to Procurement Regulation

In general, all public works, purchases or goods and services, and all lease agreements are subject to the Procurement Laws. This means that all acquisitions, leases, services and public works must be awarded by a process of public bid.

Only if an exception applies can one of the alternative procedures be implemented: a restricted invitation (invitation to at least three individuals or legal entities) or a direct award process. The justifications for the exceptions in each of these should be documented and, especially for direct awards, the rules are not easy to meet in most cases.

Participants

With regard to nationality of participants and origin of goods, the law defines the different types of public bids.

- National public bid: Only Mexican nationals can participate and the goods to be acquired must be produced in México (at least 50% of national content). The bids must either involve amounts below the thresholds provided in international treaties, or pertain to a reservation (whether by subject-matter or counting toward a "basket" amount reserved) in international treaties.
- International public bid under protection of international treaties: Only Mexican nationals and foreigners from countries with which Mexico has entered into a free trade agreement with a procurement chapter may participate. Although the title of the USMCA does not contain the words "free trade" due to politically motivated linguistic legerdemain, it is considered a free trade agreement.
- Open international: Mexican nationals and all foreign bidders may participate, regardless of the origin of the goods to be acquired or leased and services to be hired. Although notionally nearly any significant bid could be classified as this type of bid, national and treaty partner interests often oppose such a classification. Therefore, this type of bid often opens when a national bid has been declared void or when this type of bid has been agreed to in financed contracts with external financing granted to the federal government or its guarantor:
- For leases and services. Only Mexican nationals may participate.

Further Classifications of Bids

The Procurement Laws also classify public bids according to the technology used to participate, which may be in-person, electronic or mixed. Public bids may also award "framework agreements", under which the general pricing structure is defined, but the volume is left open to the requirements of the government purchaser.

The Procurement Laws provide that amounts for acquisitions, leases, services and public works must be subject to the maximum amounts established in the Federal Expenditure Budget. Each year, the Federal Expenditure Budget determines the maximum budget for acquisitions, leases, services and public works.

1.4 Openness of Regulated Contract Award Procedure

According to the classification of public bid process (national, international under international treaty or open international), the procedures are open for the participation of Mexican nationals or foreigners. Because of the way the Procurement Laws are worded, many government officials and business-persons assume that the decision on whether to hold a national or international public bid belongs to the government entity, and fail to take into consideration the national treatment obligations of the government treaties. Due to vested interests, the task of convincing the government entity to open the bid to international participants can be arduous, even when the treaty law mandates it and it would result in significant savings for the government agency.

1.5 Key Obligations

The rights and obligations for participants in public procurement procedures are established

in the bid documents, which include model contracts published by public entities of each procurement process. The Procurement Laws do not establish specific obligations for the participants of government procurement processes.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

The Procurement Laws provide that public entities must inform, no later than January 31st of each year, their annual program of acquisitions, leases, services and public works they intend to contract for each fiscal year. The information must be published on Compranet and the website of the public entities. In practice, however, this program is not set in stone, and is often updated during the year, sometimes on very short notice.

Compranet is the electronic system of governmental public information on acquisitions, leases and services, which contains a registry of suppliers, a list of "social witnesses" (ostensibly independent observers from other government entities), suppliers de-barred by federal government, calls for bids and their modifications, minutes of clarification meetings, etc.

The Procurement Laws also mandate that, prior to the formal publication of the requests for proposal (RFP), government entities may communicate/publish their RFPs for projects in draft form and private parties (individuals or entities) considered as potential participants in the bids may provide their comments and opinions. The government entity must then publish the full version of the RFPs in Compranet and a summary of the RFPs in the Federal Official Gazette.

2.2 Preliminary Market Consultations by the Awarding Authority

As a part of their preparation for publishing a RFP, government entities should conduct a market study analysing the existing commercial conditions regarding the goods, services or public works that will be involved in the RFP, to establish the most favourable format for the RFP. The market study should obtain information from public and private sources. In practice, it is not always entirely clear whether a government entity is seeking input for a market study or a bid under a limited invitation format. For smaller projects, the market studies are rarely formal.

2.3 Tender Procedure for the Award of a Contract

The process of a public tender is as follows:

Preliminary Activities

Government entities subject to the provisions of Free Trade Agreements signed by Mexico must verify whether the value of the acquisition of goods, services or public works exceeds the thresholds provided therein and determine whether there are any reserves applicable to those goods or services. Further, a market study should be conducted.

Publication of the RFP in Compranet and Federal Official Gazette

The RFP must contain the rules of the procedure and description of the participation requirements, describing the goods, services or public works to be acquired or leased, the type of procurement process, model of the contract that must be executed with the winning bidder, etc.

The RFPs may be modified up to seven days before the date set for the presentation and opening of bids. Any modifications made in this manner to the RFPs are considered an integral part of the RFP.

Clarification Meetings
The purpose of the clarification meetings is to resolve any doubts from the potential participants regarding technical or others aspects described in the RFP. The last clarification meeting must take place at least six days before the presentation and opening of bids.

Presentation of Bid Proposals
The participants' bid proposals must be delivered in a sealed envelope, which must contain the technical and economic offer. Some procedures allow for electronic bid submission. The deadline for submitting proposals may not be less than 15 days (for national tenders) or 20 days (for other tenders) after the publication of the RFP. Two or more individuals or companies may present joint proposals without needing to constitute a special purpose vehicle for the project, but they must appoint a common representative.

Opening of Bid Proposals
After receiving the bid proposals in a sealed envelope, a legal representative of the government entity that published the RFP will publicly open the envelopes in the presence of the participants, announce the documentation presented by each participant and draft the minutes in which the amount of each bid proposal is recorded. The RFP must establish the date for opening of bid proposals.

Award to the Winning Bidder
Within 20 days after opening the bids (extendable for 20 more days), the government entity must declare a winner or declare the process deserted. The contract will be awarded to the offer considered the best if it meets the legal, technical and economic requirements established in the RFP.

Execution of the Contract
Within 15 days following the award to the winning bidder, the parties must sign an agreement and the contracting parties become obligated by the provisions of the RFP and the attached contract.

The conditions described in the RFPs and in the bid proposals may not be modified by the parties.

2.4 Choice/Conditions of a Tender Procedure
Unless an exception applies, government procurement must be carried out by public tender. If one or more exceptions apply, government entities may choose (or in some cases, be obligated) not to carry out the public bid procedure and instead conduct a "restricted invitation" process (invitations to at least three individuals or entities) or make a direct award. Examples of exceptions are:

- when there is a single supplier and no alternative or substitute goods or services;
- when national security is at issue;
- when there is danger to the social order, economy, or public services; and
- in cases of Acts of God or force majeure that do not allow the public bidding process to be followed.

2.5 Timing for Publication of Documents
The timing of a public bidding process, under normal circumstances and without extensions, is is 35 days from call to tender to the contract award.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders
Individuals or companies that intend to participate in the clarification meetings must present a

letter expressing their interest in participating in the tender at least 24 hours before the time and date of the meeting. Likewise, they must present their proposals within the period indicated in the RFP, which (except in cases of emergency exceptions) cannot be less than 20 days.

2.7 Eligibility for Participation in a Procurement Process

The Procurement Laws do not define the criteria that interested parties must meet to participate in procurement processes. Instead, the RFPs must establish the specific requirements that individuals or entities interested in participating in procurement processes must meet. Criteria must not limit free participation or economic competition.

2.8 Restriction of Participation in a Procurement Process

Restricted invitations (invitations of at least three individuals or companies) can be extended exceptionally when special circumstances arise and the invitations are necessary to conduct the procurement process. Examples include when a limited number of potential bidders is qualified to provide the goods or services.

The process applicable to restricted invitations is as follows:

- publication of the invitation on Compranet and on the website of the government institution;
- presentation and opening of proposals; and
- decision on the winning bid.

The deadlines for submitting proposals must be set for each operation that is intended to be carried out, taking into account the nature of the goods, services or works to be contracted, but may not be less than five days from the delivery of the last invitation. In practice, these processes tend to be flexible and less formal due to the specialised nature of the goods or services.

2.9 Evaluation Criteria

The Procurement Laws require government entities to verify that proposals comply with the technical requirements established in the RFPs by using one of two criteria:

- binary evaluation criterion, by which the contract is awarded to whoever meets the requirements established in the RFP and offers the lowest price; or
- points and percentages or cost-benefit criteria, among others, used for goods or services of high technical specialty or technological innovation.

The RFPs must establish the criteria they will use to evaluate the bidders' proposals.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

In Mexico, the authorities must disclose the evaluation criteria for the proposals submitted by participants. Decisions issued by government entities regarding the award of a contract must contain the following:

- list of rejected proposals, stating the legal, technical or economic reasons that supported such determination, indicating the points of the RFP that were not met;
- list of qualifying proposals, describing the characteristics of the proposals;
- price analysis, determining why any rejected offers were not acceptable or convenient;

- name(s) of the winning bidder(s), indicating the reasons that motivated the award, in accordance with the published RFP;
- guidelines for signing the contract; and
- name of the persons responsible for evaluating the proposals.

Entities may declare a tender "void" (*desierta*) when the proposals submitted do not comply the requirements requested in the RFP or the prices offered are not acceptable at the discretion of the authorities. In this context, if the need to contract the goods or services persists, the entities can issue a second call or they can opt for a restricted invitation or a direct award.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The Procurement Laws do not establish any obligation to notify "interested parties" (as distinguished from the bidders) who were not selected for participating in the contract. However, unless there are exceptions that apply, government bids and contracts are open to the public and should be duly published.

3.3 Obligation to Notify Bidders of a Contract Award Decision

The decision must be made known at the public meeting that may be attended by bidders who have submitted a proposal. A copy of the award decision should be provided to them. Likewise, a copy of the decision should be published on Compranet and should be sent via email to the participants.

3.4 Requirement for a "Standstill Period"

From the time of the issuance of the award, the rights and obligations established in the model contract in the RFP will be enforceable and will oblige the government entity and the awarded winner(s), to sign the contract on the date, time and place provided for in the ruling itself or in the RFP. In the absence of such provisions, the contract must be signed within fifteen calendar days following the aforementioned notification.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

Mexican legislation establishes several processes through which government procurement participants may sue for remedies:

- appeal (*recurso de inconformidad*) – regulated by the Procurement Laws, it must be presented in writing, before the Secretary of Public Administration, against acts of the public bidding procedures or invitations to at least three individuals or companies;
- appeal for review (*recurso de revisión*) – regulated by the Federal Law of Administrative Procedure, before the Federal Court of Administrative Justice, against the decision of the appeal issued by the Secretary of Public Administration; and
- amparo – regulated by the Amparo Law, before the federal courts, against the decisions issued by the Federal Court of Administrative Justice.

Regarding controversies over the fulfilment of contracts, the Procurement Laws establish a Conciliation Procedure, which must be initiated before the Secretary of Public Administration. In the event that no agreement is reached, fulfilment of the contract may be sued through the courts (in contrast to the administrative procedure before the Secretary of Public Administration).

Furthermore, administrative agreements usually provide an arbitration clause that obliges the parties to appear before an arbitration tribunal

in the event of any dispute related to the performance of the contract.

4.2 Remedies Available for Breach of Procurement Legislation

In practice, remedies are limited and largely symbolic. If the agreement has not yet begun to be fulfilled, the award may be modified. However, most "remedies" are in reality administrative sanctions against the government officials involved, and of little practical value to the bidder that presents the appeal. The principal value may be as a prophylactic measure to influence future bidding processes. However, potential retaliatory actions must also be considered.

4.3 Interim Measures

The Procurement Laws establish that in the process of the appeal of nonconformity, the contracting process could be suspended if the challenging party requests it, if there are notoriously acts that are potential contrary to the Procurement Laws and/or to the public interest or to maintenance of public order. The suspension will only be granted if the challenging party submits a guaranty or bond to cover the potential damages that may be caused by requesting the suspension.

4.4 Challenging the Awarding Authority's Decisions

Any person that submitted a proposal as part of the procurement process may challenge the award decision.

4.5 Time Limits for Challenging Decisions

The nonconformity appeal against an awarding authority's decision must be presented within the six working days following the meeting in which the decision was made known or the bidder was notified of the decision (when a public meeting has not been held).

4.6 Length of Proceedings

If a participant in the bidding procedure presents an appeal against the award or conduct of a procurement proceeding, the typical length of the appeal depends on the provisions of the contract. Generally speaking, an estimate of time would be between two and three years, not taking into consideration the opportunity the parties have to file for other appeal proceedings such as the amparo trial protection. However, if the claim can be pressed pro-actively at the Internal Control Committee stage, there is a possibility of a more expeditious resolution.

4.7 Annual Number of Procurement Claims

According to the Activity Report of the Secretary of Public Administration, from January 2019 to September 2020, at a federal level, 1323 nonconformity appeals were resolved and 1212 requests for conciliation processes were concluded, and in 520 of them, an agreement was reached between the parties. Traditionally, government bid participants were reluctant to present appeals and other challenges to government bids. This reluctance was due to fears of reprisals from the government authorities challenged.

Government officials would often demand that the appeals be dropped before even engaging the bidder in discussions. However, depending on the economic or industry sector, over the last ten to fifteen years the practice has become much more acceptable and commonplace.

4.8 Costs Involved in Challenging Decisions

Access to justice in Mexico is a constitutional right, so court fees, if any, are nominal. Attorney or other representation fees will vary according to the skill levels and demand for the services of the representative.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

Government entities may modify contracts once they are awarded, but only for well-founded and explicit reasons. As a matter of course, they may increase the volume of the contract or the amount of goods, leases or services requested provided that the modifications do not exceed, as a whole, 20% of the amount or quantity of the concepts or volumes originally established in the contracts and the price is equal to that originally agreed.

When suppliers demonstrate the existence of justified causes that prevent them from complying with the total delivery of the goods in accordance with the amounts agreed in the contracts, the agencies and entities may modify them by cancelling items or part of the amounts originally stipulated, as long as it does not exceed 10% of the total amount of the respective contract. This mechanism is separate from a force majeure or Act of God analysis.

Any modification to the contracts must be in writing and must be signed by both contracting parties. The agencies and entities will refrain from making modifications that refer to prices, advance payments, and, in general, any change that involves granting more advantageous conditions to a supplier compared to those originally established. The stipulations established in the contract must not modify the conditions set forth in the RFP and its clarification meetings.

5.2 Direct Contract Awards

The Procurement Laws permit direct contract awards under the circumstances analogous to the application of restricted invitations. These have been controversial in Mexican politics. Direct assignments were identified in the 2018 Presidential campaign as a leading source of corruption in government contracting. The eventual winner, Andrés Manuel López Obrador, was the most outspoken against corruption and many perceived his victory was a result of this rhetoric. In reality, far from a reduction in the number and value of direct awards, the López Obrador administration has presided over a significant increase in the number and value of direct awards in government contracting.

The Secretary of Public Administration has recently issued guidelines that strongly recommend not using the direct award processes, and recommend limiting the direct award processes only in the following cases:

- when, due to the characteristics of the good, service or work, there is only one contractor or supplier in the market capable of selling the good or providing the service, assuming that best practices authorise the direct award of the contract, if there are no technically reasonable alternatives or substitute goods or services;
- in the case of goods or services that are the subject of a framework contract, only for the cases in which such agreement authorises that the award of specific contracts is made precisely by direct award and the procedure has been established in the framework contract to guarantee the best contracting conditions will be obtained in the specific case;
- in cases of emergency arising from unforeseeable circumstances or force majeure; and
- when the contracts are carried out exclusively for military or armed services purposes, or their contracting through public bidding puts national security or public safety at risk.

Despite the above, a 2019 study showed that three out of four public contracts were granted by direct award and in 2020, eight out of ten contracts were awarded through direct awards.

5.3 Recent Important Court Decisions

Mexican court decisions are only binding in subsequent controversies when they are confirmed at least four times, and thereby form what is called *jurisprudencia*. As a result, relatively few cases form true precedent. Over the past year, there have not been important decisions in terms of public procurement processes. However, in November 2020, non-governmental organisations (NGOs) MCCI (*Mexicanos Contra la Corrupción y la Impunidad*) and *Transparencia Mexicana* (Mexican chapter of Transparency International) published the "*Reporte de corrupción en los procedimientos de contratación de Petróleos Mexicanos y sus Empresas Productivas*" (Report on corruption in the contracting processes of Petróleos Mexicanos and its Productive Companies), which is a study based on publicly available information that seeks to identify and quantify the risks of corruption in Pemex, based on contracts entered into by Pemex with private parties.

The purpose of the report was to identify and quantify the risks of practices associated with corruption in Pemex's contracting processes from December 2018 to 31 October 2020. The report described corruption-related practices such as conflicts of interest, lack of competition, collusion and violations of the rules of public procurement processes established in the *Ley de Petróleos Mexicanos*, such as:

- tenders with a single participant;
- contracts awarded to recently incorporated companies without experience in public procurement;
- contracts awarded to shell companies or debarred companies;
- contracts awarded to companies related to corruption scandals; and
- procurement processes in which the same companies participate repeatedly, which may be an indication of collusion.

In this context, despite the provisions that establish that as a general rule, Pemex procurement should be contracted by public bids procedures, from December 2018 to October 2020, Pemex entered into 2,775 contracts with private parties and 56.7% were awarded through open bids, 35% by direct award and 8.3% by restricted invitation.

5.4 Legislative Amendments under Consideration

In 2020, due to the pandemic of COVID-19, the Procurement Laws were modified to establish that their regulations would not govern the acquisition of goods or the provision of health services contracted by government entities with international organisations.

In addition, the amendment allows direct awards for the acquisition of medicines and healthcare materials, regardless of whether these are carried out under an ordinary or emergency context, such as the COVID-19 pandemic. It represents an exception to the application of the Procurement Laws to agreements between government institutions, which is one of the schemes that has given rise to more cases of corruption in recent years.

Baker McKenzie has a strong presence in five states of Mexico: Mexico City, Guadalajara, Juárez, Monterrey and Tijuana. As one of the most recommended law firms in major practice areas around the world, Baker McKenzie offices are frequently involved in major mergers and acquisitions and sophisticated financial transactions. A global presence allows the firm to rapidly create teams of specialists in multiple jurisdictions to meet the needs of clients. The firm is known locally for the highly specialised and industry-focused knowledge of its attorneys. Drawing on the strength of the Global Compliance Group, the firm's Mexico compliance team advises clients on anti-bribery and corruption matters and represents clients during compliance investigations.

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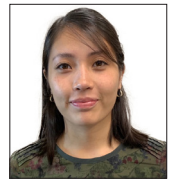
Jonathan Edward Adams heads Baker McKenzie's compliance team in Mexico and is the Global Compliance Practice Group's regional co-ordinator for Latin America. He has extensive experience in compliance, commercial and pharmaceutical law, having worked for seven years in the US and 18 in Mexico and Central America. Jonathan combines a US-based perspective on legal implementation and compliance issues with years of on-the-ground experience in Latin America. He works closely with client business and legal teams to implement innovative solutions to legal challenges. He is admitted to practise law in Mexico, as well as in Illinois and Arizona, USA.



Milka López has more than seven years of experience mainly in anti-corruption, compliance and investigations and litigation matters. Milka focuses her practice on the representation of a wide range of industry clients (eg, technology, media and telecoms, oil and gas, industrials, manufacturing and transportation). She has worked for national and multinational companies in conducting risk assessments and in the implementation of internal controls to prevent corruption and internal frauds. She has also participated in several internal investigations within organisations for acts of corruption and fraud committed by their employees and worked on the adoption of the corresponding remediation measures.

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Trends and Developments

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Introduction

The year 2020 has been a profound transformation for public acquisitions in Mexico, in two ways:

- the modification of the health regulations for imported health products;
- the addition of a provision to the Public Sector Acquisitions, Leases and Services Act to permit, outside its framework, the contracting and acquisition of such products through international organisations.

These changes represent a challenge for the acquisitions structure in Mexico. Purchases of health products by public health institutions at the federal level are, to a large extent, being made through international organisations; this implies the implementation of processes outside of the Mexican legal framework to follow the mandates and manuals of such organisations.

At the time of writing, those acquisitions are in the process of implementation. For the good of patients and the National Health System, it is hoped that they will be successful; however, it should be indicated that they deviate from the Mexican legal system in this area.

Current Framework and Context in Mexico

From 1 December 2018, the position of the federal administration has been that there is "profound corruption in the purchase of medicines".

Measures were taken to prevent the participation of distributors in the public acquisition processes, only permitting the holders of marketing authorisations to participate in them.

Resolution of the Ministry of Health

A Resolution of the Ministry of Health was published on 28 January 2020 (the "Resolution"), which permits the acquisition of medicines from abroad, even when they do not have a marketing authorisation in Mexico, creating a system of equivalency with other regulatory agencies and expedited approval of marketing authorisations.

There are several relevant points to the Resolution, including the following.

Obtaining marketing authorisations

The Resolution recognises, as equivalents, the requirements established in the RIS to obtain marketing authorisations of new molecules, generic medicines, biotechnological medicines, innovative, bio-comparable, whether manufactured domestically or abroad, with the requirements requested and evaluation procedures carried out. This is in addition to:

- the importing of medicines with or without marketing authorisation in Mexico for any illness or disease;
- for the medicines prequalified by the Prequalification Program for Medicines and Vaccines of the World Health Organization (WHO); or
- that are previously authorised by the respective regulatory authorities in Switzerland, United States, Canada, Australia, European Commission, and by WHO Regulatory Agencies of Reference PAHO/WHO or regulatory agencies members of the Pharmaceutical Inspection Cooperation System, hereinafter PIC/S (hereinafter "The Agencies").

Importing medicines for necessity
It establishes the possibility of importing medicines for necessity (in order to guarantee the supply for the correct and timely providing of services, it does not define what such concept refers to), through the coordination between the Ministry of Health and the agencies related to the national supply and entry into national territory of health products (IMSS, ISSSTE, PEMEX, INSABI, SEDENA, SEMAR or CCINSHAE).

Other considerations
Other considerations of the Resolution include the following:

- it determines that the medicines that must be imported for necessity and that do not have a marketing authorisation in mexico, must be registered by regulatory authorities of Reference PAHO/WHO or have a registration of the regulatory agencies that are members of the PIC/S; and also regulatory authorities in Switzerland, the USA, Canada, Australia, European Commission;
- it establishes a period of five business days after the first import to make the request for a marketing authorisation;
- it establishes that the marketing authorisation request will be rejected if there is evidence that the product to be registered has been reported by the WHO, by any regulatory agency that is member of the ICH or of the PIC/S, and by regulatory authorities in Switzerland, the USA, Canada, Australia, European Commission;
- it establishes a maximum period of 60 business days for response on the granting of the marketing authorisation granted under the Resolution; once that period expires constructive denial will be presumed;
- the Resolution mentions that, if necessary, the COFEPRIS "will use its powers to avoid a possible risk to health with respect to medicines that do not have a marketing authorisation in Mexico, imposing the obligation on the medical units that apply those medicines to implement intensive pharmacovigilance in terms of the applicable law.

Processing marketing authorisation
The Resolution of November 18 titled "Resolution establishing administrative measures to ease the processing of the marketing authorization of medicines and other health products from abroad" determined the following:

- the possibility of obtaining marketing authorisations for medicines in a term of five business days from the date of issuance; and
- the possibility that medicines be imported without a marketing authorisation under the modification of the Public Sector Acquisitions, Leases and Services Act, through acquisitions processes carried out by international bodies (eg, UNOPS – see below).

The Public Sector Acquisitions, Leases and Services Act
For the purpose of implementing the international purchases of health products, on 11 August 2020 the Public Sector Acquisitions, Leases and Services Act was amended. The following paragraph was added to Article 1:

"The acquisition of health goods or provision of health services contracted by the agencies and/or entities with international inter-governmental bodies, through mechanisms of collaboration previously established, are exempt from the application of this Act, provided the application of the principles established in the Political Constitution of the United Mexican States is shown".

This indicates clearly that the terms of the Act will not apply in the case of acquisitions of health products implemented through international organisations, the road was left open for them.

International organisations from which Mexico has decided to purchase medicines

On 31 July 2020 Mexico announced the execution of an agreement with two international organisations for the purchase of medicines.

The United Nations Office for Project Services (UNOPS) and the Pan American Health Care Organization (PAHO) are the international organisations through which they will be executed.

UNOPS

UNOPS is an entity of the United Nations (UN) that provides project administration services in each area in which the UN has a mandate to meet, including, among others, prevention and raising awareness of the use of explosive mines, health sector reform, IT solutions and the eradication of poverty.

UNOPS prepares development projects or provides specialised services, as may be necessary. Those services include:

- the selection and contracting of personnel for the project in question;
- the acquisitions of goods;
- the organisation of the training and education;
- the administration of financial resources; and
- the administration of credit.

It is the largest service provider of the United Nations system, which works on behalf of more than 30 departments and organisations of the UN.

The suppliers interested in working with the UNOPS (or with any of the other 12 United Nations organisations), must be registered in the UNCSD (United Nations Common Supply Database), visiting the website.

The UNOPS calls public tenders and locates suppliers through internet searches, contacts with trade offices, business missions, chambers of commerce, professional associations, commercial archives and catalogues. Its principles are:

- better quality-price relationship;
- equity, integrity and transparency;
- effective competition; and
- best interest of UNOPS and its partners.

The steps to follow to implement public acquisitions are:

- market research (*estudio de mercado*);
- procurement strategy;
- solicitation, request for quotation, invitation to tender and request for proposal;
- evaluation;
- contract award;
- review and approval; and
- signature of contract.

It implements direct purchases itself without tenders when the nature of the goods or the particularities of the project require it, for example in the case of medicines protected by patents.

PAHO

PAHO is the international organisation specialised in the public health of the Americas through the health of the inter-American system and serves as the regional office in the Americas for the World Health Organization (WHO).

The PAHO provides technical co-operation in health to its member countries, combats transmissible diseases and attacks chronic illnesses and their causes, strengthening the health systems and responding to emergency and disaster situations.

All ministers of health and governmental institutions of the public health services network of the countries that are members of PAHO can

acquire medicines and supplies through the strategic fund. To do so it is only necessary to sign an agreement with the organisation.

It uses two funds for the purchase of the products:

- the Vaccines Revolving Fund; and
- the purchase of high quality vaccines, needles and related supplies.

Strategic fund for medicines

This fund buys:

- antiretroviral medicines and medicines for opportunistic infections associated with HIV/AIDS;
- anti-malaria and anti-tuberculosis of first and second line;
- anti-chagasic, anti-leishmaniasic, anti-viral, immunosuppressive medicines and other essential medicines;
- laboratory reagents for rapid tests and confirmatory tests of HIV/AIDS and reagents for measuring the viral load; and
- pesticides and products for malaria prevention.

Supplier requirements

Suppliers must be evaluated and pre-qualified by PAHO, providing evidence that they meet the current requirements of best manufacturing practices and apply appropriate warranty and quality control standards.

They must be registered on the electronic tender system (In-Tend), where the information on the company can be updated and changed, tenders responded to and the referenced documentation maintained, securely, through the internet.

Conclusion

This is the new legal framework for making governmental health product purchases. An important quantity of such products will be acquired through these procedures. As indicated previously, it is hoped that this effort is for the good of the protection of people's health in terms of the fourth Article of the Political Constitution of the United Mexican States.

Santillana Hintze Abogados, S.C. is based in Mexico City. Founded 15 years ago, its areas of expertise include health law, regulatory, advertising, licensing, black market issues and prosecution, anti-bribery compliance and personal data protection and compliance. It advises life sciences companies involved in the pharmaceutical and medical devices industry, as well as industry associations, on legal matters related to biotechnology. The practice group consists of 20 lawyers specialising in healthcare law, with a team dedicated exclusively to administrative litigation matters, including advising and litigating on public procurement and public tenders of pharmaceuticals and medical devices. The firm's lawyers are experienced in health law, corporate law, personal data compliance, FCPA and competition matters, advising clients that are among the most prominent pharmaceutical and medical devices companies and demand highly specialised legal advice relating to the latest laws and regulations in this rapidly developing field.

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NORWAY

Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

In Norway, the Public Procurement Act regulates the general principles for public procurement, accompanied by several regulations that set out more detailed rules of each sector. These regulations are as follows:

- the Public Procurement Regulation;
- the Utilities Regulation;
- the Defence and Security Regulation; and
- the Regulation on Concessions Procurement.

In addition, there is a separate Regulation on the Complaints Board for Public Procurement. This regulates the procedural rules applicable to the Norwegian Complaints Board.

1.2 Entities Subject to Procurement Regulation

Public procurement applies to:

- government authorities;
- county and municipal authorities;
- bodies governed by public law;
- associations with one or more of the three foregoing bodies;
- public enterprises that carry out utility activities, as defined in international agreements that Norway is party to; and
- other entities engaged in utility activities on the basis of exclusive rights or special rights, as defined in international agreements that Norway is party to.

1.3 Types of Contracts Subject to Procurement Regulation

When contracting authorities mentioned above enter into contracts regarding works, supplies and services, the contracts are subject to public procurement regulation if the estimated value is equal to or exceeds NOK100,000, excluding VAT. The minimum value thresholds for all contracts that are subject to procurement regulation are NOK100,000, excluding VAT.

When it comes to establishing what part of the public procurement regulation applies to an individual contract, it depends on the estimated value of the contract.

- The national threshold is NOK1.3 million for works, supplies and services contracts. The threshold for public services contracts for social and other specific services is NOK7.2 million.
- Part II of the public regulation will apply to contracts with an estimated value between NOK1.3 million and the EU threshold.
- Part III of the public regulation will apply to contracts with an estimated value over the EU threshold. The EU threshold is NOK1.3 million for government's supplies and services contracts, NOK2.05 million for other contracting authorities that are subject to the public procurement regulation, and NOK51.5 million for works contracts.
- Part IV will apply to contracts for health and social care services over NOK7.2 million.
- Part V will apply to design contests with an estimated value over NOK1.3 million.
- Regarding concession contracts, the EU threshold is NOK51.5 million.

In the utility sector the threshold is NOK4.1 million for supply and service contracts. For works contracts in the utility sector, the threshold is NOK51.5 million, and NOK9.6 million for health and social care contracts. Aside from the latter, the threshold is the same in the defence and security sector.

1.4 Openness of Regulated Contract Award Procedure

Any interested party from any jurisdiction can attend a regulated contract award procedure.

However, right holders of the public procurement regulation are, according to the Public Procurement Act, businesses that are established in accordance with the legislation of an EEA state and have their main administration or principal place of business in such a state. The same applies to businesses that are granted rights under the WTO agreement on public procurement or other international agreements that Norway is obliged to follow.

1.5 Key Obligations

There are several key obligations of note under the public procurement legislation. The first to highlight is the obligation to ensure that public funds are utilised as well as possible, and that the purchases contribute to a competitive business sector. It is important that contracting authorities act with integrity so that the public has confidence that public procurement takes place in a socially responsible manner.

A second obligation to highlight is that the contracting authorities are obliged to publish a contract notice for all contracts that have an estimated value over the national threshold. This obligation ensures transparency in the public sector while stimulating competition in the business sector.

When it comes to the key obligations of the public procurement legislation, it is equally necessary to highlight the general principles. The general principles are competition, equal treatment, foreseeability, verification and proportionality. Essentially, the general principles can form an independent basis for duties and rights for contracting authorities and bidders, which means that the general principles must be observed.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

For contracts subject to the Procurement Regulation Part II (exceeding the national threshold), tender procedures shall be published in the Norwegian Database for Public procurements ("Doffin").

For contracts subject to the Procurement Regulation Part III (exceeding the EU threshold), the tender procedure must be published in Doffin and Tenders Electronic Daily (TED).

The publication must as a minimum include a description of the procurement, a deadline for receipt of requests for participation, registration of interest, or submission of tender, and must comply with the relevant Doffin publication form.

Contracting authorities may also make known their planned procurement procedures by way of a "guiding publication". This must include a brief description of the planned procurements and may be published in TED, Doffin or through the contracting authority's user profile.

2.2 Preliminary Market Consultations by the Awarding Authority

The contracting authority may carry out preliminary market consultations before launching the tender procedure in order to prepare the procurement procedure and to inform the suppliers of their plans and needs.

The contracting authority may seek advice from independent experts, suppliers or other market players. The advice may be used in the planning of and during the procedure provided that the advice does not distort the competition or lead to breach of the principle of equal treatment.

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2.3 Tender Procedure for the Award of a Contract

For contracts subject to the Procurement Regulation Part II (exceeding the Norwegian threshold), the contracting authority may use an open or restricted procedure and is free to clarify and negotiate, unless they have informed that they will not.

For contracts subject to the Procurement Regulation Part III (exceeding the EU threshold), the open or restricted procedure shall be used. Provided that certain conditions are met, the negotiated procedure, the competitive dialogue procedure and innovative partnership may also be used.

2.4 Choice/Conditions of a Tender Procedure

The choice of tender procedures other than the open and restricted procedure is subject to the fulfilment of certain conditions as stipulated in the Procurement Regulation. For example, the negotiated procedure may be used if the procurements character, complexity, legal or financial composition or inherent risk makes it necessary to negotiate.

2.5 Timing for Publication of Documents

The procurement documents shall be made available from the day of publication of the tender procedure in Doffin/TED or the date of invitation to participate in the procedure/confirm interest. These shall include a description of the product or service to be procured, the contractual terms, the requirements set for the tender and tenderer.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

Contracts Subject to Procurement Regulation Part II

For contracts subject to the Procurement Regulation Part II (exceeding the Norwegian threshold) there are no minimum time limits for the receipt of expressions of interest in a contract award procedure or the submission of tenders. However, the contracting authority must, when setting the deadline, take into account the complexity of the contract and the time it will take for the suppliers to provide their reply.

Contracts Subject to Procurement Regulation Part III

For contracts subject to the Procurement Regulation Part III (exceeding EU threshold), the Regulation stipulates various time limits for expressions of interest in a contract award procedure and the submission of tenders depending on the situation. The most important are mentioned below, but please note that these are subject to exemptions.

Open Procedures

For open procedures the minimum time limit for the receipt of tenders is at least 30 days after publication. For restricted procedures and negotiated procedures, the minimum time limit for receipt of requests to participate shall be 30 days after publication, and the time limit for submitting tenders shall be at least 25 days after the invitation to tender has been sent. For a competitive dialogue and innovation partnership the minimum time limit for requesting participation is 30 days after publication, time limit for tender submission is not regulated.

These are minimum limits, the contracting authority must always, when setting a deadline, take into account the complexity of the contract and the time that the supplies will need.

2.7 Eligibility for Participation in a Procurement Process

The Procurement Regulations set out mandatory and optional criteria which interested parties must meet in order to be eligible for participation in a procurement process.

Contracts Subject to Procurement Regulation Part II

For contracts subject to the Procurement Regulation Part II (exceeding the Norwegian threshold) the contracting authority may set criteria related to the supplier's qualifications, including requirements related to economic and financial capacity and technical and professional qualifications. The requirements must be connected, and proportionate, to the delivery and be relevant in order to ensure that the suppliers have the necessary qualifications to fulfil the contract.

Contracts Subject to Procurement Regulation Part III

For contracts subject to the Procurement Regulation Part III (exceeding the EU threshold), the contracting authority may only demand that the suppliers fulfil qualification requirements related to the following: registration, authorisations, economic and financial capacity and technical and professional qualifications. The requirements must be connected to and proportional to the delivery.

2.8 Restriction of Participation in a Procurement Process

The contracting authority may limit the number of participants in the restricted procedure, the negotiated procedure, in a competitive dialogue and in an innovation partnership. The Procurement Regulation sets out a minimum number of tenderers in order to secure competition. For procedures subject to the Regulation Part II the contracting authority must include at least three tenderers. For procedures subject to the Regulation Part III, the contracting authority must include at least five tenderers in a restricted procedure and at least three tenderers in a negotiated procedure, a competitive dialogue and in an innovation partnership.

The selection of tenderers must be done on the basis of objective and non-discriminatory criteria set out in the tender publication. They must be verifiable and relevant for the specific procurement and this may not lead to arbitrary discrimination of the tenderers. The criteria may be, but are not limited to, the criteria for qualification and must be accompanied by documentation requirements.

2.9 Evaluation Criteria

The evaluation of tenders shall be based on certain award criteria set by the contracting authority, and requirements related to the documentation of these. The award criteria must be objective, non-discriminatory and suitable to identify the best tender.

Contracts Subject to Procurement Regulation Part II

For procedures subject to the Procurement Regulation Part II (exceeding the Norwegian threshold) the criteria may be for example price, quality, life-cycle costs, environment, social elements and innovation. The contracting authority may use the same criteria as qualification criteria and award criteria provided that they are connected to the delivery.

Contracts Subject to Procurement Regulation Part III

For procedures subject to the Procurement Regulation Part III (exceeding the EU threshold), award of contract must be based on either the price, cost (using a cost-effectiveness approach such as life-cycle) or the best price-quality ratio, which shall be assessed on financial and qualitative criteria such as quality, availability, organisation, service or technical capacity.

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3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

In the tender documentation, the contracting authority is ordered to disclose both the qualification requirements and the award criteria of which tenders are evaluated. The qualification requirements need to be fulfilled by the bidder in order for the bidders to participate in the contract award procedure. If the contracting authority uses the contract award procedures restricted procedure, negotiated procedure, competitive dialogue and innovation partnership, the contracting authority can set a lower, or upper, limit to numbers of already qualified bidders by using objective and not-discriminatory selection criteria. The selection criteria must be disclosed in the public notice or in the tender documentation.

When it comes to the evaluation methodology, the contracting authority is not obliged to disclose this in the public notice or the tender documentation. However, the contracting authority needs to stipulate the evaluation methodology within the opening of tenders.

The qualification requirements, the selection criteria and the award criteria need to be disclosed in the tender documentation, which is published at the same time as the public notice.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

If the chosen contract award procedure is restricted procedure, negotiated procedure, competitive dialogue or innovation partnership, the contracting authorities can, by the use of selection criteria, choose to not invite interested bidders to submit tenders. The contracting authority is obliged to provide the bidders that are not selected with a written notice of the selection. The notice shall include the reasons for the selection. Such selection is not relevant for open procedure, where the contracting authority has no authority to select just some of the interested bidders to submit tenders. All interested bidders can submit tenders in an open procedure.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Before the contract is concluded, the contracting authority is obliged to notify to bidders the contract award decision. The notification to the bidders has to include a reason for the contract award decision and a standstill period. The notification also needs to include the name of the chosen bidder, and a statement of the characteristics and relative benefits of the selected tender in accordance with the award criteria.

3.4 Requirement for a "Standstill Period"

There has to be a standstill period between the notification of the contract award decision and the conclusion of the contract. The minimum standstill period is ten days, counting from the day after notification of the choice of bidder is sent.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

There is no body generally responsible for overseeing or reviewing awarding authorities' decisions where a decision is not challenged by a third party. However, complaints may be filed before the Complaints Board for Public Procurement for review and decisions may be challenged before the courts, eg, in conjunction with damages claims or interim injunctions. Although not a common procedure, complaints may also be filed before the EFTA Surveillance Authority for review. The Complaints Board, the courts

and the EFTA Surveillance Authority may only set aside awarding authorities' decisions, but do not have the authority to make a new decision.

Decisions of the Complaints Board are only advisory and thus no appeal procedure applies, but the dispute may nonetheless be brought in before the courts. Decisions of the Norwegian courts may be appealed before the appeal courts and a decision of the EFTA Surveillance Authority may be appealed before the EFTA court.

4.2 Remedies Available for Breach of Procurement Legislation

A supplier may file a complaint before the Complaints Board for an advisory decision on the contracting authority's compliance with the procurement legislation. The Complaints Board may also impose penalty fines on the contracting authority in cases of illegal direct awards.

Further, the general courts may award damages, decide a contract without effect and shorten the term of the contract, in addition to granting interim injunctions during the standstill period to suspend the signing of the contract.

4.3 Interim Measures

Interim measures are available. If the supplier files an application for an interim injunction before the court and the application is served on the contracting authority during the standstill period, the application itself will suspend the contract signing. The courts may grant an interim injunction to suspend the contract signing as long as the contract is not yet signed. The suspension applies until the dispute is settled in court.

4.4 Challenging the Awarding Authority's Decisions

Anybody with a legal interest and genuine need to have the lawfulness of the decisions, actions and/or omissions of the awarding authority assessed, has a standing to challenge the awarding authority's decision, eg, unsuccessful tenderers or tenderers who would otherwise participate for a contract which has been (illegally) awarded directly.

4.5 Time Limits for Challenging Decisions

As the courts may not grant an interim injunction if the contract has already been signed, an application for an interim injunction has to be filed during the standstill period. The standstill period is normally ten days from the day after the date of award letter publication.

An application before the courts for declaring a contract without effect, shortening the term of the contract or imposing penalty fines must be filed within two years after the contract was signed. However, if the awarding authority has published a contract award notice in accordance with applicable procurement regulations or otherwise notified affected suppliers of the entering into a contract, a 30-day time limit applies commencing from the day after the notice/notification. The 30-day time limit is suspended if a complaint concerning the illegal direct award is filed before the Complaints Board, whereby a new 30-day time limit applies from the day after the date of the Complaints Board's decision.

A three-year general limitation period applies to damages claims.

4.6 Length of Proceedings

The length of complaint proceedings before the Complaints Board varies depending on the caseload, but the processing time is currently 12 months. The contracting authority may, however, accept to suspend the contract signing awaiting the Complaints Board's decision and, if so, the complaint is prioritised with a current processing time of two months.

The length of proceedings before the courts (damages claims) also depends on the caseload of the relevant court and the complexity of the case at hand, but the dispute shall, as a main rule, be concluded within seven months if not appealed.

An application for interim injunction will automatically suspend the contract signing if served on the contracting authority within the standstill period. A court hearing normally follows an application for interim injunction and the interim injunction process is normally concluded within two to four weeks.

4.7 Annual Number of Procurement Claims

The number of procurement claims (both damages claims and interim injunction cases) considered by the courts each year varies greatly, and not all decisions are publicly available. Based on publicly available court decisions from the years 2012–19, the average number is 20.

Disregarding complaints withdrawn by the complainant, the Complaints Board has considered an average of 176 procurement claims in the years 2012-19. Only counting the years 2017–19, the average number is 139, showing a significant decrease of cases before the Complaints Board the previous years.

4.8 Costs Involved in Challenging Decisions

In addition to any costs to legal counsel, the complainant/plaintiff must pay a fee of NOK8,000 (NOK1,000 in cases of illegal direct award) when filing a complaint before the Complaints Board. Under certain circumstances the fee may be reimbursed by the Complaints Board, but otherwise the parties bear their own costs.

The court fee is currently NOK2,997 for interim injunction cases, while the court fee for damages claims is currently NOK5,995 (with an additional NOK3,597 for each day in court). As a main rule, the successful party shall be reimbursed its costs from the other party, including any court fees and costs to legal counsel.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

Modifications of contract are regulated in the Procurement Regulation Chapter 28, which implements the EU Directive Article 72 and the Pressetext judgement (C-454/16). The contracting authority may modify contracts pursuant to a change clause in the contract and if the changes do not cause a price increase exceeding the threshold values or 10% of the contract value for product and service contracts, provided that the overall nature of the contract is not altered.

In some cases, changes may also include necessary additional deliveries, changes that are necessary due to circumstances that a diligent contracting authority could not foresee or changes on the supplier side of the contract. The following modifications shall always be deemed as substantial, and thus illegal:

- if the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates or for the acceptance of a tender other than that originally accepted, or would have attracted additional participants;
- if the modification changes the economic balance of the contract or the framework agreement in favour of the supplier in a manner not provided for in the initial contract or framework agreement;

- if the modification extends the scope of the contract or framework agreement considerably; and
- where a new supplier replaces the one to which the contracting authority had initially awarded the contract in other cases than those explicitly mentioned in the Regulation.

5.2 Direct Contract Awards

The contracting authority may, in some cases, award a contract directly. This can occur when the procurement legislation is not applicable, such as when the public authority has awarded an exclusive right, when public contracts are entered into between entities in the public sector, when the contract value is below the threshold and the product or the service is exempted, such as real estate.

Furthermore, the Procurement Regulation provides for the possibility to award a contract directly (without a published procedure) for example when there is only one possible supplier, in cases where it is impossible to carry out a procedure due to urgency, after a failed procedure and substitute purchases. The main rule, however, is that there shall be competition and, therefore, the requirements for awarding a contract directly are fairly strict.

5.3 Recent Important Court Decisions

The ECJ's ruling in C-216/17 (ATE Markas) attracted national attention in the Norwegian public procurement community. The decision concerns framework agreements and states that there is in fact an obligation to state the maximum value under a framework agreement. The ECJ further stated that, once the maximum quantity estimate has been reached, "the agreement will no longer have any effect" (paragraph 61). The implementation of this judgment was anticipated.

The Complaints Board recently ruled (advisory decision) that by exceeding the maximum value of a framework agreement of NOK10 million (by NOK29 million) the contracting authority was in breach of the regulation (case No 2020-1). As a result, the Complaints Board imposed a penalty fine on the contracting authority as it was deemed an illegal direct award.

Yet, the relationship to the above-mentioned ECJ ruling was not clarified due to the fact that the Complaints Board only based its decision on the fact that the call-offs exceeding NOK10 million constituted a significant amendment to the framework agreement. The Complaints Board did not explicitly state that the framework agreement "no longer was in effect" once the maximum quantity estimate had been reached. This means that the implementation of the ECJ judgment is still anticipated.

5.4 Legislative Amendments under Consideration

There are no legislative amendments currently under consideration.

However, the Norwegian government recently issued additional guidance at national level on applicable rules to address the COVID-19-crisis (only available in the Norwegian language). In brief, the guidance concerns how Norwegian public bodies may exploit the flexibility that already exists under the regime for the purchase of the supplies, services, and works needed to respond to the COVID-19 pandemic (including measures such as immediate direct awards, reduction of applicable bid deadlines, extending existing contracts, etc).

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Arntzen de Besche Advokatfirma AS has a market-leading, full-service procurement and antitrust practice, advising major national and international clients on a broad array of EEA/EU law issues, such as procurements, antitrust, merger control, state aid and EEA law. In the procurement sphere, Arntzen de Besche is well recognised for its extensive work acting on behalf of suppliers in a wide array of industries. The practice group is headed by Espen Bakken. Arntzen de Besche is consistently sought out to assist with complex, high-stakes matters, with the team frequently appearing before the EFTA Surveillance Authority, the European Commission and the EFTA Court. The firm has broad industry expertise, with particularly strong knowledge of the transport sector, defence and security, renewables life sciences and oil and gas. Arntzen de Besche is international in nature and the firm is highly experienced in assisting with cross-border mandates and has established close relationships with leading global and regional law firms.

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Trends and Developments

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Introduction

In March 2020, the eruption of the COVID-19 pandemic showed how unpredictably and quickly society can change. It affected people, companies, whole industries and nations. The pandemic's impact on society and industries and the difficulties deriving therefrom, have also affected the public sector and public procurement, and concerns concluded contracts, as well as ongoing and future procurement procedures.

The industry and the companies taking part therein have had to face sudden changes, uncertainty, and major disruptions in their practice. Some have experienced bankruptcy. Others have experienced a drastic fall in demand for their products and errors in their supply chains of production and facilitations. In an instant, many well-established companies have experienced sudden and unpredicted economic difficulties due to changed market conditions, which again may cause issues when participating in public procurement procedures. Other pandemics, natural disasters, or other unpredictable events may in the future cause similar, sudden and severe changes to markets and the economy of companies, also affecting the public sector and the potential tenderers in public procurement.

Procedures such as negotiated procedures or competitive dialogues may, if the contract in question is complex, last over a long period of time. A tenderer might, subsequent to the submission of a request for participation, but before the award of the contract, face sudden financial difficulties with the result that the tenderer mayno longer meet the selection criteria relating to economic and financial standing.

During the procurement procedure, companies may therefore suddenly need to rely on the capacity of another entity in order to still meet the selection criteria related to their economic and financial standing at the time of the award of the contract. However, in order to rely on the capacity of other entities to meet a selection criterion related to economic and financial ability, it is a prerequisite that the company has submitted some form of declaration of commitment (or similar) and separate ESPD (European single procurement document) for the other entity, along with the submission of the request for participation.

Will non-fulfilment at the stage of award of contract automatically lead to rejection, or will it be possible for the tenderer to repair this situation by introducing a new entity on which the tenderer can rely on for extra capacity?

In the light of this, the purpose of this article is to address this issue that is currently of note in the market, and to provide valuable considerations for a tenderer who wishes to participate in two-staged procurement procedures, such as negotiated procedures and competitive dialogue, in Norway.

Selection Criteria: Economic and Financial Standing

In uncertain and unpredictable times, it is especially important for contracting authorities to identify challenges and risks before they arise. It is necessary to take precautionary actions before putting contracts out to tender, to ensure that the tenderer with which it enters into a contract, is able to fulfil the contractual obligations of the contract in question.

A mechanism ensuring this, is the use of selection criteria. Selection criteria are requirements the suppliers must meet, in order to be able to take part in the procedure, and to be awarded the contract. The purpose of selection criteria is to ensure that the tenderer being awarded the contract has the necessary ability and capacity to carry out the performance of the contract in question during the contract period.

In a procedure above EU-threshold, the contracting authority may use selection criteria relating to the tenderers economic and financial standing. An example of such a criterion is that the tenderer must have "sufficient financial capacity". The tenderer may rely on the capacity of another entity in order to fulfil a selection criterion related to economic and financial standing. Proper documentation on the fulfilment of this criterion, may for example require presentation of financial statements, appropriate statements from banks, or issued assurance/guarantee from a mother company declaring that it will provide the necessary resources for the tenderer to be able to carry out the contract.

The tenderer's fulfilment of all selection criteria is a prerequisite for being awarded the contract. In two-stage procedures such as negotiated procedures and competitive dialogue, it may also be a prerequisite for being invited to further participation and the submission of tenders. The fulfilment of selection criteria is mandatory, and if they are not met, the contracting authority is not given a choice, it is obliged to reject the tenderer from further participation in the procedure.

Submission of Documentation

The tender must state in the ESPD-form a self-declaration as preliminary evidence that it meets the selection criteria set out in the procedure, and that there is no other reason for exclusion. The full documentation, or parts thereof, supporting the tenderer's statement on its fulfilment of selection criteria in the ESPD, may be requested by the contracting authority at any stage of the procedure.

In a two-staged procedure, it is common that contracting authorities request the submission of complete documentation on fulfilment of selection criteria with the request for participation. Where the contracting authority makes use of the possibility to limit the number of candidates invited to submit tenders, requiring submission of the documentation already at this stage could be justified to avoid inviting candidates which later prove unable to meet the criteria at the time of award, depriving otherwise qualified tenderers from participation.

Even though an examination of whether a tenderer meets the selection criteria is carried out and confirmed in the first phase of a procedure, the contracting authority shall, before awarding the contract, require the tenderer nominated for the award to submit updated documentation on the fulfilment of the selection criteria. This is to ensure that at the time of the award, the tenderer still has the necessary ability and capacity to carry out the performance of the contract in question during the contract period.

Time of Fulfilment

Where it is stated in the procurement documents that the assessment on which tenderers are to be invited at a later phase is based on fulfilment of the selection criteria, it is required that those criteria are fulfilled at this stage of the procedure. And further, a prerequisite for being awarded the contract is that the tenderer submits upon request updated means of proof for the fulfilment of selection criteria prior to the award.

In the extension of this, a situation that might occur is that a tenderer who was assessed and confirmed to meet the selection criteria of economic and financial standing at an early stage of

a procedure, may suffer from financial struggles at a later stage of the procedure, and itschanged financial standing could mean that this selection criterion is no longer met at the time of the award of contract.

Reliance on the Capacity of Other Entities in Order to Meet the Selection Criteria of Economic and Financial Standing

In principle, the contracting authority shall reject the tenderer where a selection criterion is no longer met at the time of award of the contract.

Where subsequent changes in the tenderer's financial standing results in non-fulfilment of the selection criteria prior to the award of the contract, this could be repaired if the tenderer is able to provide sufficient proof that it is relying on the capacity of another entity. For example, where a bank agrees to provide a sufficient bank guarantee or a mother company is able to issue a financial guarantee or similar, guaranteeing the financial ability of the tenderer to carry out the performance of the contract in question.

For contracts above EU-threshold, in order to rely on the capacity of other entities to fulfil selection criteria of economic and financial standing, it is a prerequisite that it is stated in the tenderer's ESPD that it relies on the other entity's capacity, and that a declaration of commitment (or similar) and a separate ESPD for the other entity is provided along with the request for participation. This does also apply where a tenderer wishes to rely on the capacity of a mother company or other companies in the same company group.

In principle, this implies that if a tenderer is to rely on the capacity of another entity in order to fulfil selection criteria, this has to be formalised and submitted at the time of deadline for submission of request for participation. However, will the Norwegian procurement legislation be open to the possibility to introduce a new entity to provide capacity in order to fulfil the selection criteria at the time of award of the contract?

Extension of the possibility to request the submission of documentation

In the previous Norwegian procurement regulation, the contracting authority's right to request the tenderer to submit or supplement the relevant information or documentation on the fulfilment of selection criteria, was limited to submission of public information or to supplement information already included in the tender documentation. With the new procurement regulation of 2016, the possibility to request submission of documentation has been extended. To what extent this possibility has been extended, has not been legally clarified.

In the practice of the Norwegian Public Procurement Complaint Board, it follows that non-fulfilment of selection criteria at the stage of submission of request for participation/tender, cannot be repaired by submitting documentation which introduces a new entity for the tenderer to rely on, in order to fulfil a selection criterion subsequent to the deadline for submission. Where a selection criterion is not met at the time of submission of request for participation, the contracting authority is obliged to reject the tenderer.

However, the practice of the Norwegian Public Procurement Complaint Board on this issue concerns the tenderer's possibility to submit a subsequent declaration on the commitment of other entities for the fulfilment of selection criteria, where the tenderer was not considered qualified in the first place, at the time of deadline for submission of request for participation. If this was permitted, it would represent a breach of the principle of equal treatment, as it would enable tenderers that were not qualified for participation in the first place to participate in the procedure.

Fully qualified tenderers at the point of request for participation

The same does not necessarily apply in a situation where the tenderer was in fact considered qualified at the time of submission of the request for participation. In this situation, the premise for equal treatment of the tenderers is not distorted, as the tenderer was in fact fully compliant and permitted to take part in the procedure on the same conditions as the other participating and qualified tenderers.

However, in order for this arrangement to not be in breach of the principles of equal treatment and transparency, it is a prerequisite that the contracting authority has not stated anything in the procurement documents prevailing this. Further, it is a prerequisite that the new entity fulfils the relevant selection criteria, and that there are no other grounds of exclusion present.

It is the tenderer's ability to fulfil its contractual obligations that is decisive, not how this ability arises. Where the tenderer did fulfil the selection criteria in the first place, the permission to rely on the capacity of another entity subsequent to the deadline for submission of tenders to still ulfil the contract, will merely uphold the state that was already present and sufficiently proven as a condition for participating in the procedure, not subsequently enable it to do so. Allowing this arrangement will therefore likely not have had any impact on whether other tenderers would have participated if they were aware of such a possibility.

Closing Remarks

In the absence of legal clarification on the extent of the contracting authority's ability to request supplementary information regarding fulfilment of selection criteria, it can be argued that it should be possible to submit declaration of commitment (or similar) subsequent to the deadline for submission of request for participation under the assumption that:

- the tenderer was considered to comply with the selection criteria at the time of submission of request for participation;
- the tenderer provided sufficient documentation concerning the other entity guaranteeing it will provide the necessary resources for the tenderer to be able to carry out the contract;
- the other entity fulfils the relevant selection criteria and there are no other grounds for exclusion;
- there is no information in the procurement documentation that indicates that the contracting authority prevailed to allow such.

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Vaar Advokat AS is a boutique law firm specialised in public procurement, IT and privacy. The firm is located in central Oslo and consists of 11 employees. One of Vaar's areas of expertise is public procurement. The firm assists clients with all types of public procurement and assumes responsibility for the implementation and execution of all parts of the procurement process. The firm has a procurement portal, Vaar Portal, where subscribers can access electronic editions of Marianne H. Dragsten's books on public procurement, including guidelines and templates. Vaar has extensive experience in IT law and procurement, such as cloud services, ERP systems, welfare technology and development projects. Vaar has a comprehensive understanding of the technology sector and the related opportunities and challenges faced by clients. Vaar is also specialised in privacy and has extensive experience in all aspects of privacy and data protection laws which affect technology-related businesses, transactions, and public entities, including the handling of personal information.

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

This guide comes at the perfect time for a brief analysis of public procurement law in Poland. As of 1 January 2021, the new Act of 11 September 2019 Public Procurement Law (Journal of Laws from 2019 number 2019 as amended (PPL)) is in force. The Act of 29 January 2004 Public Procurement Law (Journal of Laws from 2004 number 19 item 177 (PPL 2004)) has been repealed. Detailed rules during the transition period are regulated by the Act of September 11th, 2019 Regulations introducing the Act — Public Procurement Law (Journal of Laws from 2019 number 2020 as amended, hereinafter: IPPL).

Key rules applicable during the transitional period:

- public procurement procedures initiated and not completed before 1 January 2021 — the provisions of PPL 2004 shall apply;
- to public procurement contracts and framework agreements concluded: before 1 January 2021 or after 31 December 2020, following procurement procedures initiated before 1 January 2021 — the provisions of PPL 2004 shall apply;
- to appeal proceedings and proceedings pending as a result of a complaint to a court, initiated and not concluded before 1 January 2021, and to the jurisdiction of the courts over complaints filed before 1 January 2021 – the provisions of PPL 2004 shall apply;
- to appeal proceedings and proceedings pending as a result of a complaint to the court, initiated after 31 December 2020, concerning contract award procedures initiated before 1 January 2021 – the provisions of the PPL shall apply; and
- the provisions of the PPL shall apply to subsequent contract award proceedings and appeal proceedings and proceedings pending as a result of a complaint to a court.

The remainder of the analysis is based on the provisions of the PPL currently in force.

Regulations Specific to COVID-19

It is worth underlining that, due to the circumstances caused by the COVID-19 pandemic, the Act of 2 March 2020 on Special Solutions to Prevent, Counteract and Combat COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (Journal of Laws from 2020 number 374 as amended (SHIELD)) was introduced, which contains regulations concerning amendments to the public procurement agreements and amendments to agreements with subcontractors, which will be discussed in more detail in the following part of the study.

Jurisprudence

A distinctive feature of Polish public procurement law is the fact that it is shaped to a large extent by the jurisprudence of the National Appeal Chamber (*Krajowa Izba Odwoławcza* or NAC) and the courts, including the CJEU, also handed down when the PPL 2004 was in force. Therefore, it is crucial to be familiar with established practices and detailed consequences, especially in the context of elements such as: self-cleaning, demonstration of experience, misleading, in-house contracts, breach of competition law.

1.2 Entities Subject to Procurement Regulation

The provisions of the PPL apply to awarding authorities, which are:

- entities of the public finance sector (public authorities, including government administration bodies, state control and law protection bodies as well as courts and tribunals, local government units and their unions, budgetary

units, executive agencies and other state or local government legal persons established on the basis of separate acts in order to perform public tasks);
- state organisational units without legal personality other than those specified above;
- legal persons other than those referred to above, established for the specific purpose of meeting needs of general interest, not having an industrial or commercial character, if the entities referred to above, directly or indirectly through another entity:
  (a) finance them for more than 50%; or
  (b) hold more than half of shares; or
  (c) exercise supervision over the management body; or
  (d) have the right to appoint more than half of the members of the supervisory or management body; or
- associations of the entities referred to above.

The PPL introduces a general principle that the Act applies to the widest possible range of entities and subject matter, however, it provides also for numerous exemptions, eg, for legal, research and development services; acquisition of ownership or other rights to existing buildings or real estate; financial services relating to the issue, sale, purchase or disposal of securities or other financial instruments, loans or credits; passenger transport by rail or metro and others. These provisions are the key to determine whether it is obligatory to apply the PPL.

1.3 Types of Contracts Subject to Procurement Regulation

The PPL applies to:

- classic procurement and organisation of competitions, the value of which equals or exceeds PLN130,000, by awarding authorities;
- sector procurements and organising competitions, the value of which equals or exceeds the thresholds of the European Union, by sector awarding authorities;
- procurements in the fields of defence and security, the value of which is equal to or exceeds the thresholds of the European Union, by awarding authorities; and
- classic contracts and the organisation of competitions, the value of which equals or exceeds the EU thresholds, by subsidised awarding authorities, ie, more than 50% of the value of the contract awarded by this entity is financed from public resources, and the subject matter of the contract is works, eg, construction of hospitals, sports facilities, school buildings or services related to such works.

EU Thresholds

The EU thresholds are applied in accordance with EU law, according to the fixed euro to Polish zloty exchange rate of 4.2693 in 2021:

- EUR5,350,000 in the case of public works contracts;
- EUR139,000 in the case of public supply and service contracts awarded by central government authorities and design contests organised by such authorities; for public supply contracts awarded by awarding authorities operating in the field of defence, this threshold applies only to contracts for products covered by Annex III to Directive 2014/24/EU;
- EUR214,000 for public supply and service contracts awarded by sub-central awarding authorities and design contests organised by such authorities – this threshold shall also apply to public supply contracts awarded by central government authorities operating in the field of defence where such contracts involve products not covered by Annex III to Directive 2014/24/EU; and
- EUR750,000 for public contracts for social and other specific services listed in Annex XIV to Directive 2014/24/EU.

Only certain provisions of the PPL apply to the preparation and conduct by awarding authorities of a classic procurement procedure with a value below the EU thresholds.

1.4 Openness of Regulated Contract Award Procedure

There are no restrictions as to the origin of a contractor seeking to conclude a public procurement contract in Poland. However, attention should be paid to proceedings where, in exceptional circumstances, the awarding authority has the right to invite one or more selected entities to conclude a contract or to negotiate. Of course, there are no exclusions with respect to contractors from the EU and the situation of contractors from non-EU countries is presented below.

Poland is a party to the Government Procurement Agreement concluded in Marrakesh in 1994 (Official Journal of the EU L 1994 No 336, hereinafter: GPA). These regulations are modelled on the EU regulations and the North American Free Trade Agreement (NAFTA). They cover public procurement for the supply of goods, services and works and, in addition, also cover awarding authorities other than governments — certain entities of central government and regional and local administrations. Article XX of the GPA 1994 directs the parties to the agreement to put in place non-discriminatory, timely, transparent and effective procedures to allow contractors to challenge violations of the GPA 1994 in the course of awarding a contract in which they had or have an interest.

The recent regulation is the revised Government Procurement Agreement which was signed in 2012 and came into force on 6 April 2014. It aims to ensure an even higher degree of transparency and equal treatment in international public procurement, including electronic means, eg, a free database containing central government procurement notices.

Thus, any entities that are party to the GPA have an open route to apply for Polish public procurement. Recently, an increased interest in the Polish market from non-EU contractors has been observed.

1.5 Key Obligations

Key Responsibilities of Awarding Authorities

Polish law, implementing EU obligations, introduced specific obligations for awarding authorities, giving contractors the right to appeal and question any action of the awarding authority, which frequently allows irregularities to be eliminated and determines the outcome of the procedure.

The most important rules for the awarding authorities are as follows.

Maintaining fair competition

A comprehensive competition law applicable throughout the EU applies here, above all the ban on limiting competition in the procedure by setting excessive conditions or subject-matter requirements, and thus narrowing the circle of contractors beyond the need to ensure that the contract will be performed by a reliable contractor capable of performing it properly, in a manner that meets the needs of the awarding authority and the law.

Equal treatment of contractors

This is a requirement that comparable situations should not be treated differently and that different situations should not be treated in the same way, especially the obligation to provide contractors with the same opportunities both at the stage of formulating applications or tenders, and during their examination and evaluation, in accordance with CJEU case law, in particular with regard to equal treatment of foreign contractors.

Proportionality
The measures adopted should not go beyond what is necessary to achieve the objective pursued, so the description of the subject matter of the contract, the conditions for participation in the procedure or the criteria for evaluating tenders must be related to the subject matter of the contract and proportionate to its value and objectives without imposing excessive requirements, so for example additional, unjustified requirements cannot be imposed merely so as to limit access to the contract to foreign entities.

Transparency
This is an obligation that guarantees the effectiveness of all other obligations by enabling contractors to acquaint themselves with the actions of the awarding authority, including all terms and conditions of the procurement procedure described in the contract notice or the contract documents in a clear, precise and unequivocal manner, as well as with all subsequent actions of the awarding authority, so that a contractor is able to review them by way of appeal, described further.

Key Obligations for Contractors

The obligations imposed by PPL on contractors are not overly burdensome compared to other EU countries, but our experience dictates that special attention should be paid to:

- detailed verification of the conditions of the procedure before submitting an offer – it often turns out that misunderstanding of the wording leads to defeat for the contractor, and in the decisive moment the legal interpretation of statements of intent and provisions of laws based on case law prevails;
- preparation of an offer should be preceded by collection of documents, especially by foreign contractors — PPL requires that certain documents be drawn up before the offer is submitted, eg, certificates from the criminal register and courts or administrative authorities, consortium agreement or agreement on making one's potential available for the purposes of the contract;
- the submission of the tender itself is currently possible only in electronic form, with different authorities using different platforms where a qualified electronic signature complying with Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28 August 2014; hereinafter: eIDAS) is required; and
- the run for the contract is likely to be preceded by a competitive dispute, so an analysis of the competitors' bids will be necessary – but it is crucial to start verifying the experience and reliability of the other contractors even before the bids are submitted.

Merely complying with formal requirements is not enough to win a contract today. What is needed is know-how in the use of legal remedies and a deep understanding not only of the law, but also of the practice of such proceedings.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Generally all award procedures at a value above the relevant EU threshold must be advertised by publishing a contract notice within the Official Journal of the European Union and in the EU public procurement database Tenders Electronic Daily. Awarding authorities must ensure that the procurement documents can be accessed directly, without restrictions and in full by electronic means and free of charge.

In proceedings below the EU thresholds, publication takes place in the Public Procurement Bulletin (*Biuletyn Zamówień Publicznych*).

In the above-mentioned sources, you can find announcements on:

- the contract;
- the intention to conclude a contract;
- the result of the procedure (the award); and
- the execution or modification of the contract.

The websites allow for saved searches and email notifications of contracts relevant to specific industries, products, etc. In addition, it is worth using publicly available schedules of public procurement procedures published by individual awarding authorities, which will allow for the planning of bid submissions throughout the year.

2.2 Preliminary Market Consultations by the Awarding Authority

The awarding authority, before launching the procurement procedure, may conduct preliminary market consultations to prepare the procedure and inform contractors about its plans and requirements for the contract.

The awarding authority is obligated to:

- analyse the needs and requirements before commencing a classic procedure with a value equal to or exceeding the EU thresholds;
- ensure the best quality of supplies, services and works, justified by the nature of the contract, within the limits of resources that the awarding authority may allocate to its execution; and
- achieve the best results of the contract, including social, environmental and economic effects, provided that any of these effects is possible to achieve in a given contract when compared to the incurred expenditures.

Therefore, market research and the search for alternative means of satisfying the awarding authority's needs will precede each procedure. However, in practice, Poland shows that very often the participation of contractors is only possible after the publication of a contract notice, eg, in the form of consultations, because officials are afraid of even the suspicion of corruption.

2.3 Tender Procedure for the Award of a Contract

Procedures above the EU Thresholds

Open tenders (Przetarg nieograniczony)

The most common contract award procedure above the EU thresholds is the open tender, where in response to a contract notice, tenders may be submitted by all interested contractors.

Restricted tender (Przetarg ograniczony)

A contract award procedure where in response to a contract notice, requests to participate may be submitted by all interested contractors, and tenders may only be submitted by contractors invited to submit a tender.

Negotiations with publication (Negocjacje z ogłoszeniem)

A contract award procedure in which, in response to a contract notice, requests to participate may be submitted by all interested contractors. The awarding authority shall invite the contractors admitted to participate in the procedure to submit initial tenders and conduct negotiations with them in order to improve the content of initial tenders. Tenders are submitted during the negotiation stage, after the completion of which it shall invite contractors to submit final tenders.

The awarding authority may award a contract on the basis of preliminary tenders without negotiations, provided that it indicates in the contract notice that it reserves such possibility.

Competitive dialogue (Dialog konkurencyjny)
A contract award procedure in which all interested contractors may submit requests to participate in the procedure in response to a contract notice. The awarding authority conducts a dialogue with the contractors invited to participate in the dialogue with regard to the solutions proposed by them, after completion of which it invites them to submit tenders.

Innovation partnership (Partnerstwo innowacyjne)
The awarding authority may award a contract under the procedure of innovation partnership in the case of demand for an innovative product, service or works, if they are not available on the market.

Negotiations without an announcement (Negocjacje bez ogłoszenia)
A contract award procedure where the awarding authority negotiates the terms of a public procurement contract with selected contractors and then invites them to submit tenders – this procedure is possible in exceptional situations, eg, when no tender was submitted in the previous procedure on the same subject.

Single-source procurement (Zamówienie z wolnej ręki)
A contract award procedure where the awarding authority awards a contract after negotiations with only one contractor – this procedure is possible in exceptional situations, eg, when supplies, services or works can be provided by only one contractor for objective technical reasons.

Below the EU Thresholds

The PPL provides for four modes of public procurement procedures below the EU thresholds:

- basic procedure (*Tryb podstawowy*) — without negotiations, with optional negotiations or with mandatory negotiations;
- innovation partnership (*Partnerstwo innowacyjne*);
- negotiations without an announcement (*Negocjacje bez ogłoszenia*); and
- single-source procurement (*Zamówienie z wolnej ręki*).

It is possible to challenge the very initiation of the procedure in a given mode, especially in the case when it is done in a manner limiting competition, which makes it impossible for a contractor to submit a tender. Then, the NAC verifies whether the statutory and factual prerequisites to apply a given mode were properly demonstrated and may decide to cancel the procedure and conduct it in a competitive mode.

2.4 Choice/Conditions of a Tender Procedure

The awarding authority may award a contract in open and closed procedures, except in cases specified in **2.3 Tender Procedure for the Award of a Contract**.

In accordance with the above-mentioned rules, the use of a non-competitive procedure is connected with the obligation to publish an announcement, thanks to which a contractor who was interested in the contract, but did not get a chance to submit a tender, can appeal to the National Chamber of Appeal and question the initiation of proceedings under a given procedure.

2.5 Timing for Publication of Documents

In competitive procedures, all documents are publicly available at the same time as the announcement itself. It is necessary to verify the completeness of the documents and to ask the awarding authority for other necessary documents or clarifications. Publication deadlines are standard in accordance with EU law.

What is important in this respect is that the contractor has the right to legal protection measures within five days in the case of proceedings below the EU thresholds and ten days in the case of proceedings above the EU thresholds, and it is then that an appeal should be lodged, which may consequently lead to the cancellation of the proceedings or changes imposed in a NAC's ruling in favour of the contractor.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The time limit for receipt of requests to participate or initial tenders may not be shorter than 30 days from the date on which the contract notice is transmitted to the Publications Office of the EU – please note, this is not counted from the publication of the notice, which normally takes place within a maximum of three days of transmission.

2.7 Eligibility for Participation in a Procurement Process

A contractor may be excluded by the awarding authority at any stage of the procurement procedure, provided that this is a mandatory reason or an optional reason, if the awarding authority indicated the optional reason in the contract notice.

Obligatory Grounds

A contractor shall be excluded from the contract award procedure if:

- the contractor is a natural person who has been legally sentenced for an offence specified in the PPL or for a respective prohibited act specified in the provisions of foreign law;
- the member of its managing or supervisory body, a partner in a general partnership or similar person has been validly convicted of an offence referred to above;
- a final court verdict or a final administrative decision has been issued against the contractor concerning payment of taxes, fees or contributions for social or health insurance;
- a ban on participation in public procurement proceedings was validly declared against the contractor;
- the awarding authority can establish, based on reliable grounds, that the contractor entered into an agreement with another contractor aimed at distorting competition, unless they can prove that they prepared those tenders independently of each other;
- there has been a distortion of competition resulting from prior involvement of that contractor or of an entity which is a member of the same capital group as the contractor, unless the distortion of competition can be eliminated other than by excluding a contractor from participation in the procurement procedure; or
- a contractor prevents or hinders the establishment of the criminal origin of money or hides its source due to the impossibility to determine the actual beneficiary, as defined by the provisions on counteracting money laundering and terrorist financing.

Optional Grounds

An awarding authority may exclude from the procurement procedure a contractor:

- who has violated obligations relating to the payment of taxes, fees or contributions for social or health insurance, unless they have paid them or they have concluded a binding agreement on the repayment;
- who has breached obligations relating to environmental protection, social or labour law;
- where a member of its management or supervisory body, a partner in a general partnership or a proxy has been validly convicted of an offence against employee rights or against the environment;

- in relation to whom liquidation has been opened, who has been declared bankrupt, whose assets are administered by a liquidator or a court, who has entered into an arrangement with creditors, whose business activities are suspended or who is in any other similar situation arising from a procedure provided for in the legislation of the place where that procedure has been initiated;
- who has committed a grave professional misconduct calling into question their honesty;
- if there is a conflict of interests;
- who had a previous public procurement contract which, for reasons attributable to them, led to the termination or withdrawal from the contract, compensation, substitute performance or exercise of rights under warranty for defects;
- who misled the awarding authority when presenting information in the procurement procedure; or
- who unlawfully influenced or attempted to influence the actions of the awarding authority or attempted to acquire or obtained confidential information which could give them an advantage in the procurement procedure.

Self-Cleaning

A contractor shall not be subject to exclusion in certain circumstances set out above if they prove to the awarding authority that they have jointly fulfilled the following conditions:

- they have made good or have undertaken to make good the damage caused by the offence, misconduct or their irregular conduct, including by way of pecuniary compensation;
- they have fully explained the facts and circumstances of the offence, the misconduct or the wrongdoing and the damage caused by it, actively co-operating with the competent authorities, including law enforcement authorities, or the awarding authority, as appropriate; and/or
- they have taken specific technical, organisational and human resources measures that are appropriate to prevent further offences, misconduct or improper conduct, in particular:
  - (a) severing all links with persons or entities responsible for the contractor's irregular conduct;
  - (b) reorganising its staff;
  - (c) implementing a reporting and control system;
  - (d) setting up internal audit structures to monitor compliance with laws, internal regulations or standards; and/or
  - (e) introducing internal regulations on liability and compensation for non-compliance with laws, internal regulations or standards.

The awarding authority shall assess whether the measures are sufficient to demonstrate its reliability, taking into account the importance and specific circumstances of the act. If the measures taken are not sufficient to demonstrate its reliability, the awarding authority shall exclude that contractor.

2.8 Restriction of Participation in a Procurement Process

Limiting the access of contractors to a given public procurement procedure may take place only by choosing a non-competitive procedure, as described in **2.3 Tender Procedure for the Award of a Contract**.

In some cases, only one contractor may participate in the procedure.

2.9 Evaluation Criteria

The awarding authority shall choose the most advantageous tender on the basis of the tender evaluation criteria laid down in the tender documents. The awarding authority shall describe the

tender evaluation criteria in a clear and comprehensible manner, which shall not give the awarding authority unlimited freedom to choose the most advantageous tender and shall allow the level of performance offered to be verified and compared on the basis of the information provided in the tenders.

The most advantageous tender may be selected on the basis of quality criteria and price or cost, and in certain cases, solely on the basis of price or cost.

Qualitative criteria may in particular be criteria relating to:

- quality, including technical performance, aesthetic and functional characteristics such as accessibility for disabled people or consideration of users' needs;
- social aspects, including the vocational and social integration of socially marginalised people;
- environmental aspects, including the energy efficiency of the subject-matter of the contract;
- innovative aspects;
- the organisation, professional qualifications and experience of the persons appointed to carry out the contract, where these could have a significant influence on the quality of performance of the contract; and/or
- after-sales service, technical assistance, delivery conditions such as the date, method or time of delivery, and delivery period.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

The tender evaluation criteria detailed in **2.9 Evaluation Criteria** must be described in the contract notice or in the documents published together with the notice, in an open manner and equally accessible to all contractors. As one of the elements of activities in the procedure, with the tender evaluation criteria and the evaluation methodology, these are all subject to appeal to the National Appeal Chamber by interested contractors.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The awarding authority shall immediately inform all contractors who submitted either requests to participate or initial tenders, of the results of the same, providing the factual and legal reasons for the decisions.

Case law has developed standards under which the justification must include detailed reasoning that allows a contractor to understand exactly why it did not qualified for the next stage of the procedure, which gives it the opportunity to lodge an appeal to the National Appeal Chamber, and should it win, to have incorrect decisions repealed by the awarding authority.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Immediately after selecting the most advantageous tender, the awarding authority shall simultaneously inform the contractors who submitted tenders as to:

- the selection of the most advantageous tender, indicating the contractor whose tender was selected and the contractors who sub-

mitted tenders, as well as the scores awarded to tenders for each tender evaluation criterion and the total score; or
- contractors whose tenders have been rejected, stating the factual and legal reasons.

The awarding authority shall make this information available immediately on the website of the procedure. The awarding authority may withhold such information in exceptional cases where its disclosure would be contrary to an important public interest.

3.4 Requirement for a "Standstill Period"

The standstill period complies with the EU law. The awarding authority shall conclude a public procurement contract within no less than ten days from the date of sending the notice of selection of the most advantageous tender if the notice was sent by means of electronic communication, or 15 days – if it was sent by other means.

In case of an appeal, the awarding authority may not conclude an agreement until a judgment or a decision closing the appeal proceedings is announced by the Chamber. However, the awarding authority may apply to the Chamber for exceptional consent to conclude a contract before the end of appeal proceedings, in strictly specified situations.

The standstill period does not extend to court proceedings in the event of a complaint against a judgment of the Chamber. However, in such a case a request may be filed with the court to grant security in the form of a prohibition to conclude a contract.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

The National Appeal Chamber is a body competent to hear appeals filed in public procurement proceedings in the first instance. It is a specialised body which meets the requirements of a court within the meaning of EU law, but which has been incorporated into the administrative structure of the Public Procurement Office.

The parties and participants of the appeal proceedings may appeal against the decision to the court. The complaint is lodged with the District Court in Warsaw – the Public Procurement Court. This court was established in 2021 – prior to that, cases were resolved in local district courts.

4.2 Remedies Available for Breach of Procurement Legislation

In the first instance, an appeal can be lodged against:

- any action taken by the awarding authority in the course of the procedure for the award of a contract, contrary to the provisions of the PPL, including the draft contractual provisions;
- failure to act, to which the awarding authority was obliged pursuant to the PPL; or
- failure to carry out a procurement procedure or organise a competition pursuant to the PPL, in spite of the fact that the awarding authority was obliged to do so.

An appeal must contain, inter alia, a concise presentation of charges, a demand as to the manner of resolving the appeal, indication of the factual and legal circumstances justifying the appeal and evidence in support of the circumstances cited. Any contractor may join the appeal proceedings, indicating the party it

accedes to and its interest in obtaining a ruling in favour of the party it accedes to. The awarding entity may accept the appeal in part or in its entirety – unless a contractor acceding to the proceedings files an objection. The Chamber cannot rule on charges which were not included in the appeal.

In the second instance the case shall be heard by the Public Procurement Court. The complaint should meet the requirements prescribed for a pleading and contain a designation of the appealed decision, indicating whether it is appealed against in whole or in part, stating the pleas in law, brief justification thereof, indication of evidence, as well as a motion for reversal of the decision or for modification of the decision in whole or in part, indicating the scope of the requested modification. In proceedings instituted as a result of an appeal, the form of order sought by the appellant and new forms of order sought may not be extended. The court may not rule on grounds which were not the subject of the appeal.

A court judgment or a decision ending the proceedings in a case may be appealed in cassation to the Supreme Court. A cassation may be filed by a party and the President of the Public Procurement Office in exceptional cases specified in the Act of 17 November 1964 — Code of Civil Procedure.

4.3 Interim Measures

In case of an appeal, the awarding authority cannot conclude a contract until the Chamber announces a judgment or a decision ending the appeal proceedings. The awarding authority may submit a request to the Chamber to waive the prohibition to conclude a contract – exclusively on the grounds specified in the PPL. However, apart from concluding the contract, the awarding authority has the right to perform any other actions in the public procurement procedure, which often affects the appeal proceedings themselves.

The standstill period does not extend to court proceedings in the event of a complaint against a verdict of the NAC. In such a case, however, a request may be filed with the court to provide security in the form of a ban on entering into the agreement.

4.4 Challenging the Awarding Authority's Decisions

Legal remedies are available to the contractor and other entities if they have or have had an interest in obtaining a contract or an award in a competition, and have suffered or may suffer a loss as a result of an infringement of the PPL by the awarding authority.

The concept of "interest" is crucial and understood as broadly as possible in order to ensure that interested parties can verify the actions taken by the awarding authority and eliminate possible violations of the PPL.

4.5 Time Limits for Challenging Decisions

In case of contracts which value exceeds the EU thresholds, appeal shall be lodged within ten days of the date of communication of information on the awarding authority's actions constituting grounds for lodging an appeal, if the information was transmitted by means of electronic communication, or within 15 days if the information was transmitted in a different manner.

In case of contracts where the value is lower than the EU thresholds, an appeal shall be lodged within five days of the date of communication of information on the awarding authority's actions constituting grounds for lodging an appeal, if the information was transmitted by means of electronic communication, or ten days if the information was transmitted in a different manner.

If the deadline for filing an appeal falls on a Saturday or a statutory holiday, the deadline shall expire on the day following the holiday.

The complaint to the court shall be lodged within 14 days of the day of delivery of the Chamber's verdict.

4.6 Length of Proceedings

Pursuant to the PPL, the Chamber examines the appeal within 15 days from the day of its delivery — the hearing is set within that period. In complicated cases, it is sometimes necessary to set further hearings, in exceptional circumstances also connected with obtaining, for example, an expert opinion. The Chamber announces the ruling after the hearing is closed; in complicated cases, the Chamber may postpone the announcement of the ruling for no longer than five days. Although the above are only instructional deadlines, appeals are usually heard within those deadlines.

It is worth noting that in 2020, due to the COVID-19 pandemic, the hearing of cases by the Chamber was suspended for a period of time, but all backlogs have now been caught up and there are currently no delays.

In summary, the typical duration of appeal proceedings from the filing of the appeal to the pronouncement of the judgment usually does not exceed one month.

According to the PPL, the Court shall hear the case promptly, but no later than within one month from the date of receipt of the complaint in court. In practice, due to the creation of a single court for all complaint proceedings, a time limit of at least four to six months should be expected.

4.7 Annual Number of Procurement Claims

According to the Public Procurement Office, almost 2,700 appeals were recognised in 2019, of which 20% were upheld, 27% were dismissed, and in 20% of cases the awarding authority upheld the charges contained in the appeal. In the remaining cases, there was return for formal reasons or discontinuance due to withdrawal of the appeal. In 2020, over 3,500 appeals were recognised, of which 26% were accepted, 19% were dismissed, and in 21% of cases the awarding authority accepted the charges included in the appeal.

It appears that more contractors are participating both at the bidding stage and in the appeal proceedings than in previous years, and the COVID-19 pandemic crisis has intensified competition in public procurement.

In 2020, 122 complaints were lodged against NAC judgments.

4.8 Costs Involved in Challenging Decisions

The amount of the appeal fee varies and depends on the value of the contract and its type. The funds must be in the account of the Public Procurement Office no later than on the day on which the deadline for filing an appeal expires.

In the case of lodging a complaint to the court, the court fee amounts to three times the appeal fee.

The costs of the proceedings shall be borne by the losing party. In addition to the above fees, these may include the costs of legal representation (PLN3,600 in the first instance), costs of an expert opinion, etc.

Public Supply or Service Contract

The amount of the appeal fee in a procedure for the award of a public supply or service contract or in a competition depends on a value:

- lower than the EU threshold of PLN7,500; or
- exceeding the EU threshold amount of PLN15,000.

Public Works Contract

The amount of the entry fee for an appeal filed in a procedure for the award of a public works contract depends on a value:

- lower than the EU threshold of PLN10,000; or
- exceeding the EU threshold amount of PLN20,000.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

A contract may be amended without a new procurement procedure only in the following cases:

- it has been provided for in the contract notice or the contract documents, in the form of clear, precise and unambiguous contractual provisions, which may include provisions concerning the rules for introducing changes in the amount of the price, if they meet all the following conditions:
  (a) they specify the type and scope of the changes;
  (b) they specify the conditions for introducing the changes; and
  (c) they do not provide for such changes that would modify the general nature of the contract;
- when a new contractor is to replace the incumbent contractor:
  (a) if such a possibility has been provided for in the contractual provisions; or
  (b) as a result of inter alia a takeover, merger, bankruptcy of the current contractor, provided that the new contractor meets the conditions for participation in the procedure, there are no grounds for exclusion against it and it does not involve other significant amendments to the agreement; and/or
- if it concerns the execution of additional supplies, services or works, which were not included in the basic contract, provided that they have become necessary and that all of the following conditions have been met:
  (a) a change of contractor cannot be made for economic or technical reasons;
  (b) a change of contractor would cause considerable inconvenience or a significant increase in costs for the contracting authority;
  (c) the price increase caused by each subsequent change does not exceed 50% of the value of the original contract; and
  (d) if the need to amend the contract results from circumstances which the awarding authority, acting with due diligence, could not foresee, provided that the amendment does not alter the general nature of the contract and the increase in price caused by each subsequent amendment does not exceed 50% of the value of the original contract.

According to regulations issued in connection with the COVID-19 pandemic (SHIELD as described in **1.1 Legislation Regulating the Procurement of Government Contracts**), each party to a public procurement contract is required to inform the other party without any delay of the impact, if any, COVID-19 might have on the proper performance of that contract.

The impact of COVID-19 on the proper performance of the contract must be confirmed by appropriate documents or statements. By way

of an example (the catalogue is open), the draft act lists such documents as those relating to:

- absent employees or other associates who are or could be involved in the execution of the contract;
- orders issued by voivodes or decisions issued by the Prime Minister related to the counter-measures against COVID-19;
- the suspension of supply of products, product components or materials as well as difficulties in accessing equipment or difficulties in providing transport services; and
- further circumstances which prevent or significantly limit the possibility of performing the contract.

The above-mentioned circumstances may also apply to a subcontractor or a second-tier subcontractor.

The anti-crisis shield 2.0. provides that in the case of contractors registered outside of the territory of Poland or conducting activities related to the performance of the contract outside the territory of Poland, instead of the above-mentioned documents, the documents issued by relevant institutions in these countries or statements of these contractors should be submitted.

If the awarding authority decides that the circumstances surrounding the occurrence of COVID-19 may affect or do in fact affect the proper performance of the contract, then, in consultation with the contractor, it may amend the contract by, in particular:

- changing the delivery deadline or suspending the performance of the contract or parts thereof;
- changing the way in which supplies, services or works are performed; and/or
- changing the scope of the contractor's performance including a corresponding change in contractor's remuneration or changing the way the contractor's remuneration is settled.

In the case of the main contract amendment related to public procurement, the contractor and the subcontractor have to agree on the appropriate amendments to the subcontract. The terms of the subcontract shall not be less favourable than those of the main contract. The same applies to the contract with the subsequent subcontractor.

Moreover, if the provisions of the contract contain more favourable conditions for the contractor concerning the amendments to the contract, the provisions of the contract shall apply and not the COVID-19 Act. The circumstances surrounding the occurrence of COVID-19 do not constitute a valid reason for withdrawal from the contract.

The above-mentioned regulations, related to the possibility of making changes to the agreement, apply accordingly to agreements on public procurement, to which the 29.01.2004 Act on Public Procurement does not apply.

5.2 Direct Contract Awards

The possibility of direct award of a contract exists in the event of occurrence of premises for applying any of the non-competitive mode, such as single-source procurement discussed in **2.3 Tender Procedure for the Award of a Contract**. These regulations are similar to those in other EU countries; however, in each case it is possible to verify the actions of the awarding authority and to appeal to the National Appeal Chamber.

5.3 Recent Important Court Decisions

Contractors who have not been awarded a contract may claim damages without a prior finding of a breach of the PPL by the National Appeal

Chamber, the Supreme Court held in Resolution III CZP 16/20 of 25 February 2021.

There is no detailed regulation of damages payable by the awarding authority in Polish law, although the appeal directives 89/665/EEC and 92/13/EEC introduce the obligation to adopt appropriate measures to award damages to contractors who have suffered as a result of an infringement. This case opens new possibilities in that field.

5.4 Legislative Amendments under Consideration

The amendment to the regulations, which came into force in 2021, is comprehensive and far-reaching, so major changes should not be expected, although some elements requiring improvement have already been identified. For example, currently, a member of the management board of a foreign contractor must present a certificate from the Polish criminal register, so it should be expected that this shortcoming will be corrected and a certificate from the place of residence will be required, as in the previous act.

SDZLEGAL SCHINDHELM was founded in 2002. The main seat of the law firm is located in Wrocław, with branch offices in Warsaw and Gliwice. The team consists of 39 lawyers, including 29 legal advisers, attorneys, tax advisers and restructuring advisers. Schampera, Dubis, Zając i Wspólnicy Sp. k. is a member of SCHINDHELM, the international alliance of commercial law firms. The SCHINDHELM network consists of lawyers from 14 countries with offices in 29 locations. The firm is a member of International Advisory Group (IAG), a network of law and tax offices all around the world. IAG is present in 74 countries, providing access to more than 2,300 lawyers. The firm's membership of IAG provides clients with the possibility of accessing new markets knowing that they will be provided with high-quality legal services in Europe, North and South America, Asia and the Pacific.

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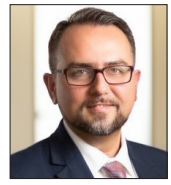
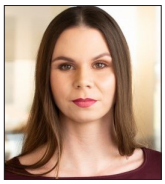


Witold Sławiński has worked for leading companies from the industrial automation and cooling industries, including a global leader in the field of electronic security and fire protection systems, a renowned supplier of fittings and valves for industry and power, and one of the world's leading producers of heating and cooling systems, advising them on business negotiations, commercial contracts, and dispute resolution. He is the author of numerous publications on public procurement law and civil law. He conducts seminars, training and workshops in the field of construction law and public procurement law.

Contributed by: *Anna Specht-Schampera, Witold Sławiński, Aleksandra Płudowska and Tomasz Dąbrowski,* ***SDZLEGAL SCHINDHELM***



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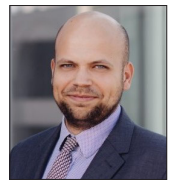

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CONTENTS

1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

The Public Contracts Code, approved by Decree-Law 18/2008 of 29 January, as amended (PCC), is the key legislation regulating public procurement and government contracts in the Portuguese legal system.

The last significant amendment to the PCC was approved by Decree-Law 111-B/2017 of 31 August 2017, which transposed Directive 2014/23/EU (Concession Contracts Directive), Directive 2014/24/EU (the Public Procurement Directive) and Directive 2014/25/EU (Utilities Directive), all dated 26 February 2014, to the Portuguese legal system. This amendment significantly modified the legal regime applicable to public procurement procedures and public contracts, revoking 35, adding 54 and changing 155 articles.

This amendment was complemented by both Ministerial Order (Portaria) 371/2017, of 14 December 2017, which established the model contract notices applicable to the pre-contractual procedures under the PCC, and Ministerial Order 372/2017 of the same date, which established the rules and terms concerning submission of the contractor's qualification documents.

Further Relevant Laws

Also relevant is Law 96/2015, of 17 August 2015, which establishes the legal framework for the access and use of electronic platforms for public procurement purposes, as well as Decree-Law 111/2012, of 23 May 2012, amended by Decree-Law 84/2019, of 28 June and Decree-Law 170/2019, of 4 December 2019, which provides for a special legal framework for public-private partnerships (PPPs).

Additionally, it is also relevant that the Decree-Law No 28/2019 of 15 February 2019 was established in the context of SIMPLEX +, a programme that foresees a set of measures to simplify and modernise Portuguese Public Administration.

As such, the Portuguese government has promoted the implementation of digital receipts/electronic invoicing. The main objective of this measure was to reduce paper tax invoices and stimulate digital transition, as well as to promote less bureaucracy in Public Administration and cutting down on the use of paper.

The deadlines for implementing electronic invoicing in public entities are as follows:

- 31 December 2020 for large companies;
- 30 June 2021 for small and medium-sized companies; and
- 31 December 2021 for micro companies.

Autonomous Administrative Regions

Portugal has two autonomous administrative regions, Madeira and the Azores, each of which has adapted regional public procurement rules to the particularities of their territories.

In Madeira, the most relevant piece of legislation is the Regional Legislative Decree 34/2008/M, of 14 August 2008, as amended, which introduced minor adjustments to the national legal framework.

In the Azores, the regional government approved Regional Legislative Decree 27/2015/A, of 29 December 2015, which consolidated the main provisions referring to the award of public contracts in the region and implemented some provisions of the European Union (EU) directives on public procurement not yet transposed into the national framework.

The APC and ACPC

Reference must be made to the Administrative Procedure Code (APC), approved by Decree-Law 4/2015, of 7 January 2015, and to the Administrative Courts Procedure Code (ACPC) and the Statute of Administrative and Tax Courts, both amended and republished by Decree-Law 214-G/2015, of 2 October and by Law No 118/2019, of September 2017; all three apply to public procurement procedures in general.

Moreover, 2020 was a very exceptional year, also with regards to public procurement. One must consider the exceptional and temporary regime regarding public procurement procedures adopted as from March 2020, due to the pandemic COVID-19, and dealing with the pandemic as it related to public acquisitions, as set forth in **5.4 Legislative Amendments under Consideration**.

1.2 Entities Subject to Procurement Regulation

The PCC establishes a wide concept of contracting authorities. However, until the revision of the PCC introduced by Decree-Law 149/2012 of 12 July 2012, certain public entities – eg, public foundations for university education or corporate public hospitals – were excluded from its subjective scope of application.

Portuguese legislation currently recognises three main categories of contracting authorities.

Category One

Article 2(1) of the PCC enshrined the first group of entities; it is generally composed of the traditional public sector and includes:

- the Portuguese state;
- the autonomous regions;
- local authorities;
- municipalities;
- public institutes;
- independent administrative authorities;
- the Central Bank of Portugal;
- public foundations;
- public associations; and
- associations financed, for the most part, by the previous entities, or subject to management supervision of the aforementioned authorities or bodies, or where the major part of the members of its administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities.

Category Two

In accordance with Article 2(2) of the PCC, the second group of entities is made up of bodies governed by public law, including:

- bodies governed by public law that, regardless of their public or private nature:
  (a) were established for the specific purpose of meeting needs in the general interest;
  (b) do not have an industrial or commercial character (ie, not subject to competition); and
  (c) are financed, for the most part, by any entity of the traditional public sector or by other bodies governed by public law, or are subject to their management supervision, or where more than half of the members of its administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities;
- any entities that are under the same situation set forth in the previous paragraph in relation to an entity that is a public contracting authority under the same paragraph; and
- associations financed, for the most part, by the previous entities; or subject to management supervision of the aforementioned authorities or bodies; or where the major part of the members of its administrative, managerial or supervisory board is, directly or

indirectly, appointed by the aforementioned entities.

Category Three

Finally, the third group of contracting authorities is foreseen in Article 7 of the PCC and is composed of entities operating in the utilities sectors (water, energy, transport and postal services) that fall within the following three subcategories:

- legal entities that are not included in the categories of Article 2 above, that operate in one of the utilities sectors and concerning which any of the entities referred to above may exercise, directly or indirectly, a dominant influence;
- legal entities that are not included in the categories of Article 2 above, and which hold special or exclusive rights that have not been granted by means of an internationally advertised competitive procedure, with the effects of reserving to itself or jointly with other entities the exercise of activities in the utilities sector and substantially affecting the ability of other entities to carry out such activities; and
- entities that were exclusively incorporated by the entities referred to in the two paragraphs above, that are financed by the same, for the most part, or are subject to the management supervision of said entities, or that have an administrative, managerial or supervisory board where more than half of its members are directly or indirectly appointed by said entities, provided that they are destined to jointly operate in the utilities sectors.

Further Categories

Further to the three main categories of contracting authorities referred to above, the PCC also extends its scope of application to entities that enter into public works contracts or associated public service contracts, provided those contracts are directly financed, for more than 50% of the contractual price, by contracting authorities and the values of the contracts to be executed are equal or greater than the relevant thresholds (Article 275 of the PCC).

Additionally, the PCC also extends the application of certain specific public procurement rules to contracts to be carried out by public works concessionaires or by entities holding special or exclusive rights, under certain circumstances expressly defined in Articles 276 and 277 of the PCC.

1.3 Types of Contracts Subject to Procurement Regulation

The contracts that are subject to procurement regulation are those whose scope is, or may be, subject to competition. In this sense, in accordance with the PCC, the following contracts are considered to be subject to competition, without limitation:

- public works contracts;
- public works concessions;
- public services concessions;
- acquisition or lease of goods;
- acquisition of services; and
- company contracts.

Relevant thresholds (referring to the thresholds' value net of VAT) may vary depending on the contracting authority and on whether the contracting authority pertains to the traditional public sector or to the utilities sector.

All public contracts executed by entities pertaining to the traditional public sector or that are considered bodies governed by public law fall within the scope of procurement law, regardless of the contract value. Nevertheless, contracts whose value is under certain amounts can be awarded through a non-competitive procedure (direct award) and their terms are also regulated by the PCC.

The scope of application of the direct award has been reduced by the latest amendment to the PCC, with the inclusion of a new procurement procedure (prior consultation) that imposes the consultation of three entities for the award of a contract.

The Utilities Sector

For contracting authorities in the utilities sector, regardless of the general application of the public procurement principles to all contracts carried out by those entities, the European thresholds apply and are currently as follows:

- for provision of services contracts, goods supply or leasing contracts – EUR428,000;
- for public works contracts – EUR5,350,000; and
- for service contracts for social and other specific services – EUR1,000,000.

All public works concession contracts and all public service concession contracts, as well as companies' incorporation contracts, fall within the scope of the PCC, regardless of their value.

1.4 Openness of Regulated Contract Award Procedure

The PCC does not establish any restrictions on the opening of contract award procedures. However, the regulated competitive public procurement procedures must be advertised in the national gazette (*Diário da República*), and also in the Official Journal of the European Union (OJEU) if their value is over the European thresholds.

1.5 Key Obligations

According to Portuguese legislation, the award of contracts is subject to compliance with the principles of the Treaty on the Functioning of the European Union, in particular, the free movement of goods, freedom of establishment and freedom to provide services, as well as with the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, competition and transparency.

Additionally, the law sets forth key obligations regarding opening and selection of procurement procedure, notices, tender documents, procedure phases and the course of the procedure, bidders' requirements and impediments, qualification and bid submission and evaluation, award, contract execution and performance.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Regarding the advertising of contract award procedures, contracting authorities are obliged to adopt two types of notices.

Prior Information Notices

According to Article 34(1) of the PCC, prior to the formal opening of the pre-contractual procedures, and in accordance with the transparency principle, the contracting authorities should disclose their annual procurement plan in a prior information notice that complies with the model provided in Article 48(1) of Directive 2014/24/EU for publication in the OJEU, provided that the aggregate contractual value of the contracts to be executed during the following 12 months equals or exceeds the European thresholds (see **1.3 Types of Contracts Subject to Procurement Regulation**).

In accordance with the Article 34(2) of the PCC, contracting authorities may also send a prior information notice for publication in the OJEU that complies with the model provided in Article 31(2) and (3) of Directive 2014/23/EU, in the case of service contracts for social and other specific services listed in Appendix IV of the Directive.

Additionally, pursuant to Article 35 of the PCC, contracting entities in the special utilities sector may send an indicative periodical notice for publication in the OJEU, with the mentions provided for in Article 67 of Directive 2014/25/EU, and covering a period of 12 months as a rule.

Contract Notices

As mentioned in **1.3 Types of Contracts Subject to Procurement Regulation**, depending on the value and the scope of the contract, public contract authorities are, as a rule, bound to advertise the awarding procedures: with the exception of the direct award and the prior consultation procedures, all public procurement procedures are required to be advertised in advance in the *Diário da República*, and in certain cases, also in the OJEU.

The information to be included in the contract notices is provided for in Annex V of Directive 2014/24/EU (for announcements to be published in the OJEU) or in Ministerial Order 371/2017 (for notices to be published in the *Diário da República*), and varies according to the type of procedure. However, regardless of the type of procedure, the following information is expected to be disclosed in all advertisements:

- the identity of the contracting authority;
- the internet address at which the procurement documents will be available;
- the type of contracting authority and main activity;
- a description of the procurement (nature and extent of works, nature and quantity or value of supplies, nature and extent of services);
- the estimated total order of magnitude of the contract;
- admission or prohibition of variant bids;
- the timeframe for delivery or provision of supplies, works or services and, as far as possible, duration of the contract;
- the conditions for participation;
- the type of award procedure, and, where appropriate, reasons for use of an accelerated procedure;
- criteria to be used for award of the contract or contracts; and
- the time limit for receipt of tenders (open procedures) or requests to participate (restricted procedures, competitive procedures with negotiation, dynamic purchasing systems, competitive dialogues, innovation partnerships).

2.2 Preliminary Market Consultations by the Awarding Authority

Significant amendments to the PCC in 2017 included the introduction of Article 35-A, regarding "preliminary market consultations". As a result of this, the awarding authorities may conduct informal market consultations before the launch of the contract award procedure, namely requesting the opinion of experts, independent authorities or economic operators.

2.3 Tender Procedure for the Award of a Contract

The PCC provides for the following procurement procedures:

- direct award – one bidder will be invited to submit bids;
- prior consultation – at least three entities will be invited to submit bids;
- open procedure – any interested entity is free to submit bids after the publication of a tender notice;
- restricted procedure with pre-qualification – similar to open procedure but comprising two stages – submitting technical and financial qualification documents, and selecting candidates; and submitting bids, evaluating bids and award;
- negotiated procedure – including the same two phases as restricted procedure with pre-

qualification and a third phase for the negotiation of bids;
- competitive dialogue – whenever a contracting authority is not able to specify a definitive and concrete solution for the contract and launches a tender to which bidders submit solutions; and
- partnership for innovation – whenever a contracting authority seeks to contract the performance of activities of R&D of goods, services or innovative works, with the intention of further purchasing it.

Both the prior consultation procedure and the partnership for innovation were introduced in the PCC in its 11th amendment, of 2017.

Negotiation with Bidders

The use of procedures involving negotiation with bidders in Portugal is limited to certain specific circumstances, and the PCC establishes two procedures that involve negotiation with bidders: the competitive dialogue and the negotiation procedure.

Currently, the PCC provides that the adoption of a competitive dialogue or a negotiation procedure may occur if:

- the contracting authority's needs cannot be fulfilled, without adapting easily available solutions;
- the goods or services include the adoption of innovative solutions;
- it is not objectively possible for the contract award to occur without any previous negotiation due to the contract's specific nature, complexity, legal or financial assemble or risk; and
- it is not objectively possible to precisely define, in a detailed manner, the technical solution to be implemented by referring to a certain rule or standard.

In addition to the two cases referred to above, provided that some requirements are fulfilled (in particular if it is provided for in the procedure programme), a negotiation phase can be carried out in the procedures of direct award, prior consultation or in public tenders, including, for example, in public tenders for the award of public works or public services concession contracts, or for the award of public works, supply or lease of goods or services provision contracts whose contract value is below certain amounts.

2.4 Choice/Conditions of a Tender Procedure

In general, awarding authorities may freely choose to adopt an open procedure or a restricted procedure with pre-qualification.

For contracts designed for the utilities sector, awarding authorities may freely choose between the open procedure, the restricted procedure with pre-qualification, the negotiation procedure, the competitive dialogue or, if the respective requirements are fulfilled, the partnership for innovation. Also, for public works or public services concessions, as well as for company incorporation contracts, awarding authorities may freely choose between the open procedure, the restricted procedure with pre-qualification, the negotiation procedure or the competitive dialogue. In both cases, other procedures may be adopted provided certain criteria legally set forth – based on the value of the contract or material criteria – are met.

Regarding the defence and security sector, Decree-Law 104/2011 provides three procedures: competitive dialogue; a restricted procedure with pre-qualification (both governed by the rules of the PCC); and the negotiation procedure, which may or may not be preceded by a contract notice.

Special procedural instruments are also set forth for design procedures, dynamic purchasing systems and qualification systems, the latter applicable to the utilities sector.

As the EU directives state the importance of simplifying and dematerialising procurement procedures with a view to ensuring greater efficiency and transparency, the PCC opts unequivocally for electronic procurement, and the awarding authorities are bound to adopt electronic procurement procedures.

Further to the above, there are certain criteria that are relevant and have to be fulfilled for the adoption of certain types of procedures – based on the contract value, material criteria, or the type of contract.

Criteria Based on Contract Value

For entities pertaining to the traditional public sector or that are considered bodies governed by public law, the thresholds are the following.

- For provision of services contracts, goods supply or leasing contracts:
  - (a) direct award may be adopted for contracts whose value is below EUR20,000;
  - (b) prior consultation may be adopted for contracts whose value is below EUR75,000 (EUR75,000 was the previous threshold for direct award); and
  - (c) public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue when respective conditions are met), without notice in the OJEU, may be adopted for contracts whose value is below the European thresholds (EUR139,000 or EUR214,000, depending on whether the contracting authority is the State or other entities, respectively).
- For public works contracts:
  - (a) direct award may be adopted for contracts whose value is below EUR30,000;
  - (b) prior consultation may be adopted for contracts whose value is below EUR150,000 for prior consultations (EUR150,000 was the previous threshold for direct award); and
  - (c) public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue when respective conditions are met), without notice in the OJEU, may be adopted for contracts whose value is below the European thresholds (EUR5,350,000).
- For other types of contracts:
  - (a) direct award may be adopted for contracts whose value is below EUR50,000; and
  - (b) prior consultation may be adopted for contracts whose value is below EUR100,000 (EUR100,000 was also the previous threshold for direct award).
- For contracting authorities in the utilities sector, regardless of the general application of the public procurement principles to all contracts carried out by those entities, the European thresholds apply and are currently as follows:
- for provision of services contracts, goods supply or leasing contracts – EUR428,000;
- for public works contracts – EUR5,350,000; and
- for service contracts for social and other specific services – EUR1 million.

However, in some situations, a direct award or a prior consultation may be adopted irrespective of the contract value, in particular when the following material criteria are met, inter alia:

- no participant has presented any bid, or all bids have been excluded in a previous open procedure or restricted procedure with prequalification, if the specifications and the

minimum technical and financial requirements are not substantially altered;
- in so far as is strictly necessary and for reasons of extreme urgency resulting from unforeseeable events by the awarding authority, the deadlines concerning other procedures cannot be fulfilled, provided that the circumstances invoked are not in any way attributable to the awarding authority;
- the services covered by the contract are mainly to enable the awarding authority to provide one or more telecommunications services to the public; and
- the contract can only be allocated to a determined entity, when the scope of the procedure is the creation or the acquisition of a work of art or an artistic event, when there is no competition for technical reasons, or when it is necessary to protect exclusive rights (namely, intellectual property rights).

Other material criteria are set forth in the law, specifically for each type of contract (Articles 24 to 27 of the PCC).

Even when one of the material criteria for the adoption of a direct award or a prior consultation is met, the law specifies that prior consultation should be adopted whenever the recourse to more than one entity is possible and compatible with the criteria used for the adoption of such a procedure.

Negotiated procedures and competitive dialogues

The awarding authorities can adopt the negotiated procedure or the competitive dialogue, when:

- their needs cannot be met without adapting easily available solutions;
- the goods or services include the design of innovative solutions;
- it is not objectively possible to award the contract without prior negotiation due to specific circumstances related to its nature, complexity, legal and financial arrangement or due to the risks associated with it; or
- it is not objectively possible to precisely define the technical specifications by reference to a standard, European Technical Approval, common technical specifications or technical reference.

Partnerships for innovation

The awarding authorities may adopt the partnership for innovation when they intend to carry out research activities and the development of innovative goods, services or works, irrespective of their nature and areas of activity, according to their subsequent acquisition, provided that they correspond to the levels of performance and prices previously agreed between it and the participants in the partnership.

Mixed contracts

Finally, there are also specific rules and conditions for the adoption and scope of a specific procedure for the award of mixed contracts.

2.5 Timing for Publication of Documents

As a rule, apart from procedures where the submission of a proposal depends on an invitation (ie, direct award and prior consultation), the award authorities shall provide free, unrestricted and full direct electronic access to the procurement documents, from the date of publication of the notice. In the other cases, ie, when direct award or prior consultation is adopted, the documents of the procedure shall accompany the invitation.

Additionally, the PCC also establishes the obligation to disclose, in the public procurement portal (called BASE), the information related to the pre-contractual procedure and performance of public contracts, through a form conforming to the model in Annex III of the PCC.

In this respect, the Ministerial Order 57/2018, of 26 February 2018, regulates the operation and management of the public procurement portal. This portal was designed to centralise the most important information relating to all pre-contractual procedures, which must be carried out electronically as required by the PCC. It is a virtual space where the elements regarding the pre-contractual procedure and performance of public contracts are publicised, thus enabling their follow-up and monitoring.

See also **2.1 Prior Advertisement of Regulated Contract Award Procedures**.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The PCC establishes the minimum timescales to present applications (technical and financial qualification documents) or tenders. Pursuant to Article 63(1) of the PCC, the awarding entity may broaden the timescales in the procedure documents, with respect for the following time limits stipulated by the PCC:

- direct award – no minimum time limit (nevertheless, the courts consider that the time limit should not be less than the period considered reasonable for the submission of the proposal); and
- prior consultation – no minimum time limit (nevertheless, the courts consider that the time limit should not be less than the period considered reasonable for the submission of the proposal).

Open Procedure

If the notice is not subject to publication in the OJEU, the PCC establishes a minimum time limit to submit bids of six days after notice is sent to publication, unless the proceeding concerns the formation of public works contracts, in which case the time limit is 14 days. If the works are of significant simplicity, the time limit of 14 days can be reduced to six days. If the notice is publicised in the OJEU, the minimum time limit is 30 days, which can be reduced to 15 days in cases of urgency duly reasoned by the awarding entity or if a prior information notice has been published complying with certain conditions set forth in the law. In urgent open procedures, the time limit is 24 hours on working days for acquisition or lease of goods or acquisition of services, and 72 hours on working days for public works contracts.

Restricted Procedure with Pre-qualification

- Submission of applications for technical and financial pre-qualification – if the notice is not subject to publication in the OJEU, the minimum time limit for the presentation of the application is six days (14 days for public works contracts) after notice is sent to publication. If the notice is subject to publication in the OJEU, the minimum time limit for presenting the application is 30 days (reduced to 15 days in case of urgency duly reasoned by the awarding entity, or of contracts in the utility sector).
- Submission of bids – the minimum time limit is six days after the invitation is sent if the notice is not subject to publication in the OJEU, unless the proceeding concerns the formation of public works contracts, in which case the time limit is 14 days. If the works are of significant simplicity, the time limit of 14 days can be reduced to six days. If the notice is publicised in the OJEU, the minimum time limit is 25 days, which can be reduced to ten days in cases of urgency duly reasoned by the awarding entity or if a prior information notice has been published complying with certain conditions set forth in the law, or for contracts in the utilities sector.

Negotiated Procedure

- Submission of applications for technical and financial pre-qualification – according to the PCC, the time limit for the presentation of the applications is 30 days after notice is sent to publication, or 25 days if a prior information notice has been published complying with certain conditions set forth in the law. If the notice is sent electronically to publication, this timescale may be reduced by seven days.
- Submission of bids – the rules concerning restricted procedure apply.

Competitive Dialogue

The minimum timescale to submit tenders is 40 days after the invitation is sent. Regarding prior phases for submission of applications for technical and financial pre-qualification and for submission of solutions, there are no minimum deadlines set forth in the law, the awarding entity being bound to indicate the same in the notice and in the invitation, respectively.

Partnership for Innovation

- Submission of applications for technical and financial pre-qualification – the rules applicable to the negotiation procedure also apply to the partnership for innovation procedure.
- Submission of proposals for R&D projects – there are no minimum deadlines set forth in the law, the awarding entity being bound to indicate the same in the invitation.

2.7 Eligibility for Participation in a Procurement Process

Public procurement law sets forth conditions for interested parties to participate in tenders, and if a bidder does not comply with these requirements it will be disqualified and excluded from the tender. These requirements certify the professional and personal suitability of bidders and are distinct from the technical and financial capacity requirements whereby candidates' technical and financial qualification is assessed.

Eligibility criteria include:

(a) insolvency or similar;
(b) conviction for crimes affecting professional reputation;
(c) administrative sanctions for a serious professional breach;
(d) non-payment of tax obligations;
(e) non-payment of social security obligations;
(f) sanction of prohibition to participate in public tenders set forth in special legislation;
(g) sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;
(h) conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set out in the PCC;
(i) direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage;
(j) unlawful influence on the competent body for the decision to contract, or obtainment of confidential information granting undue advantages, or provision of misleading information;
(k) conflict of interest; and
(l) significant faults in the performance of a previous public contract in the past three years.

In the situations mentioned in b), c), g), h) or l), the PCC allows bidders to demonstrate that enough measures have been implemented in order to demonstrate a bidder's probity for the performance of the contract.

Besides these eligibility criteria, in procedures allowing for a pre-qualification phase, contracting authorities may establish criteria to evaluate bidders' technical and financial capacity. These may include factors linked to the bidder and not

to the bid to be presented, as is the case in the EU directives.

2.8 Restriction of Participation in a Procurement Process

In procedures with a pre-qualification phase – restricted procedure with pre-qualification, negotiated procedure, and competitive dialogue – it is possible to restrict participation to a limited number of qualified interested parties.

Following the assessment of the interested parties and their compliance with the technical and financial qualification criteria, a limitation of the number of bidders may occur. There are two different legal systems for the selection of the qualified interested parties and limitation of the number of entities that will be invited to submit a bid ("qualification of bidders"), at the free choice of the awarding entity.

Simple and Complex Systems

Under the first system, the simple system, all interested parties that comply with the minimum technical and financial criteria set forth in the tender documents shall be invited to participate and submit their bids.

In accordance with the second system, the complex or selection system, the technical and financial qualification of the interested parties will be evaluated and ranked, with the criteria of the higher technical and financial capacity prevailing, and only the highest qualified parties being qualified for the submission of bids.

If the complex or selection system of pre-qualification is adopted, a minimum of five (or a minimum of three, where a competitive dialogue procedure is at stake) interested parties shall be qualified and invited to submit their bids, unless the number of entities that comply with the minimum technical and financial criteria of pre-qualification is less than five (or three in the case of competitive dialogue).

It is important to stress that economic operators may resort to the technical qualification of third parties in order to demonstrate full compliance with the qualification criteria. To do so, they must submit with their qualification documents a declaration in which they state that the third party at stake will perform the relevant part of the scope of the contract for which such expertise is required.

Non-competitive Procedures

Beyond the pre-qualification procedures, in non-competitive procedures, such as the direct award, the selection of the invited entity(ies) is at the discretion of the awarding entity.

In direct award or prior consultation procedures, the selection of the invited entity(ies) for submission of bids is at the discretion of the awarding entity – one entity only in direct awards and a minimum of three entities for prior consultations.

2.9 Evaluation Criteria

As a result of the 11th amendment to the PCC, the only award criterion is the most economically advantageous bid, which may assume one of two types:

- best price-quality ratio, where the award criteria are composed of a group of factors and sub-factors concerning several aspects of the performance of the contract to be executed; or
- evaluation of the price or of the cost, in which case the tender documents shall set forth all other aspects of the performance of the contract to be executed.

Subject to grounded reasoning, the awarding entity may choose not to submit to competition and not to evaluate the price or cost, in which

case it shall establish in the tender documents a fixed or maximum price.

The factors and sub-factors of the evaluation criteria should have a connection to the subject matter of the public contract in question, comprising all, and only, the aspects of performance of the contract to be executed. They may include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, environmental or social sustainability.

With the 11th amendment to the PCC, it became mandatory for the rules of the procedure to establish a tie-breaker criterion in case of tied evaluation of bids. This can be related to the evaluation factors established, or to the bidder being a social enterprise or a small or medium-sized enterprise. The PCC specifically determines that the tie-breaker criterion cannot be the time when the bids were submitted.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

According to the PCC, contracting authorities must be transparent. This general obligation is enshrined in the requirement to properly publicise public tender proceedings, and to make public all procedure documents, which must also be transparent and clear, thereby ensuring a level playing field among bidders.

One of the elements that has to be disclosed is the criteria and evaluation methodology of the bidders (pre-qualification phase, where it exists) and of the bids evaluated.

In accordance with the PCC, there is a general provision that demands the absolute disclosure at the beginning of the procedure of all features of the evaluation methodology that cannot be altered during its course. Thus, the relevant pre-qualification criteria for the selection of bidders, as well as the criteria for the selection of bids and their corresponding weight, the evaluation methodology, the scoring system for every single criterion, factor and sub-factor must be clearly specified in the tender documents at the beginning of the procedure.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Any relevant decisions of the contracting authority shall be notified to all interested parties, including unsuccessful bidders. Also, all proposed decisions taken by the jury of the procedure shall be notified to the same entities.

Thus, all entities or bidders that submit a pre-qualification application or a bid are notified and informed of the preliminary evaluation report, including the unsuccessful bidders. At this stage, bidders are granted a brief period, usually of at least five working days, to comment on the analysis made by the jury. They have the opportunity to present a formal request asking for a modification of the preliminary report if they do not agree with its content. A final report and final decision on the pre-qualification or on the evaluation of bids and award of contracts is issued and also notified to all participating parties, successful or not.

3.3 Obligation to Notify Bidders of a Contract Award Decision

The PCC provides that the contract award decision is notified simultaneously to all bidders participating in the procedure together with the final report prepared by the jury, which must also include the reasoning of the decision. As procedures run on electronic platforms, the relevant

entities are alerted through a notification in the platform.

3.4 Requirement for a "Standstill Period"

The PCC stipulates a general standstill period of ten days between the time of notification of the contract award decision in writing to all bidders and the execution of the contract, so that unsuccessful bidders are allowed to challenge the decision before the contract has been signed.

However, the referred ten-day period shall not apply where:

- the contract is executed under a direct award or a prior consultation procedure or, in other procedures, where the notice has not been published in the OJEU;
- the contract refers to a framework agreement the terms of which cover all the aspects related to the performance of the contract or to a framework agreement executed with one entity only; or
- only one bid has been submitted.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

As referred to in **3.2 Obligation to Notify Interested Parties Who Have Not Been Selected**, the preliminary evaluation report issued by the jury of the tender should be notified to all bidders, allowing them to submit their views, and said report may be reviewed by the jury in the final report.

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through administrative review proceedings that address the contracting authorities (the competent body for the contracting decision) or through judicial review proceedings under the jurisdiction of administrative courts.

4.2 Remedies Available for Breach of Procurement Legislation

The PCC sets forth fines that may be applied for breach of procurement rules and that depend on the seriousness and degree of fault of the defaulting party.

Also, the sanction of prohibition to participate in subsequent public procurement procedures may apply for a maximum period of two years.

Additionally, the courts can decide to annul a procedure or a contract due to breach of procurement rules, as well as to award damages (eg, the bid's preparation costs).

4.3 Interim Measures

Whenever a public procurement procedure refers to the conclusion of a public works contract, a public works concession, a public services concession, an acquisition or lease of goods, or an acquisition of services, the judicial challenge of the award decision taken by the contracting authority automatically suspends the effects of the awarding decision or the performance of the contract (if it has already been concluded). The suspensory effect can, however, be ended if so requested by the contracting authority and if the administrative court considers that the damages resulting from the suspension are greater than the ones resulting from its withdrawal.

When the judicial proceeding refers to a different decision taken in the context of a public procurement procedure (ie, not an award decision), the proceeding shall not have an automatic suspensory effect, but the administrative court may be requested to adopt interim measures aimed to ensure the effectiveness of the final judgment.

4.4 Challenging the Awarding Authority's Decisions

Any unsuccessful bidder can submit an application for review of a certain decision, tender document or contract, provided it demonstrates it has been directly affected by the infringement at stake and that it will obtain an advantage with the review decision sought.

4.5 Time Limits for Challenging Decisions

The appeal proceedings concerning procurement decisions are characterised by their pressing urgency, aimed at avoiding excessive delays in the procurement procedure. An administrative appeal must be brought within five business days. Judicial proceedings regarding pre-contractual litigation must be filed within one month of the relevant decision being issued and notified to the bidder.

4.6 Length of Proceedings

Administrative claims tend to be decided very swiftly. Judicial proceedings usually take no less than six months to obtain the first-instance decision.

4.7 Annual Number of Procurement Claims

There is no statistical data regarding this matter. That said, it is evident that the number of procurement claims is growing.

4.8 Costs Involved in Challenging Decisions

Administrative appeal of decisions taken by the contracting authorities does not have any cost to the challenging entity.

Judicial challenge has an initial cost, in the first instance, regardless of the value of the action, of EUR102. However, in the event of appeal of the court ruling, a variable judicial fee will be charged depending on the value of the claim.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

According to the PCC, amendments to concluded contracts are permitted without a new procurement procedure only on public interest grounds, if the conditions under which the parties entered into the previous agreement have changed in an abnormal and unpredictable way, and if the contractor's new obligations would seriously increase the risks it assumes under the original contract.

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

The amendments introduced cannot alter the overall nature of the contract and cannot affect competition within the procurement procedure launched for the performance of said contract (ie, the changes to be introduced cannot alter the order of the bids previously evaluated).

In fact, the amendment cannot substantiate an increase of 25% of the initial contractual price, in the mentioned case of change of circumstances, and of 10% in the case of amendments based on public interest. It cannot lead to the introduction of changes which, if included in the contract documents, would objectively change the evaluation of the bids and change the economic balance of the contract in favour of the co-contracting party.

Portuguese courts, in relation to amendments introduced to concluded contracts, still follow the Pressetext case law.

5.2 Direct Contract Awards

The legislation permits direct contract awards under the circumstances established in **1.3 Types of Contracts Subject to Procurement Regulation**.

5.3 Recent Important Court Decisions

Several decisions have been taken in relation to public procurement matters, of which the following should be highlighted.

Decision of the Supreme Administrative Court of 9 July (Case 0357/18.7BEFUN)

The Supreme Administrative Court considered that the expression of interest directed by a tenderer (legal person) with a corporate object not related to the final contract must not be accepted, for violation of the law.

However, this should only occur if the corporate object is patently not related to the final contract. When in doubt, the judge should not sanction the tenderer.

Decision of the Central South Administrative Court of 4 January 2021 (Case 1169/06.6BELSB)

In a works contract based on series of price, it is licit to adopt a measurement criterion that implies that the remuneration of the contractor for the excavation work is based on the final measurement of the overall volumes of excavated earthworks, from which, for quantification purposes, the volumes of excavated earthworks that are 20% or less below those foreseen in the project are deducted.

5.4 Legislative Amendments under Consideration

COVID-19: Exceptional Measures

Given the exceptional circumstances caused by the COVID-19 pandemic, several measures have been taken by the government in regard to judicial terms, relationship with the administration and public procurement.

The following legislative acts have been approved, among others:

- Resolution of the Council of Ministers No 10-A/2020, of 13 March 2020;
- Decree-Law 10-A/2020, of 13 March 2020;
- Law No 1-A/2020, of 19 March, amended by Law No 4-B/2021 of 1 February 2021;
- Parliament Resolution No 16/2020, of 19 March 2020; and
- Decree-Law 19-A/2020, of 30 April 2020.

Resolution of the Council of Ministers No 10-A/2020

This Resolution sets forth an increased duty of co-operation by the public contractor, in particular with regard to payment of contractual debts.

Decree-Law 10-A/2020, of March 13th

Decree-Law 10-A/2020 establishes an exceptional public procurement regime for the execution of public works, lease or purchase of goods and services supply contracts by entities in the public administrative sector, public companies and local authorities, provided that they are related to COVID-19, ie, the purpose of which is the "prevention, contention, mitigation and treatment" of COVID-19 and the "replacement of normality". The intention of this regime is to ensure the swift availability of products and services considered essential in the combat against COVID-19, by simplifying and accelerating public procurement procedures in the context of COVID-19.

It has been in force since 13 March 2020 and, despite being an exceptional and temporary regime, there is no indication of its term. Thus, it will be in force until revoked by a new legislative act or until the conditions set forth for its application cease to exist. As it applies to contracts

related to the replacement of normality, it can be assumed it will be the new normal for quite some time to come.

COVID-19-related events could justify adopting direct award procedures for reasons of "extreme urgency". The following amendments introduced by Decree-Law 10-A/2020 must be highlighted.

- Possibility of direct award on the grounds of "extreme urgency" by the State, the Autonomous Regions of the Azores and Madeira, municipalities, independent agencies, public institutes, public foundations, public associations and "public law bodies", for the execution of public works, lease or purchase of goods and services procurement contracts, provided that they are related to COVID-19 (Articles 1.3 and 2.1, as amended by Decree-Law No 10-E/2020, of 24 March 2020).
- Possibility of simplified direct award where the contractual price of public works, goods or services procurement contracts does not exceed EUR20,000 (Article 2.2).
- Possibility of simplified direct award, to the necessary extent and for duly justified reasons of extreme urgency (which cannot be attributed to the contracting authority), regardless of the price and up to budgetary ceiling, for the execution of contracts for the acquisition of the necessary equipment, goods and services for the prevention, containment, mitigation and treatment of COVID-19, or related purposes, notably personal protective equipment, goods required for testing COVID-19, equipment and materials for intensive care units, medicines (including medical gases), and other medical devices and logistics and transport services (including air transportation), related thereto, or with the respective distribution to entities supervised by the member of the government responsible for the health sector or to other public entities or entities of public interest for which they are intended (Article 2-A/1 and 3, as amended by Decree-Law No 18/2000, of 23 April 2000; also applicable to the Autonomous Regions of Madeira, mutatis mutandis, through Article 4.2 of Regional Decree No 9/2020/M).
- Application of the regime above, both to the contracting of goods and services to reinforce the provision of services through digital means and contact centres with citizens, in particular channels for assistance and support to the use of those public services, and to the contracting of road passenger transport vehicles to reinforce the rail and road networks (Articles 13/2 and 13-A/5, respectively, of Decree-Law No 10-A/2020, as amended by Decree-Law No 99/2020, of 22 November 2020).
- Exceptionally, to the extent strictly necessary and on duly grounded reasons of extreme urgency, a group of contracting entities (with a representative appointed by the Council of Ministers, which also establishes the powers of each of the members) may be assembled for the execution by direct award of the contracts for the acquisition of space for institutional advertising related or associated to COVID-19, before national, regional and local media, through television, radio, printed and/or digital means, up to an overall amount of EUR15 million, including VAT (Article 2-B of Decree-Law No 10-A/2020, added by Decree-Law No 20-A/2020, of 6 May 2020). The entities benefiting from these aids, were designated through Resolution of the Council of Ministers No 38-B/2020, of 15 May 2020, as amended by the Declaration of Rectification No 22/2020, of 27 May 2020.

On duly grounded reasons of extreme urgency, and for an 18-month period, the acquired space shall be strictly necessary for instructional advertising on:

- the public health pandemic situation and, among others, advertising on preventive and containment measures for the transmission of the virus, good social and hygiene practices, periodic reports and information on the public services in question;
- legislative measures adopted to contain the pandemic, as well as the public or social means available to rescue, monitor, inform or oversee;
- legislative measures adopted to balance the economy on a cross-sectoral or sectoral basis, as well as the public or social means available to rescue, monitor, inform or oversee;
- legislative measures adopted for the progressive recovery of life and economy in a pandemic and post-pandemic context, as well as the public or social means available to rescue, monitor, inform or oversee;
- ancillary measures in the health area, such as the call for vaccination and the use of primary and emergency health services;
- measures in the area of education to inform the educational community of their rights and duties, deadlines, timetables, teaching and auxiliary resources as well as the means available to implement them;
- raising awareness on the prevention of forest fires in a pandemic year;
- social and humanitarian causes, such as domestic violence, violence against the elderly or minors, sharing of domestic and parental responsibilities, fighting discrimination, raising awareness of mental illness, and helplines and services in times of pandemic;
- the promotion of media literacy and dissemination of cultural activities during and in the aftermath of the pandemic; as well as other areas and matters serving similar purposes;
- removal of the limits to repeated procurement set out in Article 113.2 and 113.5 of the Public Contracts Code (CCP), where economic operators who have already concluded high-value contracts by direct award in the previous two years, as well as those who, during this period, have executed works, supplied goods or services, free of charge, to the contracting authority, may be invited to submit a bid in these direct award procedures (Article 2.3);
- removal of the obligation to invite more than one entity, even where possible, due to the urgency of the procurement, as set forth in Article 27-A of the CCP (Article 2.3); and
- contracts concluded as a result of direct award procedures are not subject to the prior clearance of the Court of Auditors (Article 6.1).

Law No 1-A/2020, of 19 March, amended by Law No 4-B/2021 of 1 February 2021 and Law No 13-B/2021 of 5 April 2021

This Law determines the suspension of the deadlines for procedural acts, applying the court holidays regime. However, with the amendment introduced by Law No 4-B/2021, if the parties and the judge decide to pursue the procedure there is no suspension of deadlines. This suspension however does not apply to urgent processes, which include pre-contractual administrative litigation relating public procurement. With the Law No 13-B/2021, of 5 April 2021, the regime of suspension of deadlines was revoked.

However, in order to reduce the impact of such measure, it was determined that the administrative deadlines expiring during the suspension period would end in 20 business days after the entry into force of this Law.

Parliament Resolution No 16/2020, of 19 March 2020

This Resolution determines the cessation of the validity of Decree-Law 170/2019, of 4 December, which established the tenth amendment to the Public Procurement Code, and the reinstate-

ment of the legal regime applicable before such amendment.

Considering the challenges of the difficult times that are now upon us, it may be that new exceptional measures are enacted regarding public procurement, public expense and public contracts.

Decree-Law 19-A/2020, of 30 April 2020

Decree-Law 19-A/2020 of 30 April 2020 establishes, in the context of the COVID-19 pandemic:

- an exceptional regime for the financial rebalance of long-term contracts to which the State or any other public entity is a party (including public-private partnership); and
- an exceptional regime that limits the non-contractual liability of the State.

This Diploma was adapted to the Autonomous Region of Madeira through Article No 5 of Regional Decree No 9/2020/M.

This exceptional regime will terminate upon the World Health Organization determining that the SARS-Cov-2 virus's epidemiological situation and the COVID-19 disease no longer qualify as a pandemic. However, all effects that, given their nature, should occur or become effective after this WHO determination are safeguarded or upheld, such as:

- the exercise, at a later stage, of the right to a compensation grounded on the pandemic;
- the suspension or reduction beyond the term of this regime of obligations of road concessionaires/subconcessionaires; and
- the reduction of payments resulting from such suspension or reduction of obligations that should survive this regime.

Legislative Proposals

Through a new proposed law (Law No 41/XIV/1.ª) the Portuguese government intends to approve specific public procurement measures for projects co-financed by EU Funds for housing, decentralisation, Information Technologies (IT), PEES Program ("Economic and Social Stabilisation Programme"), fuel management within the Integrated Management System for Rural Fires (SGIFR) and agrifoodstuffs.

Such measures include the reduction of time limits to submit expressions of interest, as well as specific solutions regarding direct awards in contracts related to the above-mentioned areas.

The proposed law has not been approved, as the President of the Republic has vetoed such law.

At this moment, the Parliament is amending the proposed law to reflect the concerns of the President of the Republic.

VdA is a leading international law firm with more than 40 years of history, and is recognised for its impressive track record and innovative approach in corporate legal services. The firm offers specialised legal services covering several sectors and practice areas, enabling it to handle the increasingly complex challenges faced by clients. VdA offers robust solutions grounded in consistent standards of excellence, ethics and professionalism. Through the VdA Legal Partners network, clients have access to 12 jurisdictions, with broad sectoral coverage in all Portuguese-speaking and several French-speaking African countries, as well as Timor-Leste. The firm is recognised as a leader in the provision of legal services and has successively received the industry's most prestigious international accolades and awards.

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VIEIRA DE ALMEIDA

Trends and Developments

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Introduction

The year 2020 was an abnormal year due to the pandemic situation declared in March. Public investment abruptly slowed or even came to a complete stop and the government resorted to the implementation of emergency legislative measures to deal with the health crisis. Almost all the ongoing public procurement procedures came to a stop and saw the deadlines being extended. The main long-term government contracts in implementation were all negatively affected, and some were even suspended or had their terms extended.

COVID-19 and Its Impacts

In the first half of the year, measures implemented by the government only considered the lockdown or the postponement of investments but in the second half other types of measures began to be put in place, regarding ways to tackle the necessary economic and social downturn and prepare for the post-pandemic situation as the government had the notion that it needed to boost and accelerate the investment that has been stopped.

It was terrible to see the huge investments announced in 2019 by the government to be implemented in 2020 instantly come to a stop or a standby, like the new Lisbon Region second airport in Montijo, the urban road passenger transport concessions all around the country, the new port terminals in Sines (Vasco da Gama), in Lisbon (Barreiro) or in Leixões, the modernisation of the rail network, or the metro expansion in Lisbon and Oporto, among others, that were envisaged, in a public/private investment estimate of almost EUR5 billion.

The only major exceptions to this general lockdown were one or two tenders for urban road passenger transport concessions, Lisbon being the major one, a tender for the expansion of the Lisbon Metro (infrastructure and rolling stock worth EUR115 million), new rolling stock for the Metro do Porto, worth EUR50 million, and ten new electric ferries for Transtejo, the government-owned ferry transport company in charge of the crossing of the river Tagus, worth EUR50 million.

Emergency measures

As said, the first legislative emergency measures taken by the government, in March and April, aimed only:

- to freeze ongoing public investments;
- suspend pending deadlines; and
- to expedite procurement of medical supplies to deal with the pandemic.

Law No 1-A/2020, of 19 March 2020, suspended all court and administrative procedures, with some exceptions, namely urgent procedures. Therefore, from 9 March 2020 all proceedings were suspended, including public procurement. This measure was considered disproportional and Law 4-A/2020, of 6 April 2020, lifted the suspension in regard to public procurement procedures, so in fact they were only suspended from 9 March to 6 April.

Decree-Law No 10-A/2020, of 13 March 2020, authorised an exceptional procurement regimen for the supply of medical products to fight the pandemic. Direct simplified awards were authorised, and other simplified regimens were put in

place to allow a speedier acquisition of medical products and workers considered legally justifiable by way of necessity and urgency. These exceptional rules override the normal regimen of the Public Procurement Code.

Suspension of Public Contract Clauses and the Legal Regimen

More controversial and constitutionally dubious was the exceptional regimen introduced by Decree-Law No 19-A/2020, of 30 April 2020, which suspended all the public contract clauses and legal regimen (Public Procurement Code) on economic and financial rebalance and on the right to be compensated due to lesser infrastructure utilisation, including related to PPP contracts. Obviously, the several Highway Shadow Toll Concession Contracts in place, based on vehicles utilisation payments, with the demand risk split between the government and the private operator, were the most affected by this measure.

By this exceptional rule, it was prohibited to ask for an economic and financial rebalance or a compensation for facts affecting the concession during the emergency period. It was also stipulated that economic and financial rebalance due to pandemic causes or compensation for lesser infrastructure utilisation due to facts that occurred outside of that period, could only give rise to a mere extension of the term of the contract and no monetary compensation.

This exceptional rule was soon challenged by concessionaires and we should see several arbitrations and judicial disputes emerging from this limitation if the government cannot agree in amicable terms to a reasonable and fair alternative means of compensation. This can be described as utterly violating the consolidated legal and contractual rights of private counterparts and has to be seen as a unilateral modification of contracts that has to give cause to a just compensation in order to maintain the existing economic and financial balance of the contract. In the Portuguese Constitution it is deemed that the government can promote public interest but within the respect of private rights.

The Portuguese Procurement Code establishes the right to economic and financial rebalance and the right to be compensated in case of unilateral modifications of a contract by the government, and this is a general principle of law, established since early days, even before the current Constitution of 1976, when the powers granted to government had fewer constitutional limitations than today. Therefore, this limitation on the rights of concessionaires is seen as a huge violation of fundamental constitutional rights and will necessarily be challenged if the government is to pursue this course.

It must be kept in mind that the lockdowns due to COVID-19 had a huge impact on road mobility and our highways were almost empty in this period. A concessionaire that is paid for vehicles driving through the infrastructure had an abrupt downturn its payments and obviously has the right to be duly compensated as it kept up its obligation to continue with the maintenance of the road. This is something that we are going to see the consequences in the near future and litigation cannot be put aside.

Accelerating the Economic Environment

In the second half of the year, seeing the terrible consequences on the economy, the government began trying to accelerate the economic environment by enacting legislation more favourable to investment. In terms of government contracts this was done by a legislative proposal to simplify the Public Procurement Code and the Administrative Courts Procedural Law (Law Proposal No 41/XIV/1.ª, of 18 June) and by allowing some government contracts to skip the neces-

sary prior review by the Audit Court before being implemented.

Law No 27-A/2020, of 24 July, increased the limit for a contract to be submitted to the prior review of the Audit Court to EUR750,000 (and in cases of joint contracts, to EUR950,000). Therefore, these contracts could begin to be implemented immediately and would be scrutinised by the Court afterwards, in subsequent audits. This law is still in force till today. The measure accelerated the implementation of small and medium government contracts.

Law Proposal No 41/XIV/1.ª was to be a major change in our Public Procurement Code, aiming to simplify procedures and specifically to accelerate procurement of contracts financed with European funds. Government wanted to allow contracts to be signed more quickly by cutting or speeding up some procedures so as to execute the public investments in time, especially those that were to be financed by European funds. The government was thinking mainly of ways to have immediate access to the coming Resilience and Recuperation European Financing that has a very short timeframe to be executed (four years).

Modifications to procurement procedural rules

At the same time, the government also proposed modifications in the procurement judicial procedural rules in order to allow contracts to be implemented more quickly by restricting the automatic suspension of an adjudication (today someone who challenges an adjudication within the ten-day delay automatically stops the implementation of a contract and for the implementation of the contract to be resumed, the government has to ask the court to lift the suspension, which is not easy). Nevertheless, although Parliament approved the proposal (as Decree 95/XIV), the President of the Republic exercised his veto by alleging that the proposal did not deal sufficiently with the necessary Audit Court post-intervention (as its powers of pre-intervention were limited) and was not duly precise on the new parliamentary review that was included in order to control the contracts of government. Until now, Parliament has not made modifications or insisted on its approval, so the proposal remains pending and not yet in force.

Case Law

In terms of main new case law discussions, attention should be called to some important 2020 court decisions. Two main themes continue to be upfront in all discussions:

- the electronic signature of bid documents; and
- the qualification of bidders through subcontractors.

In a decision of 15 October, the Administrative South Central Court ruled that it was mandatory to electronically sign each document before uploading it onto the electronic platform individually, even if they are to be jointly inserted into only one PDF. The court said that this was the only way to secure the content and to be sure the documents were attributable to the bidder and remained unchanged. The discussion has been going on for some time and this decision is not going to put an end to it.

Immediately, the decision was violently criticised because it was argued that the electronic signature in a PDF was sufficient technically to secure the entire content of the file including all the documents within. Therefore, to demand that each document inside a PDF should be signed was unnecessary. Regarding this, to defend an exclusion of the bidder for not signing each document incorporated in a PDF was disproportional and should not be deemed.

Despite this reasoning, the current jurisprudence continues to demand a signature on each document even if they are inserted in one PDF, considering it insufficient to sign just the PDF, and sanctioning this omission with the exclusion of the bidder. The decision of 15 October is currently being reviewed by the Supreme Court and we will have to wait and see what the final decision will be.

Ownership of Certificates of Public Works

Another important decision in a controversial matter that has been under discussion for some time was the decision of 15 July from the Administrative North Central Court, regarding the necessity and the timeframe to prove the ownership of a certificate of public works in a mixed contract, that is to say, a contract that includes part services and part public works. The issue is controversial, as can be seen in this decision: the court of first instance decided one way and was overruled by the North Central Court (and, in 2021, the Supreme Court turned again to the decision of the first instance), so we have had three different decisions in the same case. What is under discussion is if the bidder in a mixed contract has to prove ownership of a certificate of public works and if it has to be proved simultaneously with the upload of the bid, or at a later stage only with the habilitation documents. Also under discussion was the possibility that a bidder could prove said ownership via a subcontractor and, if so, when it has to say that it will use a subcontractor.

The courts admitted the general use of a subcontractor to fill in the bidder's lack of a certificate but demanded that this must be done jointly with the bid and not afterwards. And the court's final decision was that the certificate has to exist already at the time of the upload of the bid and not after, so that the jury cannot override this by asking the bidder to complete the missing information at a later stage. The North Central Court admitted against the first instance, that the jury could ask for the missing certificate, but the Supreme Court ruled against this, considering tat deliver a certificate only afterwards and one that was also obtained afterwards was deemed to be a violation of impartiality and equality. This matter remains unsatisfied as we can see by all those contradictory opinions and we will have to follow up on this theme in future.

Conclusion

The year 2020 was, therefore, a mixed year, with restrained measures on investment in the first half and attempts to boost investment on the second half. Also, in terms of court decisions, we could see some important issues under debate but no final settling yet on the horizon. It is hoped that 2021 can bring Portugal the investments and contracts it so eagerly needs and has awaited for so long.

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SRS Advogados is a full-service, multi-practice law firm advising clients on all aspects of national and international law, with 32 partners and about 140 fee earners. Through the creation of SRS Global (Angola, Brazil, Macau, Malta, Mozambique, Portugal and Singapore), as well as the creation of a strong network of international relationships with third parties, the firm aims to extend its experience, expertise and services globally. The public procurement department at SRS Advogados comprises a team of specialist lawyers that assist and advise throughout the life cycle of any given project covering the setting up, financing, negotiation and implementation of projects. The team has extensive experience in the road, rail, port, health and energy sectors, assisting numerous Portuguese and international clients on a wide variety of projects, including public-private partnerships, and assisting both private partners and public contractors, as well as financing bodies.

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CONTENTS

1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Switzerland is a signatory to the WTO Government Procurement Agreement (GPA) and the Bilateral Agreement between the EU and Switzerland on Certain Aspects of Government Procurement (BilA). The GPA and BilA contain congruent rules applicable to public procurements in signatory states.

These basic rules have been implemented in Switzerland by a set of national statutes. For procurements at the federal, ie, central state, level, the rules are included in the Law on Public Procurement (*Bundesgesetz über das öffentliche Beschaffungswesen*) and have been further detailed in the Ordinance on Public Procurement (*Verordnung über das öffentliche Beschaffungswesen*).

For procurements at cantonal and municipal level, the rules are included in the Intercantonal Agreement on Public Procurement (*Interkantonale Vereinbarung über das öffentliche Beschaffungswesen*), which has been implemented by each canton in its own set of rules.

1.2 Entities Subject to Procurement Regulation

Generally, all procurements by Swiss public entities are subject to the rules on public procurement law. Further, the rules apply also to certain non-public entities if they are performing public tasks and are subsidised with public funds.

The entities subject to procurement law include:

- the federal government and its ministries;
- cantons and municipalities;
- institutions of public law at cantonal and municipal level (eg, public building insurance or association of municipalities);
- public and licensed private "sector enterprises" in the water, energy, transport, and telecommunication sectors;
- other holders of cantonal or municipal functions; and
- suppliers of goods, services and construction services that are subsidised with public funds to more than 50% of the overall costs.

Cantons and municipalities, institutions of public law at cantonal and municipal level, and other holders of cantonal or municipal functions are exempted from the rules of public procurement law insofar as the procurement pertains to the commercial or industrial activities of these entities with which they are in full competition with other private providers.

1.3 Types of Contracts Subject to Procurement Regulation

All contracts entered into by public entities, who themselves are subject to the procurement regulations, by which these entities procure goods or services fall into the scope of the applicable procurement rules. Contracts by which these entities sell goods or services are not subject to the procurement regulations. However, the applicable procurement procedure is different depending on the value of a procurement.

Procurements in Scope of the International Thresholds

Based on the applicable international agreements, ie, the GPA and BilA, procurements meeting the following thresholds require the open or selective procedure. These thresholds are subject to adaptations by the government and are partly different for "sector enterprises". For procurements at federal level, the thresholds are set as follows:

- for deliveries, at CHF230,000;
- for services, at CHF230,000; and
- for construction services, at CHF8.7 million.

For procurements at cantonal and municipal level, the thresholds are set as follows:

- for deliveries, at CHF350,000;
- for services at CHF350,000; and
- for construction services at CHF8.7 million.

Procurements below the International Thresholds

For procurements with a value below these thresholds, the international agreements and the rules provided therein are not applicable. However, when implementing the international rules into Swiss law, the Swiss legislator has decided to lower the international thresholds. These national thresholds, which are also subject to adaptations by the government, are as follows:

- Free-hand awards can be made:
  (a) for deliveries under CHF150,000;
  (b) for services under CHF150,000;
  (c) for secondary construction work under CHF150,000; and
  (d) for primary construction work under CHF300,000.
- Awards on invitation must be made:
  (a) for deliveries as from CHF150,000 to under CHF230,000 (federal level) or CHF 250,000 (cantonal and municipal level);
  (b) for services as from CHF150,000 to under CHF230,000 (federal level) or CHF250,000 (cantonal and municipal level);
  (c) for secondary construction work as from CHF150,000 to under CHF250,000 (only relevant on cantonal and municipal level); and
  (d) for primary construction work as from CHF300,000 to under CHF2 million (federal level) or CHF500,000 (cantonal and municipal level).
- Open or selective procedures must be chosen:
  (a) for deliveries as from CHF230,000 (federal level) or CHF250,000 (cantonal and municipal level);
  (b) for services as from CHF230,000 (federal level) or CHF250,000 (cantonal and municipal level);
  (c) for secondary construction work as from CHF250,000 (only relevant on cantonal and municipal level); and
  (d) for primary construction work as from CHF2 million (federal level) or CHF500,000 (cantonal and municipal level).

Note that certain cantons have further lowered these thresholds in their cantonal legislation.

1.4 Openness of Regulated Contract Award Procedure

Interested parties from other jurisdictions have a right to participate in a Swiss award procedure if their state of origin applies the same right to Swiss parties. This is, at least, the case for all signatory states of the GPA and BilA to the extent that the thresholds of applicability of these international agreements are reached.

1.5 Key Obligations

The legislation aims at an economic use of public funds. Therefore, it is designed to increase competition between bidders, while assuring their equal treatment and the transparency of the award procedure. These main principles – ie, the economic use of funds, the equal treatment and the transparency of the procedure – govern the entire public procurement law and serve as interpretation guidelines for the implementation of the legislation.

As a result of these main principles, the rules applying to an individual public tender procedure must be set from the beginning in the call for tender and cannot be materially changed thereafter.

Further, they must be set in a way that assures equal treatment of bidders. Therefore, it is prohibited to design them in a manner giving advantages to a particular bidder. Price negotiations with individual bidders are prohibited.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Calls for tender and the subsequent awards must be published on the official webpage (simap.ch). The publication of the call for tender must include the identity of the awarding entity, a description of the object procured, the deadline for submitting offers and the address where the tender documentation can be obtained. The publication of the award must mention the applicable procurement procedure, the object procured, the awarding entity, name and address of the winner of the award, and the price of the winning offer.

2.2 Preliminary Market Consultations by the Awarding Authority

It is not generally excluded that an awarding entity carries out preliminary market consultations before launching the contract award procedure. However, it will have to assure that it complies with the principle of equal treatment. In particular, it will have to exclude all offerors from the award procedure who participated in the preparation of the award procedure if their competitive advantage cannot be compensated adequately in order to assure equal treatment. Therefore, both awarding entities and potential offerors will have to act very carefully in a market consultation if they want to avoid excluding consulted offerors from the future award procedure.

2.3 Tender Procedure for the Award of a Contract

The relevant Swiss legislation provides for four different types of award procedures:

- the open procedure;
- the selective procedure;
- the procedure on invitation; and
- the free-hand award.

Open and Selective Procedures

The most commonly used procedure is the open procedure, where the awarding entity publishes a call for tender. All interested bidders can participate in the open procedure.

The selective procedure also starts with the publication of a call for tender. The call for tender includes, however, criteria on the pre-selection of bidders. Only bidders that apply for pre-selection and fulfil the respective criteria will be allowed to submit bids.

The open and selective procedures are strongly formalised in order to assure the equal treatment of the bidders. After the call for bids has been published, the awarding entity regularly invites bidders to a meeting at which questions can be discussed. Thereupon, bids need to be submitted in an anonymised format and within the deadline set in the call for bids. After the opening of the bids, which must be documented in minutes, the awarding entity analyses the bids according to the pre-defined award criteria. The result will be formally notified to the bidders. The conclusion of the contract with the winning bidder must not take place before the applicable appeal deadline has expired.

Procedure on Invitation and Free-hand Awards

The procedure on invitation is less formal. While the awarding entity must generally invite at least

three bidders, it has a high margin of discretion in selecting the bidders it wants to invite.

The free-hand award is the most informal procedure. The awarding entity can simply choose, at its discretion, the company with which it wants to conclude a contract.

The Applicable Procedure and Exceptions

The applicable tender procedure is defined by the value thresholds (see **1.3 Types of Contracts Subject to Procurement Regulation**). The awarding entity cannot freely choose the type of procedure. There are three exceptions.

- The first exception pertains to the open and selective procedure. These two types of procedure are perceived as being equivalent. Therefore, the awarding entity can freely choose either the open or selective procedure. In practice, the choice is predominantly for the open procedure.
- The second exception covers the case that the awarding entity decides to choose a more formal type of procedure than the applicable thresholds provide for, eg, an open procedure instead of a procedure on invitation. The awarding entity has the discretion to do so but, once it has chosen the more formal type of procedure for a certain procurement, it cannot switch back to the less formal type.
- As a third exception, the applicable rules allow under certain conditions that a free-hand award be made even though the threshold for a more formal procedure has been met. This includes cases where only one possible supplier is able to perform the work due to technical reasons, where the procurement is urgent due to unexpected events non-attributable to the awarding entity, or where replacing or supplementing an existing good or service would lead to substantial additional costs if a different supplier were chosen from the one that delivered in the past. Legally, these free-hand exceptions must be construed restrictively – although, in practice, they are often used broadly by the awarding entities in order to avoid burdensome formal award procedures.

Negotiations and Auctions

The possibility for awarding entities to negotiate contracts is very limited. As a general rule, awarding entities have to award the contract to the bidder that offered the economically most advantageous bid. The assessment of the bids must be made exclusively based on pre-defined award criteria. There are two exceptions:

- in free-hand award procedures, awarding entities are free to negotiate prices; and
- the new procurement law introduced, as per 2021, the use of electronic auctions.

These auctions take place without disclosing the bidders. In turn, the possibility in award procedures for federal entities to make price negotiations under certain conditions has been deleted from the new procurement law.

2.4 Choice/Conditions of a Tender Procedure

The applicable tender procedure is defined by the value thresholds set by the legislation. The awarding entity cannot freely choose the type of procedure (see **2.3 Tender Procedure for the Award of a Contract**).

2.5 Timing for Publication of Documents

Except for free-hand awards, the awarding entity generally needs to provide all information and specifications relevant to make a bid in the documentation accompanying the call or invitation for tender. Generally, the relevant documentation also includes a template agreement, which serves as a basis for the award.

For reasons of equal treatment and transparency, the awarding entity is prohibited from changing the relevant specifications and terms of the procurement in the course of the award procedure. Therefore, it can generally not negotiate individual contract terms with bidders. Rather, it states unilaterally at the beginning of the procedure what the applicable terms are.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The legislation stipulates that the time limit to submit offers or requests for participation must be set by the authority in a manner that gives offerors ample time to review the tender documentation and prepare the offer. The authority must in particular have regard to the complexity of the procurement when setting the time limit.

For open and selective procedures, the legislation sets explicit minimum time limits. In the open procedure, the minimum time limit is 40 days as from the publication of the call for tender. In selective procedures, the minimum time limit for submitting a request for participation amounts to 25 days as from the publication of the call for interest and 40 days for submitting the offer as from the date of invitation. These time limits can be shortened, in the case of great urgency, to ten days. In practice, authorities often set the time limit at two months or more.

2.7 Eligibility for Participation in a Procurement Process

There are only very limited legal conditions which interested parties must meet in order to be eligible for participating in a procurement process.

- First, the awarding entity is prohibited to grant an award to a bidder that does not comply with the applicable laws on the protection of employees or that discriminates against staff according to gender. These rules are particularly relevant in the building sector where contractors often use subcontractors with staff coming from abroad. The employee protection rules contain minimum wages in order to prevent "wage dumping" (ie, foreign staff being hired for much lower wages). These minimum wages are not always complied with and awarding entities increasingly hold the main contractor liable for infringements by its subcontractors.
- Second, bidders can be excluded from the award procedure if they do not pay imposed taxes and social security contributions or if they are in bankruptcy proceedings.
- Third, bidders may be excluded if they have entered into anti-competitive agreements. Given the increased detection of competition law infringements in various sectors, this right to exclusion gains relevance. This is particularly true in the building sector where several anti-competitive agreements have been detected in the past years.

Apart from these legal conditions, it is for the awarding entity to set the criteria that interested parties must meet in order to be able to participate in a procurement process. It can define so-called suitability criteria that a bidder must fulfil in order that the offer be assessed. These suitability criteria pertain to factors such as financial good-standing or technical performance levels. They are designed to assure that only those bidders that are apt to fulfil the relevant tasks can be granted an award.

These criteria must be objective and verifiable, and must assure the equal treatment of all bidders. The applicable law provides for the possibility to set up directories of bidders that are suitable for a certain type of bid. Companies included in these directories are deemed to be suitable and must only demonstrate that they are in the directory. If a company is excluded from

the directory against its will, it can challenge this decision in court.

2.8 Restriction of Participation in a Procurement Process

The number of suppliers that can participate in a procurement process can be restricted only under limited circumstances. No such restriction is possible in the open procedure. The selective procedure indirectly allows limiting the number of suppliers in that the interested parties need to apply for participation and have to show that they fulfil the suitability criteria.

By including strict qualitative standards, the authority will often be able to reduce the number of participants. Further, the legislation allows that the awarding entity limits the number of bidders that reach the second stage of submitting an offer in selective procedures as long as a sufficient level of effective competition is maintained; in general, at least three participants should be allowed to submit an offer.

In invitation procedures, the authority is requested by law to invite, if possible, at least three bidders. However, it is free to select these. For free-hand awards, the legislation has not set a minimum number.

2.9 Evaluation Criteria

Based on the principle of the economic use of public funds, the procurement must be awarded to the most economical offer. While the price of the offer is an important criterion in the award process, it is often supplemented by additional criteria. Such additional criteria may include quality aspects, ecological factors, customer service, expedience of the service, aesthetics, or technical value.

However, these additional factors must be designed so as not to discriminate against non-local bidders as opposed to local bidders. Further, according to the case law under the former procurement law, the price-related criteria must be generally allocated at least 40% of the weighing factors for the award.

It is yet to be seen whether this case law will remain applicable under the new procurement law of 2021, which has increased the possibility of taking quality aspects into consideration.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

The suitability and evaluation criteria must be disclosed in the call for bids or the tender documentation. Further, the evaluation criteria need to be listed in order of their importance. Based on the principle of transparency, the authority must not change the criteria, or their importance, after the call for bids.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

All formal decisions of the awarding authority, including the call for bids, the decision on selecting interested parties in the selective procedure, or the award, must be published on the official website (simap.ch). In practice, the authority often notifies the interested parties in addition by letter. The decision must contain a summary reasoning. Upon request of an interested party that has not been selected for participation, the authority is obliged to inform it of the most material reasons for its non-selection.

3.3 Obligation to Notify Bidders of a Contract Award Decision

All formal decisions of the awarding authority, including the award, must be published on the official website (simap.ch). In practice, the

authority generally notifies the bidders in addition by letter. The publication of the award must contain a summary reasoning. Upon request of a bidder whose offer has not been selected, the authority is obliged to inform it of:

- the most material reasons for its non-selection;
- the name of the selected bidder;
- the price of the selected offer or, exceptionally, the highest and lowest offer; and
- the decisive properties and advantages of the selected offer.

3.4 Requirement for a "Standstill Period"

The awarding authority must not conclude the awarded contract before the deadline for appeals is expired. The deadline starts with the publication of the award and amounts to 20 calendar days. In the case of an appeal, the courts have the right, upon request, to suspend the awarding authority's right to conclude the contract for the duration of the procedure.

In the absence of such an interim order, the awarding authority is entitled to enter into the contract. In this case, it cannot be obliged at a later stage to terminate the contract, even if it were decided by the competent court that the award was incompliant with the law.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

The competence to decide appeals depends on whether the awarding entity belongs to (i) the federal or (ii) the cantonal or municipal level. The competent court for orders of federal awarding authorities is the Federal Administrative Court. The competent court for an order of the cantonal or municipal level is the cantonal court of the canton to which the awarding authority belongs. The cantons have often allocated procurement matters to the cantonal administrative court.

The decisions of the first-instance court can be appealed before the Federal Supreme Court. However, the appeal will only be heard if, cumulatively:

- the value of the award exceeds the thresholds of the GPA and BilA; and
- the appeal brings a fundamental legal question forward that has not been answered yet.

The appellant has to plead and show in detail that these conditions are fulfilled. If they are not fulfilled, the Federal Supreme Court will not review the appeal. If they are fulfilled, the Federal Supreme Court will review the appeal and will not only answer the fundamental legal question but also any other relevant legal question. However, it does not deal with questions of fact. The decision of the Federal Supreme Court is final and binding.

4.2 Remedies Available for Breach of Procurement Legislation

The courts generally have the right to annul orders of awarding entities or to substitute the decision of an awarding entity by their own decision. With regard to awards, however, based on the Federal Supreme Court's case law, the courts are only entitled to annul the award and cannot award the tender directly to another offeror, eg, the appellant. The reason for this is that the awarding entity might be entitled to discontinue the award procedure and, therefore, it is for the awarding entity to make a new decision. The same has to apply to cases where the call for bids has been appealed. In this case, the courts will not be entitled to change the content of the call for bids but will only have a right to annul it and give the awarding entity the possibility to amend it in a compliant way.

If the contract has already been concluded by the awarding entity, the legislation only entitles the courts to annul the award but they cannot terminate the contract. However, some cantonal courts have started to deviate from the wording of the law in cases where unpublished free-hand awards were made, even though the authority would have had to use an open or selective procedure and the contract was already concluded before the appeal was made. In that case, the court ordered that the contract be terminated by the awarding authority at the earliest possible event.

4.3 Interim Measures

Interim measures of courts are very important in appeal procedures in Switzerland because they are the only means to prevent the awarding entity from concluding the contract with the recipient of an award. The appeal has no suspensive effect unless such effect is granted by the court. This means that the awarding entity is entitled to conclude the contract with the recipient of the award unless it is prohibited to do so by the court. If it is not prohibited, the contract would remain binding even though a court, at a later stage, could come to the conclusion that the award was unlawful. The appellant's right would then be limited to a compensation of the costs incurred by preparing the offer. Therefore, it is of utmost importance to ask the court explicitly in the appeal that a suspensive effect be granted. If a suspensive effect is requested, the competent court makes a prima facie decision on the merits of the case and, in the case of a prima facie infringement of procurement law, weighs the interest in compliance with procurement law against the interest of the awarding entity in a swift performance of the awarded work or service. In order to be successful with a request for suspensive effect, it is important to demonstrate convincingly in the appeal that there has been a prima facie infringement of procurement law.

4.4 Challenging the Awarding Authority's Decisions

For procurement procedures of federal entities, it is important to note that the courts will only be allowed to annul an order of the awarding authority if the procurement falls into the scope of the GPA or BilA; for all other procurements, the court can only state that the order infringes the law. Hence, a decision of annulment requires that the procurement value is above the thresholds of the GPA and BilA, ie, for deliveries, at CHF230,000; for services, at CHF230,000; and for construction services, at CHF8.7 million. Further, appeals in the procurement of services can only lead to an annulment of the order if the type of procured services is listed on the so-called positive list of appendix 1 annex 4 of the GPA. Third, procurements of the Swiss military can only lead to annulments of the order if they are listed on the positive list.

The right to appeal depends on the type of order issued by the awarding authority.

- The call for bids can be appealed by those interested parties that can demonstrate that they would want to participate in the bid and are a potential offeror that could supply the relevant good or perform the relevant service.
- The right to appeal against an award is generally limited to those parties able to demonstrate that they would have been awarded the contract if the awarding entity had complied with the law. All other parties of the award procedure are not entitled to appeal.
- There is an exception to this rule pertaining to free-hand awards. If a free-hand award is challenged with the argument that the awarding entity would have had to conduct an open or selective procedure, the appeal can be lodged by each potential offeror that could supply the relevant good or perform the relevant service.

4.5 Time Limits for Challenging Decisions

The deadline for filing appeals is very short and non-extendable. It amounts to 20 calendar days. The deadline starts to run with the publication of the award or, when no publication is made, such as for free-hand awards, with the appellant acquiring sufficient knowledge of the award in order to be able to lodge an appeal.

Further, it is important to note that parties must appeal the call for tenders themselves if they want to challenge a condition of the tender. This might be the case, eg, where the object of a tender has been designed in a way that is to the advantage of a certain offeror, where the published assessment criteria are not legally compliant, or where the deadline for submitting bids is too short. In these cases, the parties cannot wait until the award is made to challenge the content of the call for bids. Hence, appeals against the award can only be directed towards legal issues that could not already have been challenged at the time of the call for bids.

4.6 Length of Proceedings

Procurement appeal procedures generally last between six months and two years, depending on the complexity of the case.

4.7 Annual Number of Procurement Claims

Appeals procedures in Switzerland are still relatively rare, but have constantly increased over the past few years. The main business areas likely to experience appeals are construction and IT. Further, larger cantons see more appeals than smaller, more rural cantons. On average, it is assumed that first-instance courts review between five and 20 procurement appeals per year. Only very few of these go to the Federal Supreme Court, which hears on average about five to ten procurement cases per year.

4.8 Costs Involved in Challenging Decisions

The typical costs for court expenses and attorneys in first-instance appeals are estimated to amount to between CHF15,000 and CHF25,000.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

The principle of equal treatment and transparency requires that the object of a procurement remains the same during the whole award procedure and does not change following the award. Hence, legally speaking, there is only very limited room for modifications to procurement contracts after the award. Any modification that has an influence on the price would not be legally permissible but would rather require that the procedure be re-started. However, it sometimes happens that the authority, or the awarded company, initiates contractual discussions following the award.

5.2 Direct Contract Awards

The legislation permits under certain circumstances that free-hand awards are made although the value thresholds of a more formal procedure, eg, an open procedure, are reached. These exceptional circumstances must be applied restrictively and it is for the awarding entity to prove that the applicable conditions are fulfilled. Further, the awarding entity is obliged to publish the award, which gives interested parties the possibility to appeal against the award by asserting that the conditions for a free-hand award were not fulfilled.

The main cases of permissible exceptional free-hand awards are:

- based on technical reasons or for reasons of protection of intellectual property rights, only

one specific supplier can provide the object of the procurement and no appropriate alternative exists;
- the procurement becomes, through no fault of the awarding entity, very urgent due to unforeseen events;
- goods or services already lawfully supplied require a replacement or extension which can only be provided by the original supplier because only this ensures compatibility with the existing goods or services; and
- goods can be sourced in the framework of a temporary opportunity for a price which is significantly below the ordinary price.

5.3 Recent Important Court Decisions

In summer 2019, the Swiss Supreme Court decided that publicly owned hospitals were subject to public procurement law because they do not operate in an environment of full competition. While the reasoning only concerned publicly owned hospitals, it can also apply to privately owned hospitals that are on the so-called hospital list and, therefore, receive subsidies from the state.

5.4 Legislative Amendments under Consideration

In June 2019, the Swiss parliament adopted a revision of the procurement legislation that entered into force on 1 January 2021 on the federal level and will enter into force on the cantonal and municipal level once two cantons have adopted the new law, which is expected for the first half of 2021. This article reflects the newly introduced rules. It is important to note that the former rules remain applicable for procurement procedures initiated under the former law.

Homburger is a leading Swiss business law firm based in Zurich. Homburger advises and represents companies and executives in all aspects of corporate and commercial law, regulation, tax and dispute resolution, both in a domestic and a global context. Homburger offers clients comprehensive legal advice as well as support in negotiations, and represents them before courts, arbitral tribunals, agencies, and in administrative proceedings. Homburger's practice in the public procurement sector involves advising clients on all issues of public procurement law and representing them in court proceedings. Special areas of focus involve, inter alia, construction services, IT procurements, energy, infrastructure and transport services. Homburger's procurement specialists are members of the relevant industry associations, such as the Swiss association for public procurement law.

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Trends and Developments

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Introduction

On 1 January 2020, the revised Federal Act on Public Procurement (rPPA), regulating government contracts on the federal level, entered into force. In parallel, all Swiss cantons (ie, states) are expected to join the revised Intercantonal Convention on Public Procurement (rICPP), which applies to procurements on the sub-federal level. These adjustments paved the way for the ratification and implementation of the Revised WTO Agreement on Government Procurement (GPA 2012) and for the harmonisation of the heterogeneous Swiss public procurement landscape. In addition, the new laws strengthen competition among suppliers, reduce the complexity of the Swiss procurement regime and allow for new procedural instruments, including electronic auctions and competitive dialogue.

The next section of this contribution provides an overview of the key aspects of the revised law and their implications for procuring entities and suppliers. Under Important Decisions and Developments, we discuss recent landmark cases that will continue to shape Swiss public procurement practice under the revised law.

The Revised Swiss Procurement Law

The current Swiss procurement landscape

The Swiss procurement regime is divided into a federal and a sub-federal level. Since 1 January 2021, contracts of federal procuring entities have been governed by the revised rPPA. The rPPA implements the GPA 2012 as well as Switzerland's obligations arising from the Bilateral Agreement with the European Union on Public Procurement of 1999 (BilatAgr). In contrast, the legal situation on the sub-federal, ie, cantonal (state), district and municipal level, is more complex as it is currently in a transition phase.

Since 1994, procurements of cantonal and municipal entities have been governed by the Intercantonal Convention on Public Procurement (ICPP) of 25 November 1994 and, in addition, by individual cantonal procurement laws. On 15 November 2019, the cantons approved the revised Convention on Public Procurement (rICPP). While the former ICPP has the character of a framework convention leaving the cantons a lot of room for individual regulations, the rICPP is not only more detailed but also largely assimilated into the rPPA. This allows for a harmonisation among the (previously heterogenous) cantonal procurement regimes on one side and between the federal and the cantonal level on the other side. This harmonisation is intended to reduce costs, facilitate market entry for domestic and foreign suppliers and thus enhance competition.

All cantons are expected to join the rICPP within the coming two years. They will do so on an individual basis and in accordance with their cantonal ratification processes. With cantons joining the rICPP, the previous cantonal legislation will become largely obsolete. In contrast, public procurements of cantons which are not yet members of the rICPP are still subject to the previous ICPP and the cantonal legislation. This transitory phase leads to a complex situation where the previous ICPP (plus individual cantonal legislation) will exist, temporarily, in parallel with the rICPP. For this reason, it is important for suppliers to determine the status of the cantonal ratification process and the applicable law before participating in a tendering process.

Revision

Scope of application: procuring entities

The GPA 2012 applies to central entities of the federal government, to cantonal entities, and to certain public and private entities operating in the business sectors of water supply, electric power supply, public transport, air traffic and inland waterway transport (GPA 2012 Appendix I Annexes 1-3). By virtue of Article 2 et seq BilatAgr, the application of the GPA is extended to:

- authorities and public entities of the districts (*Bezirke*) and municipalities;
- authorities and public enterprises engaged in the railway, telecommunications and energy supply sectors; and
- private entities carrying out public service in the fields of water supply, electric power supply, local rapid transport systems and supply of air or waterway traffic enterprises.

The scope of application of the rPPA is aligned with Switzerland's international obligations und the GPA 2012 and the BilatAgr as mentioned above. In contrast to the scope of the former PPA, however, the scope of the rPPA comprises all authorities and public entities of the central and decentralised federal government by dynamic reference (Article 4 paragraph 1 litera a rPPA). Thus, the related list of government entities subject to procurement law contained in the Swiss Appendix 1 Annex 1 Section I GPA 2012 is not comprehensive. In addition, the revised law newly extends to the federal courts, the Federal Prosecutor and the parliamentary services.

As regards the sub-federal level, the GPA 2012 and rICCP operate with an abstract definition of procuring entities subject to procurement rules, as is the case under the GPA 1994 and the ICCP. In essence, centralised or decentralised authorities and administrative units at cantonal, district and communal level are covered. This definition includes bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

Cantonal procurement may thus even apply to private companies operating in the public sphere (eg, hospitals) if certain criteria are met. In addition, entities active in select business sectors and endowed with special and exclusive rights are also covered by both the rPPA and the rICCP irrespective of their legal form or shareholder structure.

Exemption procedure

Certain business sectors in which, according to the judgment of the Swiss Competition Commission, there is an adequate level of competition can be exempt from the scope of public procurement rules. Under the previous procurement law, this exemption mechanism has only been available to those procuring entities covered by the scope of the BilatAgr. Under the revised law, however, the exemption mechanism is extended to the sectoral markets covered by the GPA 2012 (Article 7 rPPA/rICCP). If the Federal Council wishes to exempt further business sectors under the rPPA/rICCP, it will first need to consult the Competition Commission, the cantons and the industries concerned. To date, exemptions have only been granted to the telecommunication services sector and the standard gauge railway freight transport sector.

Scope of application: transactions subject to procurement rules

While the PPA did not circumscribe the kinds of transactions subject to procurement rules, the rPPA sets forth that procurement rules shall be applied to public procurement (*öffentliche Aufträge*) and – explicitly – to the outsourcing of public services to private suppliers as well as to the award of public licences (Article 8 et seq rPPA/rICCP).

The term "public procurement" is now defined in the rPPA/rICCP in line with court practice as a contract concluded between the procuring entity and the supplier serving the fulfilment of a public task. The contract is characterised by an exchange of performance and counter-performance whereby the characteristic performance is rendered by the supplier in return for payment.

For suppliers, the inclusion of the outsourcing of public services and the award of public licences in the scope of procurement law bring new opportunities. The new law is explicit that, for instance, outsourcing contracts in the fields of waste disposal, maintenance of national roads, and collection of fees in accordance with the Radio and Television Act will be subject to public tender.

With the GPA 2012, the positive lists of covered procurement were extended to include various services as well as construction services not previously within scope. The same holds true, for example, for legal services. However, an exception applies to the representation of the federal government or public enterprises by lawyers in court, arbitration or conciliation proceedings, and to related services (Article 10, paragraph 1 litera g rPPA).

Special rules for non-treaty procurements
The rPPA and rICCP apply to both procurements covered by international treaties (*Staatsvertragsbereich*) and procurements regulated solely by national law (*Nichtstaatsvertragsbereich*) whilst setting forth a set of special rules for the second category. The types of procurement covered by international treaties are listed in Annexes 1-3 of the rPPA but only fall under this category if the procurement reaches or exceeds the thresholds set out in Annex 4 of the rPPA. Procurement regulated by national law only, as well as the special provisions applying thereto, are set out in Annex 5 to the rPPA.

The special rules applying to procurement only regulated by national law involve some facilitations; for instance, the option to conduct a tender invitation procedure (*Einladungsverfahren*, Article 20 rPPA/rICCP). Furthermore, foreign suppliers are only admitted to the tender:

- if their country of origin grants reciprocal rights; or
- with the consent of the contracting authority (Article 6 paragraph 2 rPPA).

Finally, on the federal level, legal protection is limited (see Legal Protection below).

General principles and objectives of public procurement
The general principles of public procurement are set out in a separate chapter in the rPPA, with only a few changes compared to previous law. The principles of non-discrimination, equal treatment of competitors, transparency and competition remain the pillars of the Swiss procurement law regime.

The few substantive changes follow the direction of the GPA 2012, one of the main objectives of which is to combat corruption. Against this background, procuring entities are now explicitly obliged to take measures against conflicts of interest, unlawful non-compete agreements and corruption (Article 11 litera b rPPA). In addition, bidding rounds – ie, pure price negotiations – are henceforth prohibited not only at the cantonal, but also the federal level (Article 11 litera d rPPA).

Finally, the violation of corruption provisions may lead to the exclusion of a supplier from future tenders by procuring entities for a maximum duration of five years and to revocation of an award (Article 44, paragraph 1 litera e in conjunction with Article 45 paragraph 1 rPPA).

New instruments

Under the revised law, the basic types of tender procedures (open tender, limited tender, tender invitation and direct award) remain unchanged. However, the rPPA presents a set of new instruments to make the tender procedure more flexible and to use the advantages of recent technological progress. These instruments do not constitute alternatives to the four above-mentioned procedures, but may rather be embedded therein if deemed appropriate. New instruments include the following:

Electronic auctions

This means an automated evaluation of certain parameters of a tender, namely the price (if the contract is awarded to the lowest price), or other quantifiable components (such as weight, purity, quality), whereby the contract is awarded to the most economically advantageous offer. Electronic auctions are only available for the procurement of standardised goods and services. The electronic auction is preceded by a (non-electronic) prequalification phase during which the suitability of the bidders is verified and an initial evaluation of the bids is made. The actual electronic auction of the tenders that passed prequalification follow in a second step (Article 23 rPPA/rICCP).

Competitive dialogue

This instrument enables the procuring entity and the tenderers to jointly define the object of procurement and to identify possible solutions thereto (Article 24 rPPA/rICCP). It is available for complex, intellectual and innovative services but must not be abused to conduct pure price negotiations.

Framework contracts

The revised law contains a new legal basis for the conclusion of framework agreements between a supplier and the procuring entity (Article 25 rPPA/rICCP). Framework contracts allow the contracting authority to award individual agreements to its framework contract partners during a given period without a new invitation for tender. The most important contract parameters (in particular, price, type and amount of services) must be specified in the framework contract.

If framework agreements are concluded with more than one supplier, the call on services may be made either under the terms set out in the framework contract (without a new invitation to tender) or by means of a call-on-services procedure in which the parties to the framework contract are invited to submit a specific offer (so-called mini-tender).

Electronic tender procedure

The conduct of tender procedures by electronic means is regulated by Article 34 paragraph 2 rPPA/rICCP. Tenders may be submitted electronically if this is communicated in the invitation to tender or in the tender documentation.

Legal protection

With the revised Swiss procurement regime, legal protection in procurement procedures is (moderately) extended. On the federal level, suppliers can now appeal against decisions by the procuring entity in procedures concerning tenders for goods or services reaching or exceeding the threshold value applicable to the invitation tender procedure; ie, CHF150,000 for procurement by federal authorities. In relation to tenders for construction services, the threshold value will be CHF2 million (Article 52 paragraph 1 rPPA). Cantonal procurements are subject to the same principles although different threshold values apply (Article 52 paragraph 1 rICPP). Prior to the revision, in procedures concerning procurements not reaching the threshold values pursuant to the relevant international treaties, no appeals were possible on a federal level.

Non-treaty procurements
On the federal level, effective legal protection will be restricted for procurements covered by international treaties. In particular, a supplier is not entitled to challenge the tender award itself in court and the procuring entity is allowed to conclude a contract with the supplier immediately after the award has been granted without waiting for it to enter into force (Article 42 paragraph 1 rPPA).

Still, suppliers not winning the award are now, under the revised law, able to (i) request that the court declares the challenged award illegal and, (ii) if necessary, obtain damages for the costs incurred in connection with the tender procedure (Article 58, paragraphs 3 and 4 rPPA/rICCP). However, non-Swiss suppliers are only admitted to such legal action if their country of origin grants Swiss suppliers reciprocal rights (Article 52, paragraph 2 rPPA/Article 52, paragraph 3 rICCP).

Appeal of tender documentation
Article 53, paragraph 2 rPPA/rICCP clarifies that a supplier needs to challenge unlawful instructions in the tender documents, the significance of which is apparent along with the invitation to tender. This means that if the supplier fails to bring forward such complaint immediately, the complaint is forfeited. Practically speaking, under the revised law, suppliers are required to study the tender documents thoroughly immediately after publication, address any inconsistencies to the procuring entity without delay and, if necessary, file the complaint with the court within the time limit for appeal.

Time limits
The revision has brought about a harmonisation of the time limits for appeal. A 20-day time limit for appeal is applicable at both the federal and the cantonal level (Article 56, paragraph 1 rPPA/rICPP) while the ICPP only provides for a ten-day period. In return, no court holidays apply to complaints under the revised law, regardless of their subject matter (Article 56, paragraph 2 rPPA/rICPP). This is an important contribution to an acceleration of tender procedures. By contrast, under the previous ICPP that will remain in force for a while in several cantons, a court holiday only applies to proceedings about injunctive measures.

Important Decisions and Developments

Scope of application – foundation under private law

Determining the (personal) scope of application of procurement law belongs to the most challenging tasks for procuring entities. In a judgment of 20 October 2020, the Swiss Federal Supreme Court had to assess this question with respect to a foundation for the construction of social housing which had been established by a municipality under private law. The court confirmed that the foundation falls within the definition of "a body governed by public law" contained in Swiss Appendix 1 Annex 3 to the GPA 2012 (see section "scope of application" above). The court held that:

- the foundation was established for the specific purpose of performing tasks of a non-commercial nature in the general interest, ie, the construction of social housing;
- it has, as a foundation under private law, legal personality; and
- the majority of its supervisory body (*Stiftungsrat*) consists of members appointed by a body governed by public law.

Hence, according to the Swiss Federal Supreme Court, the foundation is subject to public procurement law and must put its contracts out to public tender, providing that the relevant thresholds are met (BGer 2C_1060/2017).

Evaluation criteria – travel time

In a decision of 24 April 2019, the Swiss Federal Administrative Court dealt with the question of whether and in what circumstances a contracting authority may evaluate the "transfer time" or the travel route of the staff of a supplier. The challenged procurement included architecture, engineering and planning services with respect to gasoline stations run by the Swiss military throughout Switzerland. The court, referring to previous case law, held that the admissibility of such evaluation criterion must be assessed in light of the principle of equal treatment. More specifically, such criterion must be based on an "objective reason"; eg, if a standby service from the provider is required. According to the court, however, no such objective reason exists if the nature of the procurement and other evaluation criteria do not imply the necessity of urgent interventions (BVGer B5601/2018).

Scope of application – hospitals

In a landmark decision of 21 February 2019, the Swiss Federal Supreme Court put an end to a long-time controversy in procurement practice. It confirmed that Swiss hospitals are subject to government procurement law if they:

- are controlled by the (cantonal or municipal) government; and
- have a public mandate allowing them to directly charge Swiss healthcare insurances (*Obligatorische Krankenpflegeversicherung*) for medical treatments (*Listenspital*).

While the court decision focused on a public hospital (controlled by a group of municipalities), the court's findings are relevant for all Swiss listed hospitals, including hospitals that are fully controlled by private entities. Hence, whenever a listed hospital intends to purchase goods or services (eg, medicinal products) that are designated to contribute to the execution of the public mandate and provided the relevant procurement thresholds are reached, it is obliged to make a public call for tender.

However, whilst all Swiss listed hospitals (including private ones) are subject to domestic procurement law, only hospitals controlled by the government are subject to the WTO Agreement on Government Procurement (GPA). In contrast, procurements of hospitals that are fully controlled by private investors fall outside the scope of the GPA. With respect to these hospitals, non-Swiss providers are entitled to participate in the tendering procedure only to the extent their country of residence grants market access to Swiss suppliers in a reciprocal way (principle of reciprocity) (BGE 145 II 49).

Admission to tender – cross-subsidies

For many years, there had been an extensive doctrinal debate about whether and under what circumstances public entities, such as universities or other companies controlled by the government, are entitled to participate in tendering procedures as bidders. In 2017, the Swiss Federal Supreme Court examined a claim brought by a private telecommunications company against the Federal Office of Communications (OFCOM) (the procuring entity).

OFCOM had awarded a service contract to the University of Zürich, which is entirely controlled by the Canton of Zürich. The claimant criticised the award on the basis that OFCOM had acted in contravention of public procurement law by ignoring the fact that the University of Zürich is funded by the government and that such funding leads to an unlawful competitive advantage on the part of the University in relation to private bidders. The court found that bidders financed by the government must behave neutrally from a competition law perspective. In particular, such providers are required to completely separate their commercial from their monopolistic activi-

ties, failing which, they are not entitled to participate in tendering procedures.

According to the court, contracting authorities are required to seek additional clarifications if they obtain offers from such providers. In addition, public service providers must be excluded from the tendering procedure in the case of specific evidence of a distortion of competition. The judgment may have a significant impact on future procurement practice and the behaviour of publicly financed bidders. However, the scope of the procuring entities' duty to gather additional information is far from clear since the courts have not yet provided any guidance on this aspect (BGE 143 II 425).

Walder Wyss Ltd has around 220 legal experts and offices in six locations and is one of the most successful Swiss commercial law firms and one of the few with a dedicated team of public procurement specialists. The firm's clients benefit from its renowned specialist knowledge and wealth of experience, which cover all stages and aspects of a procurement project. Walder Wyss is well versed in sector-specific needs and offers customised solutions for infrastructure and construction projects, complex IT projects and procurements in the energy, healthcare and pharmaceutical sectors. The firm's services include court representation, legal advice and legal training with respect to the structuring and implementation of procurement projects, tender offers, as well as assistance in related contractual, intellectual property and competition law issues. The firm's public procurement specialists are members of the Swiss Association for Public Procurement and have initiated the publication of the commentary of the revised Swiss Public Procurement Act.

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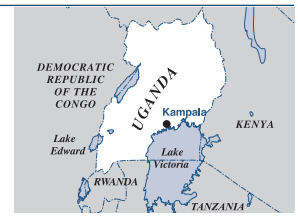

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Governing Law

The Public Procurement and Disposal of Public Assets Act, 2003 (as amended) (the "Act") regulates procurement of government contracts in Uganda.

The Act, established to formulate policies and regulate practices in respect of public procurement and disposal activities, grants the line Minister authority to issue regulations, with approval from the Public Procurement and Disposal of Public Assets Authority (the "Authority") and Parliament for the purposes of implementing the objectives of the Act.

Twelve regulations have so far been issued by the Minister, five of which directly regulate procurement of government contracts, namely:

- the Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014;
- the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014;
- the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014;
- the Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities Regulations), 2014; and
- the Public Procurement and Disposal of Public Assets (Procurement of Medicines and Medical Supplies) Regulations, 2014.

1.2 Entities Subject to Procurement Regulation

Entities subject to procurement regulation are Procurement and Disposing Entities (PDEs). They include:

- a Ministry or department of government;
- a district council or a municipal council;
- a body corporate established under an Act of Parliament other than the Companies Act;
- a company registered under the Companies Act in which government or a PDE:
  - (a) controls the composition of the board of directors of the company;
  - (b) is entitled to cast, or controls the casting of more than 50% of the maximum number of votes that may be cast at a general meeting of the company; or
  - (c) controls more than 50% of the issued share capital of the company, excluding any part of the issued share capital that does not carry a right to participate beyond a specified amount in the distribution of profits or capital;
- a commission established under the Constitution or under an Act of Parliament;
- a public university and a public tertiary institution established under the Universities and other Tertiary Institutions Act, 2001;
- the Bank of Uganda except in exercise of the functions specified in Section 4 of the Bank of Uganda Act; and
- any other procuring and disposing entity as may be prescribed by the Minister.

1.3 Types of Contracts Subject to Procurement Regulation

The types of contracts subject to procurement regulation include:

- contracts for the procurement of consultancy services;
- contracts for the procurement of medicines and medical supplies; and

- contracts for the procurement of works, supplies and non-consultancy services.

1.4 Openness of Regulated Contract Award Procedure

PDEs may adopt different methods of procurement. These include:

- open domestic bidding;
- restricted domestic bidding;
- open international bidding;
- restricted international bidding;
- micro procurement;
- direct procurement; and
- quotation method of procurement.

The above-listed methods of procurement specify the parties from whom bids or expressions of interest are welcome.

1.5 Key Obligations

The key obligations on which all public procurement is grounded include:

- non-discrimination;
- transparency, accountability and fairness;
- maximisation of competition and ensuring value for money;
- confidentiality;
- economy and efficiency; and
- promotion of ethics.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Advertisement is one of the modes of inviting bidders to participate in a procurement process. The form of the advertisement is categorised into two, dependent on the nature of contract and procurement requirement, ie:

- works, supplies and non-consultancy services; and
- consultancy services.

Advertisement for Works, Supplies and Non-consultancy Services

Advertisement for these contracts is through publishing bid notices. A bid notice must be displayed on the website of the Authority and the notice board of the PDE, not later than the date of publication of the bid notice and must be displayed until the deadline for submission of bids.

The bid notice must also be published in at least one newspaper of wide circulation.

The information contained in the bid notice includes, but is not limited to:

- the name, address and contact details of the PDE;
- a summary of the scope of the assignment and a brief description of the required works, supplies and non-consultancy services;
- a statement of any eligibility and qualification requirements;
- the criteria to be used to evaluate the bids;
- details of the information required in the bids including any information or documentation required to verify the eligibility or qualifications of a provider;
- instructions on the location for submission of the bids and the deadline for submission; and
- instructions on the sealing and labelling of the bids.

Advertisement for Consultancy Services

Advertisements for procurement for consultancy services is through publication of a notice inviting expressions of interest. The notice inviting expressions of interest is published in at least one newspaper of wide circulation in Uganda and where a PDE requires to obtain effective competition, the notice inviting expressions of

interest shall also be published in the relevant trade or professional publication.

The information contained in a notice of expression of interest includes:

- the name, address and contact details of the PDE;
- a summary of the scope of the assignment and a brief description of the required consultancy services;
- a statement of any eligibility and qualification requirements;
- the criteria to be used to evaluate the expressions of interest;
- details of the information required in the expression of interest, including any information or documentation required to verify the eligibility or qualifications of a consultant;
- instructions on the location for submission of expressions of interest and the deadline for submission; and
- instructions on the sealing and labelling of expressions of interest.

Other modes of advertisement of contract award procedures include direct invitation, undergoing a pre-qualification exercise and development of a shortlist of providers.

2.2 Preliminary Market Consultations by the Awarding Authority

Every PDE has an accounting officer, whose overall responsibility is to execute the procurement and disposal process in a PDE. The accounting officer of a PDE has authority to conduct a market assessment of the price of a procurement item, which may include works, supplies and non-consultancy services and consultancy services.

When conducting the market assessment for works, supplies and non-consultancy services, an accounting officer may take into account the following:

- prices obtained on previous similar bids or contracts, taking into account any difference in the quantities purchased;
- prices published or advised by potential providers; and
- a build-up of estimates of prices of components of the works, non-consultancy services or supplies.

When conducting a market assessment for consultancy services, an accounting officer may take into account the following:

- prices obtained on previous similar services; and
- prices advised by potential consultants.

2.3 Tender Procedure for the Award of a Contract

PDEs are required to follow prescribed procedures/methods in a procurement and disposal process. The choice of procurement method is determined by the estimated value of the requirement, the circumstances relating to the requirement and the type of procurement, whether supplies, works, consultancy or non-consultancy services. The methods of procurement that may be used to award a contract include:

Open Domestic Bidding

Open domestic bidding is a procurement method, which is open to participation on equal terms by all providers, through advertisement of the procurement opportunity. Unless provided otherwise, PDEs are required to adopt this method of procurement and disposal. Open domestic bidding is used to obtain maximum possible competition and value for money, and is open to foreign or international bidders.

Restricted Domestic Bidding

This is where bids are obtained by direct invitation without open advertisement of the procurement opportunity. It is used to obtain competition and value for money to the extent possible, where the value or circumstances do not justify or permit the open bidding procedure.

Open International Bidding

This is a procurement method which is open to participation on equal terms by all providers, through advertisement of the procurement opportunity and which specifically seeks to attract foreign providers. This mode of procurement is used to obtain the maximum possible competition and value for money, where national providers may not necessarily make this achievable.

Restricted International Bidding

This is a procurement method, which involves bids being obtained by direct invitation without open advertisement, and the invited bidders include foreign providers. It is used to obtain competition and value for money to the extent possible where the value or circumstances do not justify or permit an open bidding method and the short-listed bidders include foreign providers.

Micro Procurement

This procurement method is used for very low-value procurement requirements. It is used to achieve efficient and timely procurement where the value does not justify a competitive procedure. The current threshold for micro procurement is the UGX5 million equivalent to USD1,365.

Direct Procurement

Direct procurement is a sole-source procurement method for procurement requirements where exceptional circumstances prevent the use of competition. It is used to achieve efficient and timely procurement, where the circumstances do not permit a competitive method.

Quotation Method of Procurement

The quotation method is a simplified procurement method which compares price quotations obtained from a number of providers. The quotation method is used to obtain competition and value for money to the extent possible, where the value or circumstances do not justify or permit open or restricted bidding procedures.

Negotiations during the Procurement and Disposal process

Negotiations are not permitted between PDEs and a contractor, in respect of a proposal of the contractor, except where:

- the competitive procurement method was used and only one bid was received in response to the call for bids;
- the direct procurement method was used; or
- the procurement is for consultancy services.

Negotiations under the above are only carried out where the best evaluated bid or proposal exceeds the budget of the PDE.

2.4 Choice/Conditions of a Tender Procedure

While there is more than one tender procedure, the choice of procedure is not at the sole discretion of the PDE, but is dependent on the circumstances surrounding the procurement and the value of the procurement.

There are thresholds that determine the method of procurement to be used by a PDE. The applicable thresholds are highlighted below.

Supplies and Non-consultancy Services

- Open bidding (domestic and international) is used for procurements whose value is

higher than UGX200 million, equivalent to USD54,600;
- restricted bidding (domestic and international) is used for procurements whose value is equal to or higher that the UGX100 million, equivalent to USD27,300, but does not exceed UGX200 million, equivalent to USD54,600;
- request for quotations is used for procurements whose value is equal to or more than the UGX5 million, equivalent to USD1,365 but does not exceed UGX100 million equivalent to USD27,300; and
- micro procurement is used for procurements whose value is less than UGX5 million, equivalent to USD1,365.

Works
- Open bidding (domestic and international) is used for procurement whose value is higher than UGX500 million, equivalent to USD136,600;
- restricted bidding (domestic and international) is used for procurement whose value is equal to or higher than UGX200 million equivalent to USD54,600 but does not exceed UGX500 million, equivalent to USD136,600;
- request for quotations is used for procurement whose value is equal to or more than UGX10 million (USD2,730) but does not exceed UGX200 million (USD54,600); and
- micro procurement is used for procurement whose value is less than UGX10 million, equivalent to USD2,730.

Consultancy Services
- Request for proposals with expression of interest: procurements the value of which is equal to or higher than UGX200 million, equivalent to USD54,600; and
- request for proposals without expression of interest: procurements the value of which is equal to UGX50 million, equivalent to USD13,660, but which does not exceed UGX200 million, equivalent to USD54,600.

Medicine and Medical Supplies
Special thresholds apply for medicine and medical supplies.

- Open bidding is the default method for procurements of medicines and medical supplies. It may be used irrespective of the value of the procurement; on condition that National Drug Authority (NDA) registers the providers, except in cases where the NDA has not registered any provider for a specific requirement.
- Restricted bidding is used for procurements whose value is not more than UGX2 billion, equivalent to USD546,450, if the entity procuring is national medical stores and for procurements whose value is not more than UGX500 million (USD136,600) for any other PDE. It is a requirement that at least five bidders must be invited.
- The request for quotations method is used for procurements whose value is not more than UGX1 billion (USD273,225) if the entity procuring is national medical stores and for procurement, whose value is not more than UGX100 million (USD136,600) for any other PDE. It is a requirement that at least three quotations must be considered.
- Micro procurement is used for procurement whose value is not more than UGX100 million (USD136,600), if the entity procuring is national medical stores and for procurements whose value is not more UGX5 million, (USD1,365) for any other PDE. It is a requirement that at least three quotations must be considered.
- Direct procurement is used where the supplies are available from a single provider.

2.5 Timing for Publication of Documents

The Act does not impose timing for publication of documents except for those in **2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders** and **3.4 Requirement for a "Standstill Period"**.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The Act provides for minimum periods for submission of expressions of interest for consultancy services or submission of bids for works, supplies and non-consultancy services.

Minimum Periods for Submission of Expressions of Interest

The minimum periods of submission of expressions of interest are ten working days where the notice is only published in Uganda, and15 working days where the notice is published internationally.

The period for expressions of interest starts on the date the notice is first published and ends on the deadline for submission of expressions of interest.

The period for submission of expressions of interest is determined by taking the following factors into consideration:

- the level of detail required in the expression of interest;
- whether the consultants are required to submit authenticated legal documents or similar documents as part of the proposals and the time required to obtain the documents; and
- the location of the consultants and the time required to deliver the expression of interest to the procuring and disposing entity.

Minimum Periods for Submission of Bids

The minimum bidding periods in respect of each procurement method are:

- for the open domestic bidding method, 20 working days;
- for the open international bidding method, 30 working days;
- for the restricted domestic bidding method, 12 working days;
- for the restricted international bidding method, 20 working days; and
- for the quotations method, five working days.

Direct Procurement

This method of procurement does not have a minimum bidding period. The period of bidding is determined by taking the following factors into consideration:

- the time required for the potential bidders to obtain the bidding documents from the PDE;
- the time required for the preparation of bids, taking into account the level of detail required and the complexity of the bidding;
- the need for bidders to submit authenticated legal documents or similar documents as part of the bids and the time required to obtain the documents;
- the location of shortlisted or potential bidders and the time required for obtaining bidding documents and for the delivery and submission of bids to the procuring and disposing entity;
- the anticipated duration of the procurement process; and
- the minimum bidding period.

2.7 Eligibility for Participation in a Procurement Process

PDEs require all bidders participating in public procurement or disposal to meet the qualification criteria set out in the bidding documents,

which in all cases shall include the following basic qualifications:

- that the bidder has the legal capacity to enter into the contract;
- that the bidder is not:
  (a) insolvent;
  (b) in receivership;
  (c) bankrupt; or
  (d) being wound up;
- that the bidder's business activities have not been suspended;
- that the bidder is not the subject of legal proceedings for any of the circumstances mentioned in bullet point two, above; and
- that the bidder has fulfilled his or her obligations to pay taxes and social security contributions.

2.8 Restriction of Participation in a Procurement Process

Pre-qualification for Non-Consultancy Services

The Act permits pre-qualification under open domestic and open international bidding to obtain a shortlist of bidders in the procurement of works, supplies and non-consultancy services.

Pre-qualification is used in circumstances where:

- the non-consultancy services or supplies are highly complex, specialised or require detailed design or methodology;
- the costs of preparing a detailed bid would discourage competition;
- the evaluation is particularly detailed and the evaluation of a large number of bids would require excessive time and resources from a procuring and disposing entity; or
- the bidding is for a group of similar contracts, for the purposes of facilitating the preparation of a shortlist.

The criteria for evaluation for pre-qualification includes:

- experience in executing similar contracts;
- performance on similar contracts;
- capabilities with respect to equipment and manufacturing facilities;
- the qualifications and experience of the personnel of the bidder;
- financial capability of the bidder to perform the proposed contract;
- facilities or representation at or near the location for performance of the contract;
- the available capacity to undertake the assignment; and
- any other relevant criteria.

Note: the Act does not provide for a minimum number of bidders that may be pre-qualified.

Pre-qualification for Consultancy Services

A PDE may elect to shortlist consultants under the following circumstances:

- the consultancy service can only be provided by a limited number of consultants, in this case not more than six consultants;
- the value of the procurement is lower than the value prescribed for publication of notice inviting expression of interest; or
- there is an emergency situation.

The evaluation criteria PDEs must take into account in preparing a shortlist of consultants include the following:

- the consultant has the legal capacity to enter into a contract with the procuring and disposing entity;
- the consultant is not insolvent, in receivership, bankrupt or being wound up;
- the business activities of the consultant are not suspended;

- the consultant is not the subject of legal proceedings for any of the circumstances mentioned in the second bullet point;
- the consultant fulfilled the obligations to pay taxes and social security contributions in Uganda;
- the consultant does not have a conflict of interest in relation to the subject of the procurement;
- the consultant is not suspended by the Authority; and
- the consultant is:
  (a) not a member of the Contracts Committee or of the evaluation committee;
  (b) not an employee of the procuring and disposal entity or a member of the Board of Survey;
  (c) not a person appointed to politically or administratively control the procuring and disposing entity, including a minister, the accounting officer or a member of the governing body of the procuring and disposing entity; and
  (d) not a company, where persons specified herein have a controlling interest.

Where the consultant is a firm, company, corporation, organisation or partnership, the consultant is required to submit the following documents, with the application to be pre-qualified:

- a copy of the trading licence of the consultant or its equivalent;
- a copy of the certificate of registration of the consultant or its equivalent;
- a signed statement indicating that the consultant does not have a conflict of interest in the subject of the procurement; and
- any other relevant documents or statements as may be stated in the pre-qualification documents.

2.9 Evaluation Criteria

Evaluation Criteria during the Procurement and Disposal Process

The choice of an evaluation methodology is determined by the type, value and complexity of the procurement or disposal.

All evaluations are conducted by an evaluation committee which reports to the Procurement and Disposal Unit (PDU). A PDE is mandated to establish a PDU whose function among others is to manage all procurement or disposal activities of the PDE except adjudication and the award of contracts.

The evaluation of bids by interested parties is conducted during meetings of the evaluation committee.

Evaluation of Bids for Procurement of Works, Supplies and Non-consultancy Services

Bids for the procurement of works, supplies and non-consultancy services are evaluated using the technical compliance method.

The evaluation criteria assess the following:

- the compliance of the bid with the statement of requirements;
- the ability of the bidder to perform the proposed contract; and
- the ability of the bid to meet the objectives of the procurement.

The PDE is required to state the evaluation criteria used which must not be amended during the procurement process.

Evaluation of Proposals for Consultancy Services

Proposals for consultancy services are considered using the following methods:

- the quality and cost based selection method;

- the quality based selection method;
- the fixed budget selection method;
- the least cost selection method; or
- the consultants' qualifications selection method.

The quality and cost based selection method is used for highly specialised assignments, where it is difficult to develop precise terms of reference or the required input and for which a procuring and disposing entity expects consultants to demonstrate innovation in the proposal; assignments that have a high downstream impact and in which the objective is to have the best consultants; and assignments that can be carried out in several different ways, where a proposal is therefore not comparable and where the value of the consultancy services depends on the quality of the proposals submitted.

The fixed budget selection method is used where an assignment is simple, can be precisely defined, and where the budget is fixed.

The least cost selection method is used where the required consultancy service is of a standard or routine nature and where well established practices and standards exist.

The consultants' qualifications selection method shall be used for consultancy services of a value as may be prescribed by the Authority.

A PDE is required to disclose the evaluation criteria in the notice of expression of interest.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

PDEs are required to disclose the evaluation and qualification criteria. This disclosure is contained in the solicitation/bidding documents issued by the PDE. The bidding documents are issued to interested parties upon the publication of a bid notice in the course of a procurement process.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

There is no obligation to notify parties who have not been selected of the reasons for their non-selection in the procurement process.

3.3 Obligation to Notify Bidders of a Contract Award Decision

A PDE is required to notify bidders of a contract award decision. This must be done within five working days of the decision to award to the contract.

Notification of the award decision by the PDE is done by:

- delivering a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process;
- displaying a notice of best evaluated bidder on the notice board of the PDE; and
- sending a copy of the notice of best evaluated bidder to the Authority for publication on its website.

3.4 Requirement for a "Standstill Period"

During a procurement and disposal process, a PDE is required to not take any action for a period of ten days from the date of the display of the notice of the best evaluated bidder.

However, this standstill period does not apply to micro and direct procurement and all procurement in emergencies, irrespective of the procurement method used.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

Review of Decisions Made by a PDE after a Procurement and Disposal Process

A bidder may seek administrative review of any omission or breach by a PDE or any regulations or guidelines made under the Act or of the provisions of the bidding documents including best practices.

A PDE is required to provide a bidder seeking administrative review with:

- a summary of the evaluation process;
- a comparison of the tenders, proposals or quotations, including the evaluation criteria used; and
- reasons for rejecting the bids concerned.

The following bodies are responsible for the review of decisions of awarding authorities:

Review by the Accounting Officer

A bidder aggrieved by the decision of a PDE may make a complaint to the accounting officer of the PDE. The complaint must be made in writing, within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint. The accounting officer is required to make a decision in writing, within 15 working days, indicating the corrective measures to be taken, if any, and giving reasons for his or her decisions, and submit a copy of the decision to the Authority.

If the accounting officer does not make a decision within the prescribed 15 working days, or the bidder is not satisfied with the decision of the accounting officer, the bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the accounting officer.

Review by the Authority

Upon receipt of a complaint, the Authority shall promptly give notice of the complaint to the respective PDE, suspending any further action by the PDE until the Authority has settled the matter. The Authority is required to issue its decision within 21 working days after receiving the complaint, stating the reasons for its decision and remedies granted, if any.

A bidder who is not satisfied with the decision of the Authority may appeal against the decision to the Public Procurement and Disposal of Public Assets Appeals Tribunal (the "Tribunal").

Review by the Tribunal

A bidder aggrieved by a decision of the Authority may make an application to the Tribunal for review of the decision of the Authority. An application to the Tribunal must be in writing in a prescribed form, include a statement of the reasons for the application and be lodged with the Tribunal within ten working days of being served by the Authority with its decision.

A party to the proceedings before the Tribunal who is aggrieved by the decisions of the Tribunal, may within 30 days after being notified of the decision of the Tribunal or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court.

Review by the High Court

Where an application for review of a decision of the Tribunal is lodged with the High Court, it may make an order staying or otherwise affecting the

operation or implementation of the decision, as the High Court considers appropriate for securing the effectiveness of the proceedings and for determining the application or appeal.

4.2 Remedies Available for Breach of Procurement Legislation

The following remedies are available for breach of procurement legislation:

- termination of a procurement process;
- cancellation of a contract that has been awarded under an impugned procurement process;
- orders of compensation to an aggrieved party affected by an unlawful act in the procurement process; and
- orders to a PDE to do or redo anything in the procurement process.

4.3 Interim Measures

During an administrative review process, the awarding authorities may grant the following interim measures:

- suspension of the procurement process;
- a PDE cannot enter into a contract during the process of administrative review;
- prohibition of any further action by the PDE until settlement of the matter; and
- annulment in whole or part of an unlawful act or decision made by the PDE.

4.4 Challenging the Awarding Authority's Decisions

The following persons have standing to challenge the awarding authority's decisions:

- a bidder in the procurement process – the bidder may also appoint a person to represent them in the administrative review process;
- a person adversely affected by a decision of the Authority may lodge a complaint with the Tribunal; and
- a PDE may challenge a decision of the Authority before the Tribunal.

4.5 Time Limits for Challenging Decisions

The following time limits apply in the course of challenging a decision of a PDE:

- a complaint to an accounting officer of a PDE must be made within ten working days from the date on which the circumstances giving rise to the complaint arise;
- an appeal arising from the decision of an accounting officer of a PDE to the Authority must be made within ten working days from the date of communication of the decision of the Accounting Officer;
- an appeal arising from the decision of the Authority to the Tribunal must be made within ten working days of being served with the decision of the Authority; and
- an appeal from the Tribunal to the High Court must be made within 30 days from the date of notification of the decision of the Tribunal.

4.6 Length of Proceedings

Length of Proceedings of an Accounting Officer

An accounting officer, to whom a complaint arising from a procurement process is referred, is required to make a decision within 15 working days and submit a copy of the decision to the Authority.

Length of Proceedings of the Authority

- The Authority is required to review the decision of the accounting officer and provide recommendations to the PDE within 15 working days; and

- where a party appeals to the Authority, a decision must be made and communicated with 21 working days.

Note: the Act does not provide for the length of proceedings before the Tribunal and the High Court.

4.7 Annual Number of Procurement Claims

Copies of annual reports regarding the number of procurement claims considered by the review bodies are not readily available to the general public.

4.8 Costs Involved in Challenging Decisions

The costs payable for challenging an award before an accounting officer and the Authority are pegged to the value of the procurement or disposal in issue.

The costs payable at lodgement of a complaint before an accounting officer and the Authority:

- UGX500,000 (USD136) for procurements or disposals of a value of up to UGX100 million (USD27,300);
- UGX1.5 million (USD408) for procurement or disposal of a value of more than UGX100 million (USD27,300) up to UGX500 million (USD136,000);
- UGX2,500,000 (USD680) for procurement or disposal of a value of more than UGX500 million (USD136,000) up to UGX1 billion (USD273,000);
- UGX5 million (USD1,360) for procurement or disposal of a value of more than UGX1 billion (USD273,000) up to UGX50 billion (USD13.6 million);
- UGX10 million (USD2,730) for procurement or disposal of a value of more than UGX50 billion (USD13.6 million) up to UGX100 billion (USD27.3 million); and
- UGX15 million (USD4,080) for procurement or disposal of a value of more than UGX100 billion (USD27.3 million).

Note: where a complaint is upheld by an accounting officer or the Authority, the fees are refundable. Where a complaint is dismissed or withdrawn, the fees are non-refundable.

Costs before the Tribunal

A further appeal made to the Tribunal costs UGX300,000 (USD82).

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

Modification of contracts following their award is permissible in the following circumstances:

Change Orders

A PDE may issue a change order to the provider, requiring the provider to make changes to the general scope of the contracts and in particular, with respect to:

- the drawings, designs, or specifications;
- the method of shipment or packing;
- the place of delivery;
- time of performance or duration of the contract; or
- the related services to be provided by the provider.

The change order must not be one that increases the cost of the contract beyond 0.1% in the case of a single change or 1% in the case of cumulative change orders, of the original contract price.

Amendment of a Contract

Where a change in the contract increases the price of the original contract beyond 0.1% in the

case of a single change or 1% cumulatively, such a change is effected by amending the contract.

A single contract amendment must not increase the total contract price by more than 15% of the original contract price.

Where a contract is amended more than once, the cumulative value of all contract amendments must not increase the total contract price by more than 25% of the original contract price.

5.2 Direct Contract Awards

The Act permits direct procurement, as a sole source procurement method where exceptional circumstances prevent the use of competition.

Direct procurement as a method of procurement is used in the following circumstances:

- there is insufficient time for any other procedure, such as, in an emergency situation;
- the works, services or supplies are available from only one provider;
- an existing contract could be extended for additional works, services or supplies of a similar nature and no advantage could be obtained by further competition, if the prices on the extended contract are reasonable;
- additional works, services or supplies are required to be compatible with existing supplies, works or services and it is advantageous or necessary to purchase the additional works, services or supplies from the original supplier, provided the prices on the additional contract are reasonable; or
- it is essential or preferable to purchase additional works, services or supplies from the original supplier to ensure continuity for downstream work, including continuity in technical approach, use of experience acquired or continued professional liability, if the prices on the additional contract are reasonable.

Note: the circumstances in the last three bullet points apply where the value of the new works, services or supplies does not exceed 15% of the value of the original or existing contract, and the original or existing contract is awarded through a competitive process.

Direct Procurement

Where direct procurement is used more than once in the circumstances specified in the second bullet point above, the cumulative value of all new works, services or supplies shall not exceed 25% of the value of the original or existing contract.

For the purposes of direct procurement, an emergency situation is defined to mean:

- a situation where a circumstance which is urgent or unforeseeable or a situation which is not caused by dilatory conduct where Uganda is seriously threatened by or actually confronted with a disaster, catastrophe, war or an act of God;
- life or the quality of life or environment may be seriously compromised;
- the conditions or quality of goods, equipment, buildings or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness;
- an investment project is seriously delayed for want of minor items; or
- a government programme would be delayed or seriously compromised unless a procurement is undertaken within the required time frame.

5.3 Recent Important Court Decisions

Walukuba Transporters Co-operative Society v Jinja Municipal Council and Others

(Consolidated Miscellaneous Cause 47/2017) Delivered by the High Court on 8 May 2020

Background

The Applicants sought, by way of judicial review, to set aside the decision of the Respondent PDE, when it awarded a contract for revenue collection to an entity other than the Applicant. The Applicant had a running contract with the PDE, slated to end on 31 October 2017. On 10 May 2017, the Respondent PDE advertised a call for bids for the 2017–18 contract period, conducted the procurement process and the revenue collection contract awarded to another entity, which would take effect after 31 October 2017, when the Applicant's contract was to expire.

The Applicant filed a complaint with the Respondent, alleging that the advert and subsequent award of the contract to another entity was a breach of contract.

Decision of the Court

The Court held that a claim of breach of contract lies in the realm of private law and public law. As such, the Applicant's claim was not amenable to judicial review as there were remedies under private law.

The Court also held, upon an analysis of the facts, that the advert and invitation of bids for the 2017–18 contract period was not a breach of contract and did not in any way flout any procurement laws.

The Court consequently dismissed the Applicant's claim.

5.4 Legislative Amendments under Consideration

There are no legislative amendments currently being considered.

Kyagaba & Otatiina Advocates (Dentons) is made up of a dynamic, passionate and committed team of six partners who have a combined experience of over 70 years in advising and representing some of the leading brands both in Uganda and across the globe. The team of professionals possess the talent, industry knowledge and legal expertise necessary to deliver solutions which are faster, better and more cost-effective in order to ensure client satisfaction at every level. The public procurement and government contracts practice group helps clients go through the complete tendering procedure, solve any risks that may occur, make use of legal remedies and perform the contract in accordance with any applicable rules. It also advises clients on public policy and regulation, infrastructure and PPPs.

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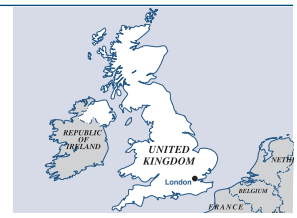

CONTENTS

1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

The relevant domestic legislation is as follows:

- the Public Contracts Regulations 2015 (PCR 2015), which applies to public sector procurements;
- the Utilities Contracts Regulations 2016 (UCR 2016), which applies to procurements by certain regulated utility companies;
- the Concessions Contracts Regulations 2016 (CCR 2016), which applies to the procurement of works and services concession contracts; and
- the Defence and Security Public Contracts Regulations 2011 (DSPCR 2011), which applies to the procurement of certain defence and security contracts.

With the exception of DSPCR 2011, which applies on a UK-wide basis, the above procurement legislation applies only to England, Wales and Northern Ireland. Scotland has its own procurement legislation that is, nonetheless, substantively similar to the procurement rules that apply to the rest of the UK.

Unless otherwise specified, the responses below relate to the application of the PCR 2015, on the basis of which, the majority of regulated contracts are awarded. Accordingly, any reference in this chapter to "the legislation" should be construed as a reference to the PCR 2015, whilst any reference to "the Regulations" should be construed as a collective reference to the procurement legislation listed above.

The Regulations (as well as Scottish procurement legislation) implement domestically EU procurement directives that regulate the award of certain contracts by public bodies and certain utilities (including certain private sector utilities).

Although EU law no longer applies to, and in, the UK (other than in Northern Ireland in certain circumstances), the Regulations continue to constitute good law and to apply domestically in an amended form (see below).

The UK ceased being a member of the EU on 31 January 2020. However, under the Withdrawal Agreement that sets out the terms of the UK's exit from the EU, EU law continued to apply to, and in, the UK until the end of the "transition period" at 11pm GMT on 31 December 2020.

Impact of Brexit on Public Procurement

The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (the "EU Exit Regulations") came into force at the end of the transition period. The primary aim of this amending legislation was to correct any deficiencies in the Regulations so as to reflect the UK's new status outside the EU. However, in terms of substantive obligations, in most respects, the law has remained unchanged.

The amendments to the Regulations do not affect any ongoing procurement procedure that commenced before the end of the transition period. These procurement procedures continue to be subject to the EU procurement directives and EU law more generally. The question as to whether the Regulations might be amended further is discussed in **5.4 Legislative Amendments under Consideration**.

Separately, as a result of the EU treaties ceasing to have direct effect in the UK, "below-threshold" procurements no longer need to comply with "general EU treaty principles" irrespective of whether these contracts would be of cross-border interest to suppliers in an EU member state. The only exception relates to Northern Ireland. By virtue of the Northern Ireland Protocol to the Withdrawal Agreement, general EU treaty principles arguably continue to apply to below-

threshold procurements that are of cross-border interest and that involve the provision of goods into Northern Ireland.

The reference to "economic operators" in this chapter should be construed as a general reference to an entity providing goods or services (including works) on the market and includes an applicant, which is an entity that has sought or is seeking an invitation to participate in a contract award process, and a bidder, which is an entity that has been invited to participate in a contract award process and has submitted, or intends to submit, a tender.

1.2 Entities Subject to Procurement Regulation

The Regulations apply primarily to the award of certain contracts by "contracting authorities", a term that is broadly defined and captures the overwhelming majority of public bodies. The term applies, for example, to government departments, local authorities, National Health Service trusts and police authorities.

In addition, a smaller group of entities that are not "contracting authorities" may, nonetheless, be subject to procurement regulation if they operate in the water, energy, transport or postal services sectors and carry out a regulated utility activity on the basis of "special or exclusive rights" or under the "dominant influence" of a contracting authority. This type of regulated body includes private sector water utility companies, electricity network and distribution operators, and ports.

In the interest of simplicity, this chapter will use the term "contracting authority" to refer to any entity that has an obligation to carry out a procurement process under the Regulations.

1.3 Types of Contracts Subject to Procurement Regulation

In principle, the Regulations apply to the award of contracts for pecuniary interest that are concluded in writing between one or more contracting authorities and one or more economic operators, and that have as their object the execution of works, the supply of goods or the provision of services.

The term "pecuniary interest" means, broadly, consideration (whatever its nature). Judicial authorities have clarified that the provision of goods, works or services in exchange for the full, or even partial, reimbursement of costs can be sufficient for pecuniary interest to arise.

The award of works and services concession contracts is also subject to regulation. Concession contracts involve consideration that consists, either solely or partly, in the right to exploit the works or services that are the subject of the contract and the transfer to the concessionaire of the operating risk that this exploitation entails.

The Regulations apply only where the estimated value of regulated contracts meets or exceeds certain thresholds. These thresholds are reviewed every two years by the Minister for the Cabinet Office to ensure that they align with the thresholds established in the context of the World Trade Organization's (WTO's) plurilateral Agreement on Government Procurement (GPA).

The value thresholds under the PCR 2015 are:

- works contracts – GBP4,733,252;
- supplies and most services contracts – GBP122,976 for central government bodies and GBP189,330 for other contracting authorities; and
- contracts for social and certain other types of services – GBP663,540.

The value thresholds under the UCR 2016 are:

- works contracts – GBP4,733,252;
- supplies and most services contracts – GBP378,660; and
- contracts for social and certain other types of services – GBP884,720.

The value threshold for concession contracts under the CCR 2016 is GBP4,733,252.

The value thresholds under the DSPCR 2011 are:

- works contracts – GBP4,733,252; and
- supplies or services contracts – GBP378,660.

All of the above figures are exclusive of value added tax.

1.4 Openness of Regulated Contract Award Procedure

Under the legislation, access to contract award procedures is guaranteed, and remedies for breaches of the legislation are available, to economic operators from:

- the UK;
- EU member states, but only in relation to procurements that are covered by the EU–UK Trade and Cooperation Agreement (TCA);
- a GPA state (other than an EU member state), but only in relation to procurements that are covered by the GPA; and
- other countries with which the UK has a bilateral agreement but only in relation to procurement covered by such agreement.

While, in practice, most regulated contract award procedures in the UK are open to all economic operators, there is no obligation on a contracting authority to consider the application or the tender of an economic operator from a country that is not covered under one of the categories identified above (a "third-country economic operator"). In addition, in the event that there is a breach of the legislation, a third-country economic operator would not be afforded protection (including access to remedies) under the legislation.

1.5 Key Obligations

Where the legislation applies, contracting authorities must, in general, meet their contractual requirements for goods, works or services by means of an advertised competitive contract award process that is based on objective, relevant and proportionate criteria. Underlying the legislation are the key obligations to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner. These obligations are relevant even before the procurement process has commenced; for example, the carrying out of a preliminary market consultation or the design of the procurement process must be consistent with these obligations. Equally, even after the procurement process has concluded with the signing of a contract, there is a prohibition on making substantive modifications to contracts, so as not to breach the above obligations.

In terms of the steps that a contracting authority must take in carrying out an advertised competitive contract award process, these would depend on the procurement procedure used, but generally would include:

- advertising the contract by means of the publication of a contract notice on Find a Tender (FTS), describing the requirement and inviting expressions of interest (within timescales set out in the notice);
- determining whether an economic operator that has expressed an interest has the necessary legal and financial standing and the relevant technical and professional abilities to perform the contract;

- inviting a shortlist of qualified economic operators, selected on the basis of objective and non-discriminatory rules and criteria, to submit tenders or carry out negotiations before submitting tenders (with potentially multiple rounds of negotiations and bidding before submission of final tenders);
- evaluating the tenders submitted on the basis of pre-disclosed objective award criteria that must be linked to the subject matter of the contract, so as to determine the most economically advantageous tender (MEAT);
- notifying the contract award decision to all economic operators that have submitted a tender (and, in certain cases, also to those who participated in earlier stages of the competition);
- observing the standstill period (or Alcatel period) of a minimum of ten clear calendar days (depending on the method used for the communication of the award decision), during which time the contract cannot be concluded;
- concluding the contract only after the expiry of the standstill period (if there is no legal challenge to the contract award decision before then); and
- advertising the contract award by means of a contract award notice on FTS.

Finally, contracting authorities are subject to an express obligation not to design procurements with the intention of excluding economic operators from the scope of the legislation or of artificially narrowing competition.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Contract award procedures launched after the end of the transition period must be advertised on FTS using the online Find a Tender Service and on the national online portal Contracts Finder. National publication can only take place following publication of a contract notice on FTS. However, if 48 hours elapse after the notice was submitted to FTS and the notice has not yet been published, contracting authorities are entitled to publish at a national level. Contracting authorities must publish a notice on Contracts Finder within 24 hours of the time when they become entitled to do so.

The advertisement of a contract must be made using standard online forms. These generally require the publication of the following information:

- the identity, address and other relevant details of the contracting authority;
- details as to how to access the procurement documents;
- a description of the procurement and the contracting authority's requirements, including the nature and quantity of works, supplies or services and the estimated value as well as duration of the contract;
- the award criteria;
- the conditions for participation, including any legal, economic and financial, technical and professional requirements; and
- details as to the procedure, including the type of procedure, and the time limit for receipt of tenders or requests to participate.

The standard form used for the advertisement of a PCR 2015-regulated contract on FTS may be found on the Find a Tender Service website.

2.2 Preliminary Market Consultations by the Awarding Authority

The legislation expressly permits contracting authorities to carry out preliminary market consultations with a view to preparing the procurement and informing the market of their procurement plans and requirements. In carrying out

such consultations, contracting authorities are permitted to seek or accept advice from independent experts or authorities, or from market participants. Such advice may be used in the planning and conduct of the procurement procedure, provided this does not have the effect of distorting competition and does not violate the principles of non-discrimination and transparency.

Where an economic operator has advised or has been involved in some other way in the preparation of the procurement process, the contracting authority is obliged to take appropriate measures to ensure that competition is not distorted as a result of the participation of that economic operator in the subsequent process. Such measures must include communicating to all other participants in the competition any relevant information exchanged with that economic operator in the context of preparing the procurement process and the fixing of adequate time limits for the receipt of tenders.

Where there are no means of ensuring the equal treatment of all economic operators, the economic operator who had been involved in the preparation of the process must be excluded from the procedure (but only after the economic operator in question has been given the opportunity to prove that its prior involvement is not capable of distorting competition).

2.3 Tender Procedure for the Award of a Contract

The legislation provides for six procedures that may be used for the award of a contract.

- Open procedure – the contracting authority invites interested parties to submit tenders by a specified date. The process does not involve a separate selection stage, in that the tenders of all economic operators that meet the qualitative criteria for participation in the process must be evaluated and the contract awarded to the bidder with the most economically advantageous tender. Negotiations are not permitted under this procedure.
- Restricted procedure – the contracting authority considers applications from interested parties and invites a minimum of five qualified applicants (determined on the basis of objective and non-discriminatory rules and criteria) to submit tenders. The contract is awarded to the bidder who has submitted the most economically advantageous tender. Negotiations are not permitted under this procedure.
- Competitive procedure with negotiation – the contracting authority considers applications from interested parties and invites a minimum of three (although two might be permissible in specific circumstances) qualified applicants to negotiate the contract with the contracting authority. Negotiations may involve successive bidding rounds, so as to reduce the number of tenders to be negotiated. Final tenders cannot be negotiated.
- Competitive dialogue – the contracting authority considers applications from interested parties and invites a minimum of three (although two might be permissible in specific circumstances) qualified applicants to conduct a dialogue with the contracting authority with a view to identifying the solution or solutions capable of meeting its needs. A competitive dialogue may take place in successive stages to reduce the number of solutions to be discussed. There can be no substantive discussions following the submission of final tenders, although these may be clarified, specified and optimised at the request of the contracting authority. Limited (non-substantive) negotiations may also take place after the bidder with the most economically advantageous offer has been identified, with a view to finalising the terms of the contract.

- Innovation partnership – this aims at setting up a partnership between a contracting authority and one or more economic operators for the development of an innovative product, service or works meeting the contracting authority's minimum requirements. At the conclusion of the innovation phase, the contracting authority can purchase the resulting products, services or works without the need for a new procurement process, provided that these correspond to the performance levels and maximum costs agreed between the contracting authority and the participants. The actual process for setting up an innovation partnership is based on the procedural rules that apply to the competitive procedure with negotiation.
- Competitive procedure without prior publication – in certain limited and narrowly defined circumstances, the legislation permits contracting authorities to award contracts without first having to advertise the requirement. Such cases include where there is an extreme urgency (not attributable to the contracting authority) or where the requirement can only be met by a particular economic operator as a result of technical reasons or the existence of exclusive rights (see **5.2 Direct Contract Awards**).

In line with all other aspects of a procurement process, the conduct of negotiations is subject to the obligation to treat economic operators equally and without discrimination. Among other things, this means that the contracting authority cannot disclose the confidential information of one bidder to the other bidders without the former's agreement. Such agreement cannot take the form of a general waiver. Instead, consent may only be granted with reference to the intended disclosure of specific information.

Where the competitive procedure with negotiation is used, negotiations are not permitted once final tenders have been submitted. However, where the competitive dialogue procedure is used, final tenders may be clarified, specified and optimised at the request of the contracting authority. Limited (non-substantive) negotiations may also take place after the identification of the most economically advantageous tender, with a view to finalising the terms of the contract.

2.4 Choice/Conditions of a Tender Procedure

The legislation permits the conduct of an open or restricted procedure at the option of the contracting authority. The use of the other procedures outlined in **2.3 Tender Procedure for the Award of a Contract** is only permissible where specific conditions are met.

The competitive procedure with negotiation and the competitive dialogue can be used only where one of the conditions below applies:

- the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- the contracting authority's needs include design or innovative solutions;
- the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, complexity or the financial and legal make-up, or because of risks attaching to them;
- the technical specifications cannot be established with sufficient precision by the contracting authority; and
- in response to an open or restricted procedure, only irregular or unacceptable tenders were submitted.

As noted earlier, the innovation partnership, which also involves negotiations, may be used where there is a need for the development of new products, services or works whilst the use of the negotiated procedure without prior pub-

lication is considered an exceptional procedure that can only be used in limited and narrowly construed circumstances (see **5.2 Direct Contract Awards**).

2.5 Timing for Publication of Documents

The legislation generally requires contracting authorities to offer online unrestricted and full direct access to the procurement documents from the date of the publication of the contract notice on FTS (although certain exemptions apply).

The definition of the "procurement documents" in the legislation is broad and essentially captures all documents that are relevant to the carrying out of a procurement process, including the contract notice, the technical specifications, an invitation to tender or negotiate, any document that describes the requirements or the rules of the competition and the proposed conditions of contract.

Although the wording of the legislation does not clarify this issue, it is arguable that this obligation applies only in relation to documents that are capable of publication at the start of the process. However, this interpretation has yet to be confirmed by the courts. In view of the uncertainty over this issue, it is not unusual for contracting authorities to issue some of the procurement documents as drafts at the start of the process and reissue these in a final form at a later stage of the process.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The legislation sets certain minimum time limits but these vary depending on which procedure is used and whether certain conditions are met.

- Open procedure – as a general rule, the minimum time limit for the receipt of tenders is 35 days from the date on which the contract notice was submitted to FTS for publication. However, this time limit may be shortened to 30 days where the contracting authority accepts the submission of tenders by electronic means and to a minimum of 15 days in certain circumstances, including where the requirement is urgent.
- Restricted procedure and competitive procedure with negotiation – the minimum time limit for receipt of requests to participate in the process is generally 30 days from the date on which the contract notice was submitted to FTS for publication. This period may be reduced to a minimum of 15 days if the requirement is urgent. The minimum time limit for the receipt of tenders (or initial tenders in the case of the competitive procedure with negotiation) is 30 days from the date on which the invitation is sent. This limit may be shortened to between ten and 25 days in certain circumstances, including where the requirement is urgent.
- Competitive dialogue procedure and innovation partnership – the minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is submitted to FTS for publication.

Irrespective of any minimum time limits permitted by the legislation, contracting authorities have an obligation to take into account the complexity of the contract and the time required for drawing up tenders when fixing the time limits for the receipt of tenders and requests to participate.

2.7 Eligibility for Participation in a Procurement Process

In determining whether interested parties might be eligible for participation in a procurement process, contracting authorities may only take

into account a candidate's suitability to pursue a professional activity, its economic and financial standing, and its technical and professional ability.

The legislation sets out detailed rules as to how these criteria may be taken into consideration at the selection stage of a procurement process and the type of evidence that contracting authorities may ask applicants to provide to prove compliance with specific requirements in this regard. In this context, contracting authorities have an obligation to ensure that any selection requirements they impose are related and proportionate to the subject matter of the contract.

Separately, the legislation requires contracting authorities to consider whether applicants have committed certain offences that would normally require their exclusion from the competition (the "mandatory exclusions"). Contracting authorities may also exclude from the competition interested parties that find themselves in certain situations (the "discretionary exclusions").

The exclusion period is five years from the date of the economic operator's conviction, in relation to mandatory exclusions, and three years from the date of the relevant event (a reference that case law has interpreted as the date when the wrongful conduct was established), in relation to discretionary exclusions.

An economic operator that finds itself in one of the circumstances that require or permit disqualification may avoid this if it can demonstrate to the satisfaction of the contracting authority that it has taken appropriate "self-cleaning" measures.

2.8 Restriction of Participation in a Procurement Process

When using one of the competitive procedures other than the open procedure, contracting authorities may restrict participation in a competition to only a small number of qualified applicants. The legislation requires that the decision as to which applicants should be shortlisted must be made on the basis of objective and non-discriminatory criteria or rules that must be disclosed at the start of the process.

The legislation requires the shortlisting of a minimum of five applicants when using the restricted procedure and a minimum of three when using the competitive process with negotiations, the competitive dialogue and the innovation partnership.

However, where the number of applicants meeting the relevant requirements is below the minimum number set in the legislation, the contracting authority may continue with the procedure by inviting the applicants that meet the minimum conditions for participation, provided that there is a sufficient number of qualifying applicants to ensure genuine competition.

2.9 Evaluation Criteria

A contracting authority must award the contract to the bidder with the most economically advantageous tender, from the point of view of the contracting authority. The tender that is the most economically advantageous must be determined by reference to price or cost alone, or the best price-quality ratio, which must be assessed on the basis of criteria that are linked to the subject matter of the contract.

These may include qualitative, environmental or social aspects. The cost element may also take the form of a fixed price or cost, on the basis of which, bidders then compete on quality criteria only.

The criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority (which would be the case if, for

example, the criteria are not clearly defined). The criteria must also ensure the possibility of effective competition, enabling an objective comparison of the relative merits of the tenders. They must also be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

The selection criteria, including the grounds for exclusion as well as the objective and non-discriminatory criteria or rules on the basis of which the contracting authority will determine the qualified applicants that will be invited to participate in the competition, must be disclosed at the start of the process. Equally, the award criteria and their weightings must be disclosed in the procurement documents that are published at the start of the process.

Over and above the specific obligations in the legislation that relate to the disclosure of selection and award criteria, case law has clarified that a contracting authority must disclose all elements to be taken into account in the evaluation (which are likely to affect the preparation of tenders), including sub-criteria and their weightings.

In practice, and so as to limit the risk of non-compliance in this context, contracting authorities tend to disclose the full evaluation methodology at the start of the procurement process, or, at the very least, well in advance of the submission of tenders, allowing a reasonable opportunity for bidders to take account of the methodology when preparing their submissions.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The legislation does not create an explicit obligation on contracting authorities to inform unsuccessful applicants of the decision to reject their application to participate in a competition and the reason for that decision in a timely manner. Instead, the legislation provides that where the contracting authority has not informed an applicant of its decision to reject its application and the reasons for that decision at an earlier stage in the process, the contracting authority must do so before commencing the standstill period that must precede the award of the contract (see **3.4 Requirement for a "Standstill Period"**).

In practice, contracting authorities choose to inform unsuccessful applicants of their rejection and the reasons for this without undue delay, not least so as to limit the risk of a challenge against that decision at a later stage in the process.

Separately, the legislation provides that where an unsuccessful applicant requests in writing information about the reasons for the rejection of its request to participate in the competition, the contracting authority is required to provide this information as quickly as possible and, in any event, within 15 days from receipt of the written request.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Bidders must be informed about the contract award decision as soon as possible after that decision has been made. In notifying bidders of that decision, the contracting authority must specify:

- the criteria for the award of the contract;
- the reasons for the decision, including the characteristics and relative advantages of the successful tender;

- the scores (if any) obtained by the tenderer receiving the notice and the successful tenderer;
- the name of the successful tenderer; and
- confirmation of when the standstill period (see **3.4 Requirement for a "Standstill Period"**) will expire.

The notice communicating the contract award decision is normally sent electronically, although facsimile and "other means" are, in principle, also permissible.

In certain circumstances, the contracting authority has an obligation to notify the contract award decision also to rejected applicants as well as bidders that might have been eliminated at earlier stages of the competition.

3.4 Requirement for a "Standstill Period"

The legislation requires the contracting authority not to conclude the contract before the expiry of a standstill period following the notification of the contract award decision to bidders. The length of that period depends on the means of communication used to notify the contract award decision. Where all bidders have been notified of that decision electronically, the standstill period must be a minimum of ten clear calendar days.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

Review applications are heard by the national courts of the United Kingdom; for example, the High Court in England and Wales. Decisions of the first-instance review body may be appealed to the relevant appellate court; for example, in England and Wales, this would be the Court of Appeal. In matters of public interest or matters involving a point of law of general importance, a further appeal may be permitted to the Supreme Court of the United Kingdom.

Complaints may also be made directly to the European Commission in relation to alleged breaches that occur in procurements launched before the end of the transition period. The European Commission is not obliged to pursue the complaint but if it does, this may ultimately lead to an action against the UK government in the Court of Justice of the EU. Under the terms of the Withdrawal Agreement, the European Commission may take such action within four years following the end of the transition period.

4.2 Remedies Available for Breach of Procurement Legislation

Economic operators who have suffered loss or damage as a consequence of a breach of the Regulations may be awarded damages to compensate them for such loss. In order to recover damages, the relevant economic operator must establish that there has been a breach of the Regulations and that the breach has caused the economic operator to suffer loss or damage.

The Supreme Court decision in Nuclear Decommissioning Authority v Energy Solutions EU Ltd clarifies that damages will only be available if the relevant breach of the Regulations is "sufficiently serious". For these purposes, a breach will be sufficiently serious if it has an impact on the outcome of the procurement process. Separately, issuing a claim in the courts against the contracting authority's award decision has the effect of automatically suspending the procurement process, preventing the conclusion of the contract, provided the contracting authority has become aware that a claim has been issued against its award decision before the contract's conclusion (see **4.3 Interim Measures**).

Without prejudice to any other powers of the court, the legislation provides that where the

contract has not been concluded, the court may also order the setting aside of the unlawful decision or action, or order the contracting authority to amend any document.

Where the contract has been concluded, the court may award damages to an economic operator that has suffered loss or damage as a consequence of the breach. In addition, the court must make a declaration of "ineffectiveness" (unless there are general interest reasons for not doing so) in certain limited circumstances, including where:

- the contract was awarded without the prior publication of a contract notice, in circumstances where one was required; or
- there has been a breach of the automatic suspension or standstill obligations depriving the claimant of the possibility to pursue pre-contractual remedies and this is combined with an infringement of the Regulations that has affected the chances of the claimant obtaining the contract.

Where a declaration of ineffectiveness is granted, the contract is prospectively ineffective as from the time when the declaration is made, so that any outstanding contractual obligations must not be performed. In such circumstances, the court must also impose a civil financial penalty on the contracting authority of an amount that it considers to be "effective, proportionate and dissuasive".

Declarations of ineffectiveness are rare, with only two examples of such a declaration being granted in the UK at the time of writing, the most recent being by the English Court of Appeal in the case of Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532.

4.3 Interim Measures

As noted in **4.2 Remedies Available for Breach of Procurement Legislation**, issuing a claim against a contracting authority's award decision has the effect of automatically suspending the procurement process and preventing the conclusion of the contract, provided that the contracting authority has become aware that the claim has been issued before the contract's conclusion.

In response, the contracting authority can apply to the court for an order to "lift" the automatic suspension, so that it may conclude the contract, despite the outstanding claim. When considering whether to lift an automatic suspension, the court will consider whether the claim raises a serious issue to be tried, whether damages would be an adequate remedy for the claimant if the suspension remained in place but the claim succeeded at trial (if not, would damages be an adequate remedy for the contracting authority), and whether the balance of convenience favours maintaining or lifting the suspension.

In essence, the court will consider whether it is just in all the circumstances to confine a claimant to a remedy of damages and, to the extent there is any doubt as to the adequacy of damages for either party, it will decide where the balance of convenience lies in the circumstances. As a condition of maintaining the suspension, the court will normally require the claimant to give a cross-undertaking in damages (essentially a promise to pay the contracting authority damages for any loss it may suffer as a result of the suspension being maintained, in the event that the claim is unsuccessful).

Separately, an economic operator may seek a court order to suspend the procurement process in relation to which it alleges that there has been a breach, or the implementation of any decision or action taken by the contracting authority

in the course of such process. In determining whether or not to grant such interim order, the court will consider the issues set out in the previous paragraph.

4.4 Challenging the Awarding Authority's Decisions

A breach of the legislation is actionable by any economic operator that is owed a duty under the legislation and, in consequence of the alleged breach, suffers, or risks suffering, loss or damage. As noted elsewhere in this chapter, a contracting authority owes a duty of compliance with the legislation to economic operators from the UK, an EU member state, a GPA state (other than an EU member state), or a country with which the UK has a bilateral agreement.

However, in relation to operators from an EU member state, a GPA state (other than an EEA state) or countries with which the UK has bilateral agreements, only to the extent that the procurement in question is covered by the TCA, the GPA or the bilateral agreement, respectively.

4.5 Time Limits for Challenging Decisions

This will depend on the type of remedy being sought. The Regulations require a claim seeking the remedy of "ineffectiveness" to be made within a period of six months starting from the day following the date of the conclusion of the contact. Where the contracting authority has published a contract award notice on FTS, or has informed the relevant economic operator of the conclusion of the contract and provided a summary of the reasons leading to the award of that contract, the period for bringing a claim is shortened to 30 days from the date of publication of the contract award notice, or the date on which notice of the conclusion of the contract (together with a statement of reasons) was provided to the relevant economic operator.

Claims seeking a remedy other than "ineffectiveness" must be brought within 30 days, beginning with the date on which the claimant first knew or ought to have known that grounds for starting the proceedings had arisen. The Court has the power to extend this period to up to three months where it considers that there is a good reason for doing so.

4.6 Length of Proceedings

The time taken for the proceedings to come to a full hearing will vary significantly depending on the circumstances, including the complexity of the case. It would not be unusual for a claim to take between nine and 12 months to reach full hearing. In urgent cases, the court may order that the claim be expedited, in which case, the period from issuing a claim to judgment may be around three months.

4.7 Annual Number of Procurement Claims

The number of procurement law cases with reported UK court judgments is low when compared with most EU jurisdictions (very broadly, around ten reported cases per year). It is often said that the comparatively low number of cases does not reveal the true level of challenges to UK contract award procedures, with a larger number of claims settled out of court before judgment.

4.8 Costs Involved in Challenging Decisions

For a claim that includes a claim for damages over GBP200,000, the cost of issuing proceedings is GBP10,000. An additional fee of GBP528 will be payable if the claim includes a claim for non-monetary relief, such as a declaration of ineffectiveness or an order setting aside a decision to award a contract.

Additional fees will be payable at various stages of the claim, such as if an application is made for an interim order for specific disclosure or the

matter proceeds to a hearing. Total fees, including legal fees, will vary depending on the nature and complexity of the issues in dispute. Fees ranging from tens to hundreds of thousands of pounds are not uncommon.

To the extent that a claimant is successful, it may be able to recover a proportion of its fees from the contracting authority. Typically, a successful claimant would hope to recover in the region of 65% of its total costs from the defendant. If the claimant is unsuccessful, it would usually expect to pay a similar proportion of the defendant's total costs.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

The Regulations (other than DSPCR 2011) incorporate provisions that regulate the modification of contracts following their award. These prohibit substantial modifications. In brief, a modification will be deemed substantial when it:

- renders a contract materially different in character from the one initially concluded;
- introduces conditions that, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure;
- changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract;
- extends the scope of the contract considerably; or
- involves the replacement of the original contractor (unless "safe harbour" provisions apply – see below).

At the same time, the Regulations (other than DSPCR 2011) incorporate certain provisions that specify the conditions that, if met, mean a modification would not be deemed to constitute a substantive modification and, as such, it would be permissible (generally referred to as the "safe harbour" provisions).

These rules differ in certain respects, depending on whether the contract is subject to the PCR 2015 or the UCR 2016 or whether a concession contract is awarded by a contracting authority in the exercise of an activity that is not regulated under the UCR 2016. Briefly, modifications would not be deemed to be substantive where they:

- have already been provided for in the original procurement documents in clear, precise and unequivocal review clauses and provided these do not alter the overall nature of the contract;
- relate to the provision of additional requirements by the original contractor that are outside the scope of the original procurement but where a change of contractors is not possible for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting entity and the value of the modification does not exceed 50% of the value of the original contract (this value rule does not apply to utility procurements);
- have become necessary as a result of circumstances that a diligent contracting authority could not foresee, the modification does not alter the overall nature of the contract and the value of the modification does not exceed 50% of the value of the original contract (this

value rule does not apply to utility procurements);
- are limited to the replacement of the original contractor with a new one in certain circumstances, including where this is the result of corporate restructuring, and the new contractor meets the original selection criteria and this does not entail other substantial modifications and is not aimed at circumventing the rules;
- are not "substantial" within the meaning of the legislation (as described above);
- are of a value that is below:
  (a) the relevant value threshold for the application of the rules; and
  (b) less than 10% (for services or supplies) or 15% (for works) of the value of the original contract, and provided there is no change to the overall nature of the contract. The value must be calculated cumulatively if there are successive modifications.

The second and third safe harbour provisions also require the publication of a "modification of contract" notice on FTS.

5.2 Direct Contract Awards

As noted earlier in this chapter, the legislation permits a contracting authority to award a contract without having to advertise the requirement on FTS and conduct a competitive tender process in certain limited circumstances, including where:

- no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open or restricted procedure, provided that, among other things, the initial conditions of the contract are not substantially altered;
- where the requirement can be met only by a particular economic operator as a result of technical reasons or the existence of exclusive rights.
- it is strictly necessary to make the direct award for reasons of extreme urgency brought about by events unforeseeable by the contracting authority and the time limits for the open, restricted or competitive procedure with negotiation cannot be complied with;
- in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, it is not possible to comply with the time limits for the open or restricted procedures or the competitive procedures with negotiation; and
- additional supplies are necessary and a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance, and where certain other conditions are met.

5.3 Recent Important Court Decisions

In Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport and other cases [2020] EWHC 1568 (TCC), the High Court considered whether the Secretary of State had breached his obligations of transparency, fairness and proportionality by seeking to require the successful bidder to accept potentially large pension risks. Each of the claimants had refused to accept the pension requirements and therefore submitted tenders that offered different terms. These tenders were disqualified by the Secretary of State as being non-compliant.

The court held that although there were obvious reasons why the claimants did not want to accept the proposed pension liabilities, there is no applicable legal principle that would restrict the amount of risk that the successful bidder must be subject to as part of a procurement exercise.

The court also rejected the claimants' argument that the procurement lacked transparency as a result of the broad definition of "non-compliance" with the tender requirements. It was held that it would be clear to a "reasonably well-informed and normally diligent" (RWIND) tenderer that the discretion to disqualify was not unlimited and could only be exercised on a principled and proportionate basis.

Finally, the court noted that had the Secretary of State not disqualified the claimants' tenders despite being non-compliant, the risk of a successful legal challenge by a compliant bidder would have been "extremely high" and, therefore, this option could not have been sensibly contemplated by the Secretary of State unless absolutely compelled to do so.

In Neology UK v Council of the City of Newcastle Upon Tyne and others [2020] EWHC 2958 (TCC), the High Court considered one of the first summary applications for a procurement case under the PCR 2015. The claim concerned the procurement of equipment to monitor vehicles in mandatory clean air zones.

The claimant alleged various scoring errors in the evaluation of its bid and issued an application for summary judgment at the same time as the council applied to lift the automatic suspension.

The question for the court to determine was whether "the defendant has no real prospect of avoiding the remedy of setting aside the award decision". It was held that as the claimant's submissions concerned the scoring of its bid, it lacked the "knock-out blow" necessary to obtain summary judgment. Disclosure would be necessary to decide the issues in the case, whereas summary judgment "must stand on its own two feet, unaided by disclosure". The application for summary judgment was therefore dismissed.

Additionally, the automatic suspension was lifted as it was held that the claimant would be adequately compensated by damages, noting that the public interest in achieving implementation of the mandatory clean air zone would also have been a decisive factor.

5.4 Legislative Amendments under Consideration

As noted at the start of this chapter, EU law no longer applies to, and in, the UK, including as regards procurements launched on or after the end of the transition period on 31 December 2020.

On 15 December 2020, the UK government published its Green Paper consultation titled "Transforming public procurement". The consultation invited comments from stakeholders on the proposed reforms to the public procurement regime following the UK's exit from the EU. The government's objectives behind the reforms are, among other things, to speed up and simplify procurement processes and facilitate further SME access to public contracts.

At the time of writing, the government was in the process of considering the responses to the public consultation with a view to taking these into account where appropriate in the drafting of new procurement legislation.

Ultimately, any new legislation will have to be compliant with the GPA, to which the UK is now a signatory in its own right. Equally, the new rules will need to be consistent with the TCA and any other trade agreements to which the UK enters into that incorporate commitments that relate to public procurement.

Pinsent Masons has one of the largest and most dynamic procurement practices in the UK and Europe. The practice spans all major sectors, including regeneration, defence, transport, energy, water and infrastructure, and advises both regulated procurers as well as suppliers bidding for public or regulated utility contracts. The practice is recognised for its ability to provide practical and commercially focused advice on complex procurements across the UK and abroad. Contentious and non-contentious procurement lawyers in the team work closely together to ensure that clients are provided with innovative strategic advice that anticipates and minimises legal risks. The team covers a diversity of matters, covering all aspects of procurement regulation, including the highly specialised defence sector, utility procurements in the transport, energy and water sectors, major central government procurements as well as local authority, health and education sector procurements. The team also advises clients on all aspects of the World Trade Organization's plurilateral Agreement on Government Procurement.

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

Under the US system of federalism, government functions are carried out by the federal government, as well as state and local governments. Each level of government has its own laws, processes and procedures, including those that govern the procurement of goods and services. For companies entering the federal procurement market, understanding these distinctions, and which rules apply, is essential. This chapter focuses primarily on the US federal government's procurement processes and regulations, but will mention some notable points about state and local procurement laws.

US Federal Procurement Statutes and Regulations

Within the US federal procurement legal structure, there are a number of significant federal statutes, regulations and executive orders that directly frame and govern the federal procurement process. The primary, overarching governing statutes and regulations are:

- Title 41 of the US Code, which addresses key elements of procurement for civilian agencies;
- Title 10 of the US Code, which does the same for Department of Defense (DOD) agencies, the National Aeronautics and Space Administration (NASA) and the Coast Guard;
- within Titles 10 and 41 of the US Code are other specific procurement laws, such as the Competition in Contracting Act (CICA), which encourages competition for the award of US government contracts, and the Truthful Cost or Pricing Data Act (formerly known as the Truth in Negotiations Act, and still commonly referred to as "TINA"), which generally permits the US government (in certain circumstances) to obtain certified cost or pricing data from contractors; and
- the Federal Acquisition Regulation (FAR), codified at Title 48 of the US Code of Federal Regulations (CFR), which implements many aspects of the statutes listed above as well as others.

Socio-economic Laws

The federal government also uses the procurement process to advance various socio-economic objectives, including those related to trade, labour and employment, the environment, national security and industrial preparedness. In some cases these socio-economic objectives are enacted by executive orders issued by the president, which can lead to their adoption into the FAR or agency FAR supplements without congressional involvement. The requirements of these socio-economic objectives are largely woven into the FAR and agency FAR supplements, and in some cases appear in Titles 10 and/or 41 of the US Code. For example, US government contractors are subject to the following socio-economic laws.

- Labour and employment laws – laws establishing heightened minimum wages, benefits and other employee protections, such as:
  - (a) the McNamara-O'Hara Service Contract Act (41 U.S.C. ch. 67) (applies to services contracts);
  - (b) the Davis Bacon Act (40 U.S.C. § 3141) (applies to construction contracts);
  - (c) the Walsh Healey Public Contracts Act (40 U.S.C. ch. 65) (applies to manufacturing contracts);
  - (d) the Contract Work Hours and Safety Standards Act (40 U.S.C. ch. 37) (applies to contractors employing labourers and mechanics); and
  - (e) requirements that contractors develop affirmative action plans and compile and file equal employment opportunity (EEO) reports.

- Trade-related laws – laws creating domestic preferences in US acquisitions, including:
  (a) the Buy American Act (BAA) (41 U.S.C. §§ 8301 et seq) (establishing a preference for US-manufactured products);
  (b) the Trade Agreements Act (TAA) (19 U.S.C. §§ 2501 et seq) (establishing an exception to the BAA for products manufactured by "designated countries"; ie, those countries with which the United States has a trade agreement); and
  (c) the Berry Amendment (10 U.S.C. § 2533c) (requiring absolute domestic production and sourcing of certain products procured by the DOD, such as clothing and textiles).
- Small-business preference laws – laws granting procurement preferences to US-owned small businesses, including the Small Business Act (15 U.S.C. §§ 632 et seq).

Contractor Compliance Laws

In addition to these laws designed to advance US socio-economic objectives, there are numerous federal laws focused on contractor compliance. These laws are designed to uphold integrity and transparency in the procurement process, by imposing significant compliance obligations and prescribing substantial enforcement consequences for non-compliance. These are discussed in more detail in **1.5 Key Obligations** and include:

- the Anti-Kickback Act (41 U.S.C. ch. 87);
- the False Claims Acts (31 U.S.C. §§ 3729, 3731) (imposes both civil and criminal penalties); and
- the Procurement Integrity Act (41 U.S.C. §§ 2101 et seq).

Federal Funding of State and Local Government Projects

Where the federal government is funding projects carried out by state and local governments, similar federal requirements may apply, such as the Buy America Acts, which impose domestic preference requirements, similar to the BAA.

Assistance Agreements

Finally, the federal government also distributes hundreds of billions of dollars in assistance through grants and co-operative agreements (collectively referred to as "assistance agreements"). These assistance agreements are governed by the Federal Grant and Cooperative Agreement Act (31 U.S.C. §§ 6301 et seq) and regulations found in Title 2 of the US Code of Federal Regulations. While there are similarities in the laws governing procurement contracts and those governing assistance agreements, it is important to note that separate statutory and regulatory authorities exist and govern.

1.2 Entities Subject to Procurement Regulation

Federal executive branch agencies are subject to the FAR, and the various procurement laws noted above, when acquiring goods and services. By its terms, the FAR, and the statutes it implements, apply to "all executive agencies" – defined to mean an "executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101". Executive agencies are permitted to supplement the FAR with agency-specific requirements.

Certain federal entities – such as the Federal Aviation Administration (FAA), the US Post Service (USPS) and the Federal Deposit Insurance Corporation (FDIC) – are exempt from the FAR. Nonetheless, these agencies have adopted their own procurement regulations.

State and local governments are not subject to the FAR, and have also adopted their own sys-

tem of procurement laws and regulations. As noted above, where federal funding is provided for certain state and local projects, the state and local governments must incorporate certain federal requirements (eg, those set forth in Title 2 of the Code of Federal Regulations and, where applicable, the Buy America Acts).

1.3 Types of Contracts Subject to Procurement Regulation

The FAR and related procurement laws apply when executive agencies are acquiring goods or services for the agencies' own benefit and use. When executive agencies are acquiring goods and services for their own benefit and use, agencies are required to use procurement contracts. Procurement contracts are distinct from "assistance agreements" (grants and co-operative agreements), which are not considered to be "procurement" actions.

Acquisition Methods

When engaging in procurement actions, the FAR provides for several types of acquisition methods, depending on the nature of the goods or services being acquired and the value of the anticipated acquisition. The major acquisition methods include:

- commercial item acquisitions (FAR part 12) – provides simple, streamlined procedures and lessened requirements for acquiring goods and services readily available in the commercial marketplace;
- simplified acquisition procedures (FAR part 13) – provides simplified procedures for acquiring goods and services when the anticipated value of the acquisition is below USD250,000 (known as the "Simplified Acquisition Threshold", or SAT) and allows for the use of blanket purchase agreements (BPAs), a simplified method of filling anticipated repetitive needs for supplies or services;
- sealed bidding (FAR part 14) – provides a method of contracting that involves competitive bids, the public opening of sealed bids, and award to the bidder offering the lowest price, whose bid is responsive to the terms of the solicitation; and
- contracting by negotiation (FAR part 15) – provides a method of contracting for competitive and non-competitive (ie, "sole source") negotiated acquisitions, utilising a request for proposal (RFP) process.

Contract Types

FAR part 16 defines contract types (ie, the type of contract that may result after a particular acquisition method is used). Some contract types are defined by the manner in which the contract pricing is determined (eg, firm fixed price or "lump sum" pricing, FAR subpart 16.2; fixed unit or labour rate pricing, known as labour-hour or time and material contracts, FAR subpart 16.6; or cost reimbursement, FAR subpart 16.3).

Firm fixed price contracts generally do not provide for adjustments to contract price, except in limited circumstances. The contractor typically bears the risk if its costs of performance exceed the agreed-upon price (the "fixed price"). Compare firm fixed price contracts with cost reimbursement contracts, where the government reimburses the contractor for its costs incurred (subject to the contractor's costs being reasonable, allocable to the contract performed, and allowable under the FAR). Cost reimbursement contracts shift some risk away from the contractor and on to the government. Profit under cost reimbursement contracts is defined as "fee" and can take various forms and is often structured to incentivise performance.

FAR subpart 16.5 establishes indefinite-delivery, indefinite-quantity (IDIQ) contracts in which contract pricing and other terms are set at award, but the timing and quantity of orders is not

known at the time of contract award. Typically, task orders or delivery orders are issued to IDIQ contract holders once a definitive requirement is identified. IDIQ contracts are often awarded to multiple awardees, who then compete among themselves for individual task or delivery orders. In some cases, an IDIQ contract may also be designated as a "requirements" contract, in which case the agency will use that particular contract vehicle for all its needs within the prescribed ordering period and subject to a maximum limitation.

Alternative Methods of Filling Acquisition Needs

Beyond these core contract types, executive agencies can use a number of variants to fill acquisition needs, including BPAs (discussed above) and basic ordering agreements (BOAs). In addition, some agencies are authorised to make their procurement programmes available across the federal government (ie, available for other executive agencies to utilise and place orders). This includes the General Services Administration's (GSA's) Federal Supply Schedule contracting programme (known as "FSS" or "GSA Schedules"), which is governed by FAR subpart 8.4. The way these types of contracts work is that GSA has established set contract terms and conditions for a host of commercial goods and services. Other executive agencies can simply look to the GSA Schedules, and if the needed goods or services are available, place an order directly under an existing GSA FSS contract, with relatively few additional competitive procedures, simplifying the acquisition process. More than USD30 billion of goods and services are acquired through the GSA FSS programme each year.

Similar to GSA's FSS programme is the Department of Veterans Affairs' (VA's) Medical/Surgical Prime Vendor programme, which streamlines the procurement of medical products and services, and totals more than USD10 billion a year in sales.

Finally, the US government's procurement of real property, and related goods and services, is subject to special regulations and requirements.

1.4 Openness of Regulated Contract Award Procedure

US federal procurement laws establish mechanisms to ensure integrity and transparency in the procurement process, to include a presumption that the government's requirements can be actively competed among businesses, a requirement that such acquisitions be announced publicly, and a mandate that agencies take the steps necessary to utilise the breadth of the US government contracting market. Such a mechanism for enforcing these requirements is the US government's bid protest process, which is discussed later in this chapter. Bid protests serve as an important "check" on agency actions to ensure their compliance with federal procurement laws and regulations.

CICA, one of the procurement statutes mentioned above, requires procuring agencies to use "full and open competition" to the "maximum extent practicable" in their acquisitions of goods and services. While full and open competition is the goal, CICA includes a number of exceptions to this requirement (implemented by FAR part 6). Some such exceptions to CICA include situations where:

- there is only one responsible source and no other supplies or services will meet the agency's needs;
- an unusual and compelling urgency exists;
- an exception is required to maintain important areas of the US industrial base or critical research, engineering or development capabilities;

- statutes authorise other than full and open competition, such as those authorising sole source or limited competition among certain small-business participants in the US Small Business Administration's (SBA's) federal procurement programmes; and
- publication of the requirement would compromise national security.

With the exception of the last scenario, agencies generally must announce their intention to use other than competitive procedures. Agencies must also document their bases for doing so through executing a written "determinations and findings" document (D&F), and by developing justification documents and requiring approval from higher levels within the agency (commonly referred to as "J&As").

FAR part 5 requires that agencies publish all anticipated contracting actions exceeding USD25,000 in a centralised public database. Until recently this database was known as "FedBizzOpps", but was cleverly renamed "Contracting Opportunities" and moved to a new online platform called "beta.SAM.gov". Agencies must also publish summaries of contract awards on this platform.

Finally, FAR part 10 encourages agencies to engage with industry prior to beginning the acquisition process, and requires agencies to conduct "market research" for purposes of identifying potential sources of supplies or services.

Beyond the express exceptions to competition included in CICA, there are other federal contracting requirements that effectively serve to limit competition, such as domestic preference requirements (ie, BAA) and small-business programmes that limit participation to small, US-owned companies. National security considerations concerning export controls and foreign ownership control and influence (FOCI) create tension with CICA's goal of full and open competition, but nonetheless serve important national interests. The same can be said for orders placed under IDIQ contracts and GSA Schedules, where publication and competition requirements are limited to holders of the particular IDIQ or GSA FSS.

1.5 Key Obligations

Beyond setting forth the core business terms typically included in contractual arrangements (eg, price, description of product or services, inspection and acceptance, invoicing and payment), federal procurement law imposes a number of additional obligations on contractors, including socio-economic conditions and provisions barring certain "improper" business practices and conflicts of interest, as noted above.

- Socio-economic requirements – generally summarised in **1.1 Legislation Regulating the Procurement of Government Contracts**, these requirements impose obligations on federal contractors in the areas of:
  (a) labour and employment;
  (b) domestic preference and trade restrictions; and
  (c) promoting US small businesses.
- Limits on improper business practices and conflicts of interest – principally through FAR part 3, the FAR imposes several limitations on improper business practices, many of which are defined by statute. FAR part 9 also requires that federal government contractors be "responsible" – meaning both ethically and financially responsible, technically capable, and required to avoid organisational conflicts of interest (OCIs). These limitations stem from the following statutes, and are contained in the following parts of the FAR.
  (a) Bribery (18 U.S.C. § 201(b)).
  (b) Gifts and Gratuities (18 U.S.C. § 201(c); FAR subpart 3.2).
  (c) Antitrust and Bid Rigging (FAR 3.103 and

subpart 3.3).
(d) Anti-Kickback Statute (41 U.S.C. ch. 87; FAR subpart 3.5).
(e) Procurement Integrity Act (41 U.S.C. § 2101 et seq; FAR 3.104), which contains requirements governing:
  (i) employment discussions with federal officials;
  (ii) gifts and gratuities to federal procurement officials; and
  (iii) procurement sensitive information (source selection information and competitor proprietary information).
(f) OCIs (FAR subpart 9.5).
(g) Personal Conflicts of Interest (FAR subpart 3.11).
(h) Whistleblower Protections (FAR subpart 3.9).
(i) Covenant Against Contingent Fees (FAR subpart 3.4).
(j) Anti-Lobbying Rules (FAR subpart 3.8).

Consistent with these prohibitions on improper business practices and conflicts of interest, FAR subpart 3.10 requires most contractors to maintain ethics and compliance programmes. The requirements of such programmes mandate reporting to the government of fraud or criminal activity in connection with any federal contract, in further support of the procurement system's goals of integrity and transparency.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

As noted in **1.4 Openness of Regulated Contract Award Procedure**, FAR part 5 requires executive agencies to advertise all anticipated contracting actions exceeding USD25,000 on beta.SAM.gov.

Advertisement of agency procurement actions (eg, through publishing the solicitation or RFP) typically includes information such as the name of the federal agency procuring the goods or services, instructions on how to submit a response, the date and time responses are due, and whether the contract is reserved or "set aside" for entities meeting a certain criteria – such as those participating in the SBA's small-business programme, which includes businesses owned by military veterans, women-owned small businesses and businesses located in historically underutilised business zones (known as "HUBZones").

2.2 Preliminary Market Consultations by the Awarding Authority

As noted in **1.4 Openness of Regulated Contract Award Procedure**, FAR part 10 requires executive agencies to engage in preliminary "market research" prior to advertising the solicitation on beta.SAM.gov. FAR part 10 directs agencies to conduct research to, among other things, determine whether enough small businesses exist in a particular market, such that the contract award should be "set aside" for small businesses; determine if commercial items exist that meet the agency's needs; and determine, generally, if sources in fact exist that are capable of satisfying the agency's requirements.

2.3 Tender Procedure for the Award of a Contract

Generally, executive agencies solicit responses to their requirements through issuing RFPs or invitations for bids (IFBs). RFPs and IFBs are generally referred to simply as the "solicitation" for the procurement. As noted in **1.3 Types of Contracts Subject to Procurement Regulation**, proposals submitted in response to RFPs are governed by FAR part 15, and are subject to further discussions between the agency and the "offeror" (ie, the entity seeking the award), though such discussions are not mandated.

RFPs are designed to solicit a proposed solution to the agency's published requirements. By contrast, bids submitted in response to IFBs (governed by FAR part 14) are sealed and not subject to negotiation between the agency and the offeror (or "bidder"). IFBs specify the exact goods or service required by the agency, and do not leave open the possibility of multiple contractor solutions. Hence, there is no need for the discussions or negotiations contemplated by FAR part 15.

Solicitations issued for orders from pre-existing contracts, such as GSA Schedules or IDIQ contracts, may take a slightly different form (eg, requests for quotations (RFQs), but generally follow a similar construct to standalone solicitations. In addition, different procedures apply to certain procurement types, such as commercial procurements and procurements valued at less than the current SAT, as noted in **1.3 Types of Contracts Subject to Procurement Regulation** (FAR parts 12 and 13).

2.4 Choice/Conditions of a Tender Procedure

The particular acquisition method utilised (eg, FAR part 12, 13, 14, or 15), as discussed in **1.3 Types of Contracts Subject to Procurement Regulation**, is generally up to the procuring agency's discretion. With that said, the FAR and agency FAR supplements do provide guidance on the various acquisition methods, and which type is most likely to meet the agency's objectives under a particular set of circumstances.

2.5 Timing for Publication of Documents

Procurement actions that are likely to result in a contract award generally must be publicised at least 15 day prior to the agency's issuance of a solicitation or award of a sole-source contract. The procuring agency may set a shorter period for commercial acquisitions.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

Agencies generally must provide at least 30 days for offerors or bidders to submit proposals or bids in response to a solicitation. Most research and development solicitations require a 45-day response time. Agencies are afforded additional discretion with respect to commercial acquisitions.

2.7 Eligibility for Participation in a Procurement Process

Parties interested in responding to federal agency solicitations must first be registered in the US government's System for Award Management (SAM), which is the US government's official, centralised repository for all entities wishing to do business with the government.

The registration website, SAM.gov, also provides information regarding the additional requirements for registering to do business with the US government, such as the requirement to have a Data Universal Numbering System (DUNS) number, a Commercial and Government Entity (CAGE) code and a US taxpayer identification number.

2.8 Restriction of Participation in a Procurement Process

Procuring agencies may restrict competition for certain requirements if, based on the agency's market research, it determines that a sufficient number of small-business contractors (eg, businesses owned by military veterans, women-owned small businesses) are available and capable of performing the services or providing the goods required by the agency.

Procuring agencies may also restrict competition for particular requirements to a limited number of offerors or only one qualified supplier, if the agency demonstrates in a published J&A (dis-

cussed in **1.4 Openness of Regulated Contract Award Procedure**) that the required supplies or services are available from only one responsible source and no other types of supplies or services will satisfy agency requirements.

2.9 Evaluation Criteria

Procuring agencies enjoy discretion in fashioning the evaluation criteria for a particular procurement, subject to the requirements of the FAR and any applicable agency FAR supplements, which provide guidance regarding suggested (and sometimes required) evaluation factors and award procedures. The guidance varies depending on the acquisition method utilised (eg, FAR part 15) and the contemplated contract type (eg, firm fixed price), but common evaluation criteria include technical capability, price and past performance.

With respect to RFPs, procuring agencies are required to set forth in the solicitation the method by which it will evaluate proposals – for example, if the agency will use a best value trade-off (allowing it to select a higher-priced proposal that offers a superior technical solution) or a "lowest price technically acceptable" approach (requiring it to select the proposal with the lowest price that meets minimum qualifications).

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

For competitive procurements, CICA requires procuring agencies to include a statement of all significant factors and subfactors the agency intends to consider in evaluating competitive proposals, along with the relative importance assigned to each of those factors and subfactors.

CICA requires procuring agencies to disclose these factors and subfactors – the agencies' evaluation criteria and methodology – in the solicitation (ie, before offerors/bidders submit proposals/bids). Contracts pursuant to sealed bids are awarded to the responsive bidder offering the lowest price. The purpose behind this requirement is to ensure that all offerors/bidders are on equal footing in competing for government contract awards.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

In competitive procurements under FAR part 15, procuring agencies are required to notify offerors (pre-award) when their proposals are excluded from the competitive range or otherwise eliminated from the competition. Such notices must state the basis for the agency's determination and that any proposal revisions from the offeror will not be considered. For the required post-award notices, see **3.3 Obligation to Notify Bidders of a Contract Award Decision**.

3.3 Obligation to Notify Bidders of a Contract Award Decision

Within three days after contract award, the procuring agency (and, specifically, the contracting officer) is required to provide notice to each offeror whose proposal was not selected for award (provided the offeror did not receive a pre-award notice described in **3.2 Obligation to Notify Interested Parties Who Have Not Been Selected**). Such notices must include the number of offerors solicited; the number of proposals received; the name and address of each offeror receiving an award; and, in general terms, the reason the offeror's proposal was not accepted.

3.4 Requirement for a "Standstill Period"

There is no statutory or regulatory requirement for a "standstill period" between the notification of contract award and the beginning of contract

performance. As discussed in **4.3 Interim Measures**, if a disappointed offeror or bidder files a bid protest, there may be a "stay" in contract performance, such that there is a delay between the notification of award and the beginning of contract performance. Aside from a bid protest triggering a stay of performance, no standstill period is required.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

An interested party may seek review of an awarding agency's actions by:

- filing an agency-level protest;
- filing a protest at the US Government Accountability Office (GAO); or
- filing a protest at the US Court of Federal Claims (COFC).

All agency-level protests must be addressed to the contracting officer. In accordance with agency procedures, an interested party may seek independent review of the contracting officer's decision at a level above the contracting officer (but still within the agency). This agency "appellate review", however, does not extend GAO's timeliness requirements. A protester may opt to file a subsequent protest at GAO (within ten days of initial adverse agency action) or at COFC (no strict timeline).

GAO is an independent, non-partisan legislative agency that adjudicates bid protests on behalf of protesters, procuring agencies and intervenors. Protesters, procuring agencies and intervenors involved in a GAO protest may request reconsideration of an unfavourable GAO decision. Such requests must be filed within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. A protester may file a subsequent protest at COFC (no strict timeline). Relatedly, a protester may file suit at COFC challenging a procuring agency's decision to disregard a GAO recommendation.

COFC is the only judicial forum authorised to adjudicate bid protests. An interested party may file a protest at COFC alleging that the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" in violation of the Administrative Procedure Act. Unfavourable COFC decisions may be appealed to the US Court of Appeals for the Federal Circuit by filing a notice of appeal within 60 days from COFC's entry of judgment.

4.2 Remedies Available for Breach of Procurement Legislation

The following remedies may be available to a protester if a solicitation, proposed award or award does not comply with a procurement statute or regulation. The procuring agency may:

- refrain from exercising any options under the contract;
- re-evaluate proposals;
- reopen discussions;
- request revised proposals;
- recompete the contract entirely;
- cancel or amend the solicitation;
- issue a new solicitation;
- terminate the award;
- award a contract consistent with the requirements of such statute or regulation; or
- implement any combination of the above.

As a legislative agency, GAO lacks authority to issue binding decisions on procuring agencies – by statute, GAO is only permitted to issue "recommendations". Nonetheless, executive agencies almost always implement GAO recommendations, and COFC gives "due weight and deference" to GAO recommendations in

reviewing challenges to an agency's decision to disregard a GAO recommendation.

COFC, unlike GAO, has the authority to issue an injunction against the procuring agency.

4.3 Interim Measures

Interim relief may be available to a protester, depending on where and when the protest is filed. At the agency level and GAO, if an interested party files a protest before contract award, the agency is prohibited from awarding a contract pending the resolution of the protest (suspension of award). If an interested party files a GAO protest within ten days after contract award, or within five days after a requested and required debriefing, the agency must immediately suspend contract performance pending resolution of the protest (suspension of performance).

However, to obtain interim relief at COFC (whether pre-award or post-award), a protester must file a motion for a preliminary injunction – there is no "automatic stay" of award or performance. To succeed on a motion for preliminary injunction, a protester must demonstrate:

- it is likely to succeed on the merits of its protest;
- it will suffer irreparable harm absent an injunction;
- granting the injunction will serve the public interest; and
- the harm the protester will suffer absent an injunction outweighs any harm to the government caused by the injunction.

That said, it is not uncommon for the government to agree to a stay of performance in a COFC protest.

4.4 Challenging the Awarding Authority's Decisions

Only "interested parties" have standing to challenge a procuring agency's actions, and all three forums utilise the same definition of "interested party". An interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract". An awardee is generally deemed to be an interested party.

4.5 Time Limits for Challenging Decisions

The time limits within which a procuring agency's actions must be challenged generally depend upon the type of protest and the protest forum.

- Agency level:
  - (a) pre-award – protests challenging alleged apparent improprieties in a solicitation must be filed before bid opening or the closing date for receipt of proposals; and
  - (b) all other protests – all other protests must be filed no later than ten days after the basis of protest is known or should have been known, whichever is earlier.
- GAO:
  - (a) pre-award – protests challenging alleged apparent improprieties in a solicitation must be filed prior to bid opening or the time set for receipt of initial proposals; improprieties subsequently incorporated into a solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation;
  - (b) protests following agency-level protests – if a protester filed a timely agency-level protest, any subsequent GAO protest must be filed within ten days of actual or constructive knowledge of initial adverse agency action; and
  - (c) requested and required debriefings – for procurements conducted on the basis

of competitive proposals, under which a debriefing is requested and required, the initial protest must not be filed prior to the debriefing date offered to the protester but must be filed not later than ten days after the date on which the debriefing is held; to obtain a stay of performance, the protest must be filed within five days of the debriefing; and

(d) all other protests – all other protests must be filed within ten days after the basis of protest is known or should have been known, whichever is earlier.

- COFC:
  (a) unlike agency-level and GAO protests, there are no statutory or regulatory deadlines for filing protests at COFC. With that said, in Blue & Gold Fleet v United States, COFC held that a protester waives its right to challenge the terms of a solicitation unless it files a protest prior to the close of the bidding process – effectively adopting the timeliness standard for pre-award protests at the agency level and GAO.

Further, while there are no statutory or regulatory deadlines for filing COFC protests, the court may apply the doctrine of laches to bar post-award protests where a protester unreasonably and inexcusably delayed filing suit after the protester knew or should have known its basis for protest and where the protester's delay caused prejudice to the other party (either economic prejudice or prejudice in defending the protest).

4.6 Length of Proceedings

The length of protest proceedings depends upon the venue in which the unsuccessful offeror files its protest:

- agencies are required to "make their best efforts" to resolve agency-level protests within 35 calendar days after the protest is filed; and
- by statute, GAO is required to resolve protests within 100 calendar days after the protest is filed.

There is no statute or regulation limiting the length of COFC bid protests. As a result, rulings on COFC protests may take longer as compared with rulings in agency-level and GAO protests.

4.7 Annual Number of Procurement Claims

On average, GAO considered 2,468 protests between fiscal years (FYs) 2016 and 2020, sustaining between 13% and 23% of the protests filed in a given year. In GAO's Bid Protest Annual Report to Congress for FY 2020, GAO reported a protest "effectiveness rate" of 51%. The effectiveness rate is based on a protester obtaining some form of relief from the agency (either as a result of corrective action or GAO sustaining the protest). In FYs 2019 and 2018, GAO reported an effectiveness rate of only 44%. It is possible that the COVID-19 pandemic may have affected agencies' ability to defend protests, which could explain the higher effectiveness rate for FY 2020 compared to prior years.

GAO also reported a 15% sustain rate, up from 13% in FY 2019. The most prevalent protest bases upon which GAO sustained protests were:

- unreasonable technical evaluation;
- flawed solicitation;
- unreasonable cost or price evaluation; and
- unreasonable past performance evaluation.

A 2018 RAND report noted that approximately 950 COFC protests had been filed between 2008 and 2017. Otherwise, there is no publicly reported data on the number of agency-level or COFC protests reviewed per year.

4.8 Costs Involved in Challenging Decisions

The costs involved in challenging a procuring agency's actions depend largely on the protest forum, and the size and complexity of the protest issues and administrative record.

The most inexpensive venue for filing a protest is the agency level, followed by GAO, then COFC. The expenses vary because of the required procedures at each forum (protests at the agency level are less formal, whereas protests at COFC are akin to civil litigation). Protests to GAO and COFC also involve filing fees (USD350 to file a protest at GAO and USD402 to file a bid protest complaint at COFC).

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

Contracts can be modified, subject to certain limits, and the FAR provides specific processes for modifications.

As a threshold matter, contracts generally may not be modified to add goods or services that were outside the scope of the original contract. Such actions are held to constitute new contracting actions and generally must be offered for competition. In addition, contracts may only be modified by an authorised contracting officer or procurement official.

Proper contract modifications can arise in several ways. They may be bilateral, where both the agency and the contractor agree to and execute the modification document (typically a Standard Form 30). The agency may also issue unilateral modifications in certain circumstances, where the agency alone issues and executes the modification document. In either case, a contractor may be entitled to an "equitable adjustment" to the contract to account for additional costs or impacts on schedule resulting from the modification. In limited circumstances, contractors may be entitled to a modification and equitable adjustment for external events.

In some circumstances, contracts must also be modified to adjust for changes dictated by law. For example, when prevailing contractor wages are revised by the Department of Labor (DOL), the contract may be revised to provide the contractor with a price adjustment reflecting the new wage. Finally, where a contract fails to include provisions required by law, those provisions are deemed to be incorporated in the contract by operation of law under what is known as the Christian doctrine.

5.2 Direct Contract Awards

Direct contract awards are permitted in certain circumstances, such as where the procuring agency demonstrates urgent and compelling circumstances. Additionally, the procuring agency may make a "sole-source" award (ie, a direct award to a single offeror) where it can show that supplies or services required by the agency are available from only one responsible source and no other type of supplies or services will satisfy agency requirements.

5.3 Recent Important Court Decisions

The government contracts bid protest and dispute forums issued several significant decisions in 2020, including the following.

Bid Protests

In Inserso Corp. v United States, 961 F.3d 1343 (Fed. Cir. 2020), the Federal Circuit, over a dissent, affirmed a COFC decision finding that a protester had waived its right to challenge the improper disclosure of information useful to the subset of offerors who received the information by failing to protest the solicitation as written

prior to submitting its proposal. Inserso involved a solicitation for an IDIQ contract.

The agency divided competition into two "suites". One competition would award a "suite" of contracts in a "full and open" competition; the other would award a suite of contracts to small businesses. The solicitation stated that small businesses could compete in both competitions but could only receive one award. Bidders in both competitions submitted their proposals by the same date.

Inserso, a small business, only competed in the small-business competition. Following proposal submission, the agency first notified successful and unsuccessful offerors in the full and open competition of their award status. The agency completed the debriefing process less than a week later, disclosing certain details of the agency's source selection decision to the winners and losers. The agency had not yet completed evaluating the proposals submitted in the separate small-business competition and engaged in discussions with the small-business offerors. The agency did not request final proposal revisions from the small-business offerors until over six months after the agency had completed the award notice and debriefing process with the full and open offerors. Inserso did not receive an award because its total evaluated price was comparatively higher than that of the other offerors.

Inserso filed a protest first at GAO, and then later at COFC, alleging that the agency's debriefing of the full and open competition offerors provided small-business offerors who had competed in both competitions an advantage over those small-business offerors who competed only in the small-business competition.

COFC ruled against Inserso, finding that even if the agency's actions were improper, there was no prejudice to Inserso. Relying on the standard announced in Blue & Gold Fleet v United States, the Federal Circuit's majority held that because Inserso "did not object to the disparity in provision of competitively advantageous information until after the awards were made in the small-business competition", it "forfeited the objection". The Federal Circuit noted that Inserso "knew, or should have known, that [the agency] would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards".

Less than two months after the Inserso decision, the Federal Circuit decided Boeing v United States, No 2019-2148, 2020 WL 4578988 (Fed. Cir. 10 August 2020), in which the Federal Circuit again revisited "the Blue & Gold Fleet waiver rule". This time, the case involved a Contract Disputes Act claim.

In 2017, Boeing filed an action in COFC under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109, alleging that the government breached the contract at issue by failing to negotiate an equitable adjustment in accordance with the cost accounting standards (CAS) statute, 41 U.S.C. § 1503(b). Specifically, Boeing challenged the validity of FAR 30.606, which prohibits the offsetting of cost increases and cost reductions arising from multiple, simultaneous changes in cost accounting practices. Boeing argued that the regulation conflicted with the CAS statute, which provides that the government "may not recover costs greater than the aggregate increased cost to the Federal Government". Alternatively, Boeing argued that the regulation effected an "illegal extraction".

COFC agreed with the government's argument that, by failing to challenge the legality of FAR 30.606 before entering into the contract, Boeing waived its breach of contract claim that depended on challenging FAR 30.606 as unlawful. The

COFC concluded that the conflict between FAR 30.606 and the CAS statute was a "patent ambiguity", which Boeing was required to seek clarification of prior to contract award. With regard to Boeing's "illegal extraction" argument, the COFC found that it lacked jurisdiction because the CAS statute upon which Boeing's claim rested was not a "money-mandating statute".

Again looking to the waiver standard announced in Blue & Gold Fleet, the Federal Circuit this time sided with Boeing and reversed COFC's decision. The Federal Circuit found Boeing could not have "waived" a challenge to the validity of FAR 30.606 because adherence to the regulation was mandatory and the government conceded that it could not lawfully have declared the regulation inapplicable in entering into the contract. The Federal Circuit also reversed COFC's dismissal of Boeing's illegal extraction claim, explaining that Boeing sought to recover money already paid over to the government, in direct violation of the CAS statute. The Federal Circuit concluded that there was no further requirement to identify a money-mandating statute.

Claims/Disputes

In Pernix Serka, CBCA No 5683, 20-1 BCA ¶ 37,589 (22 April 2020), the CBCA denied a contractor's appeal seeking costs incurred as a result of an Ebola epidemic outbreak while performing a firm fixed price contract in Sierra Leone. Following the outbreak, the contractor sought direction from the government on how to respond to the epidemic (ie, whether it should leave the job site), but the government refused to provide any direction. The contractor took certain actions to protect its personnel, to include demobilising, and later remobilising and expanding its onsite medical facility. The contractor subsequently sought equitable relief from the government, which denied the contractor's claims.

On appeal, the Board found that the contractor's firm fixed price contract obligated the contractor to perform and receive "only the fixed price". The Board, in referencing FAR 52.249-10, the Default clause, found that the contractor was entitled to additional time, but not additional costs, as a result of the epidemic (see FAR 52.249-10, excusing a contractor's delay in completing the work attributable to unforeseeable causes such as "acts of God" and "epidemics").

This is a particularly important decision, issued during the COVID-19 pandemic, as it may provide insight into how the Boards of Contract Appeals will review COVID-19 impact claims.

Intellectual Property

In Boeing Co. v Secretary of Air Force, No 2019-2147, 2020 WL 7484750, at *1 (Fed. Cir. 21 December 2020), the Federal Circuit concluded that the Armed Services Board wrongly determined that Boeing cannot mark non-commercial technical data delivered to the government in the performance of a government contract as "proprietary", to protect its interests from third parties. Boeing entered into two contracts with the Air Force to provide work under the F-15 Eagle Passive/Active Warning Survivability System (providing offensive and defensive electronic warfare options for Air Force pilots and aircraft). The contracts required Boeing to deliver technical data to the Air Force with "unlimited rights" – the "rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so" pursuant to DFARS 252.227-7013(a)(16).

Boeing marked each technical data deliverable that it submitted to the Air Force with a legend describing Boeing's rights as they pertain to third parties ("Non-U.S. Government Notice Boeing Proprietary Third Party Disclosure Requires Writ-

ten Approval"). The Air Force rejected Boeing's technical data deliverables because of the legend. The Air Force concluded that Boeing's legend was non-conforming because it was not in the same format authorised by 252.227-7013(f).

The ASBCA sided with the Air Force. On appeal, the Federal Circuit reversed, finding that DFARS 252.227-7013(f) is only applicable when a contractor is asserting restrictions on the government's rights and that it did not apply to Boeing's legends, which purported to restrict third parties' rights.

The takeaway here is that DFARS 252.227-7013(f) applies only in situations in which a contractor seeks to assert restrictions on the government's rights. Going forward, contractors should feel comfortable placing legends restricting the rights of third parties on non-commercial technical data delivered to the government.

False Claims Act

In United States ex rel. CIMZNHCA v UCB, Inc., 19-2273, 2020 WL 4743033 (7th Cir. 17 August 2020), the Seventh Circuit articulated a third standard of review to be applied when evaluating a motion to dismiss a qui tam action by the government over a relator's objection. The FCA requires that relators first present their qui tam complaint to the DOJ so that the DOJ can investigate the allegations and decide whether "to intervene and proceed" as the primary plaintiff and prosecute the lawsuit, pursuant to 31 U.S.C. § 3730(b)(2), (c)(1). If the DOJ declines to intervene, the relator has the right to proceed with the lawsuit without government involvement. The FCA, however, gives the DOJ the right to dismiss the action over the relator's objection if the relator is provided notice and an opportunity for a hearing. Prior to CIMZNHCA, there were two prevailing standards of review applied to a government motion to dismiss under Section 3730(c)(2)(A):

- the standard in Swift v United States, 318 F.3d 250, 253 (D.C. Cir. 2003), which gives the government "unfettered" discretion to dismiss; and
- the more burdensome standard announced in United States ex rel. Sequoia Orange Co. v Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998), which requires the government to first identify a "valid government purpose" and then show "a rational relation between dismissal and the accomplishment of the purpose".

If the government does so, the burden then shifts to the relator to show that "dismissal is fraudulent, arbitrary and capricious, or illegal".

The CIMZNHCA case involved a qui tam action against pharmaceutical companies alleging unlawful kickbacks to physicians for prescribing or recommending certain drugs. The DOJ declined to intervene in the action and a series of motions extended the defendants' time to answer.

A year later, before the defendants' had answered, the DOJ moved to dismiss the action pursuant to Section 3730(c)(2)(A), stating that the qui tam claims "lack sufficient merit to justify the cost of investigation and prosecution to otherwise be contrary to the public interest". The district court, following the Sequoia Orange test, determined the DOJ's decision to dismiss was "arbitrary and capricious" and "not rationally related to a valid government purpose".

On appeal, the Seventh Circuit rejected the Sequoia Orange standard and declined to follow the Swift standard. Instead, the Seventh Circuit adopted a new standard, treating a motion to dismiss under Section 3730(c)(2)(A) as necessarily including a motion to intervene and applying the voluntary dismissal standard set forth in Fed. R. Civ. P. 41(a).

Fed. R. Civ. P. 41(a)(1)(A)(i) gives a plaintiff an absolute right of voluntary dismissal before the opposing party serves either an answer or a motion for summary judgment. Because neither had occurred, the Seventh Circuit found that the DOJ had an absolute right to dismiss the case.

The key takeaway is that the CIMZNHCA standard is "much nearer to Swift than Sequoia Orange", at least with respect to early dismissal under Fed. R. Civ. P. 41(a), seeming to give the government an unfettered right to intervene and dismiss before the defendants file an answer.

5.4 Legislative Amendments under Consideration

Both Congress and federal executive agencies are continually considering revisions and updates to the FAR and agency FAR supplements, to address evolving issues and incorporate best practices. Amendments to federal procurement laws may also be brought about by the White House.

In his first 100 days, President Biden signed an executive order proposing significant changes to promote the enforcement of the Buy America/American Act's preference for domestic end products, including directing the FAR council to consider a number of amendments, including ones to increase the numerical threshold for domestic content requirements for end products and construction materials, and increase the price preferences for domestic end products and domestic construction materials.

Additionally, the annual National Defense Authorization Act (NDAA) for FY 2021 enacted a number of important procurement provisions for government contractors, including those concerning:

- acquisition policy and management;
- amendments to general contracting authorities, procedures and limitations;
- supply chain and industrial base matters;
- small-business issues; and;
- provisions related to software acquisition.

Enacted as part of the NDAA, the Corporate Transparency Act requires that amendments to the FAR be implemented within two years of the effective date of the Act, to provide that "any contractor or subcontractor" subject to the Act disclose its beneficial ownership information as part of any bid or proposal for a contract valued above the simplified acquisition threshold (currently USD250,000, subject to certain exceptions). This will expand the current requirements under the FAR, which requires prime contractors to provide certain information about corporate ownership in bids or proposals.

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Holland & Knight LLP has more than 1,300 lawyers and a reputation for understanding clients' business issues and staying abreast of the knowledge and trends that shape their industries. Interdisciplinary practice groups and industry-based teams provide clients with access to attorneys throughout the firm, regardless of location. Holland & Knight's government contracts group guides clients through all phases of the procurement process, including forming teaming arrangements, responding to solicitations, and compliance with contractual requirements and the Federal Acquisition Regulation. The firm provides guidance in handling bid protests, prime/subcontractor litigation, claims and disputes, and defence of enforcement matters, including suspension and debarment matters, False Claims Act litigation, FCPA compliance, and government audits and investigations. The group represents government contractors of all sizes and across a wide array of industries, and works closely with the firm's government contracts M&A practice, which is among the largest in the country.

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Trends and Developments

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The US government continues to offer opportunities as the largest public procurement marketplace. But with the rewards come risks – from adjustments in procurement methods and competition to new compliance requirements and active enforcement. This chapter summarises the key trends and developments in US government procurement.

Procurement Policy Priorities of the New Biden Administration

The Biden administration has already influenced federal contracting policy. It has sought to increase preferences for the domestic sourcing of goods, utilise the Defense Production Act to combat the COVID-19 pandemic and ensure the domestic production of key electronic and medical products, and enforce wage and benefit requirements for contractor employees.

Strengthening domestic preferences

The previous administration sought to increase domestic production of certain products and the Biden administration is expected to continue to enact similar policies.

In the first week of his administration, President Biden issued Executive Order (EO) 14005, which strengthens domestic preference requirements. The EO requires (in part) new regulations to be drafted that will increase the numerical threshold for domestic content requirements for end products and construction materials, and increase the price preferences for domestic end products and construction materials. President Biden also called for the creation of a "Made in America Office" to centralise the domestic preference waiver process and provide additional transparency.

The last administration issued EO 13944, which would require the insourcing of the production of certain medical products into the United States and require companies to eliminate vulnerabilities in their medical products supply chain. These goals would be reached by limiting competition to medical products produced in the United States and allowing the offer of medical products from outside the United States to be rejected for national defence reasons. Regulations still need to be written to implement this EO and President Biden has the power to modify or rescind it.

Increase domestic production through the Defense Production Act

Throughout 2020, the US government exercised extraordinary procurement authorities to acquire scarce health and medical resources, such as ventilators and N95 respirators. The Defense Production Act of 1950 (DPA) authorises the US government to source critical products and services for "national defense preparedness", which includes emergency preparedness and response activities. Under the last administration, EOs were issued delegating authority to use the DPA to the Departments of Health & Human Services and Homeland Security for the procurement of "health resources and medical resources needed to respond to the spread of COVID-19".

The DPA gives certain executive agencies within the US government the authority to do the following:

- issue "rated orders", which puts the US government first in line for the purchase of products and services;
- take "allocation actions", which allows the US government to reserve materials or facilities in anticipation of a rated order or even direct the use of a private facility;
- offer financial assistance for increased production of critical supplies; and
- facilitate voluntary agreements between competitors.

The DPA regulations contain details about a company's options for accepting or rejecting a rated order or allocation action and the strict deadlines for doing so. Compliance is important, as there are criminal penalties for wilful violation of the DPA. Companies receive liability protection under the DPA when filling a priority rated order causes the company to breach unrated contracts.

The last administration utilised the DPA to give itself priority for the procurement of certain products, and prohibited the export of, and funded additional production lines for, certain goods needed to combat the COVID-19 pandemic.

It is expected that the Biden administration will continue those policies. Through an EO and other executive actions, the Biden administration is reviewing the scarcity of important products and whether the DPA is needed to increase production of vaccines and testing kits.

Increase labour and employment enforcement

The Biden administration is expected to increase enforcement of labour laws protecting workers employed by contractors. This includes the Service Contract Act (now known as the Service Contract Labor Standards) and the Davis–Bacon Act. These acts (and their attendant regulations) require the provision of certain wages and benefits to contractor workers performing services and construction, respectively.

Foreign Investment Considerations

The Committee on Foreign Investment in the United States (CFIUS) issued a final rule related to the mandatory filing requirement for critical technology investments. Under the new rule, transactions will be subject to mandatory pre-closing filings where a "U.S. regulatory authorization" would be required for the export, re-export, transfer (in-country), or retransfer of the US business's critical technology at issue to a foreign person that is a party to the covered transaction. Previously, mandatory filings were based on whether the target business fell within certain industry categories under the North American Industry Classification System (NAICS).

The Department of Defense (DOD) also issued a new rule implementing an important change regarding mitigation requirements for US contractors operating under foreign ownership, control, or influence (FOCI). If a non-US investor is effectively acquiring control of a contractor with access to classified or sensitive information, the contractor can mitigate through a special security agreement (SSA). A contractor subject to SSA mitigation also requires the government to issue a National Interest Determination (NID) before having access to classified or other sensitive information. Under the new rule, NIDs are no longer required for SSA-mitigated contractors whose foreign parents are from Australia, Canada, or the United Kingdom (the same countries currently designated as "excepted countries" for CFIUS purposes).

Procurement Methods and Competition

The US government has been rethinking its own acquisition strategy with the goal of expanding the marketplace to more non-traditional government contractors offering innovative commercial

products and services, and better leveraging the buying power of the federal enterprise.

Category management and shift to government-wide MAS IDIQ contracts

The US government has been steadily implementing "category management", which continues to change the contracting landscape and strategic approaches in the federal marketplace. The government has determined that approximately 60% of all contract spending (approximately USD325 billion in FY 2018) is spent on ten categories of common products and services. Category management is the procurement practice of buying common goods and services as an enterprise in order to eliminate redundancies, increase efficiency, and deliver more value and savings.

To implement category management, the Office of Management and Budget (OMB) has requested agencies to establish plans to shift "unaligned spending" in ten categories of products of services to "best-in-class" (BIC) contracts. BIC contracts are government-wide, pre-vetted contract solutions that are structured as multiple award, indefinite-delivery, indefinite-quantity (IDIQ) contracts and increase transactional data available for government-wide analysis of buying behaviour. Agencies are in the process of migrating their spending up to a "spending under management" maturity model, with the goal of using BIC contracts for the ten common spending categories.

Category management creates opportunities and advantages for established US contractors and imposes new barriers to entry for contractors seeking to enter the market. BIC contracts have been established for every common spend category (a list is available at General Services Administration's (GSA's) Acquisition Gateway website. Examples include GSA's Federal Supply Schedules (FSS), NASA SEWP, GSA OASIS, GSA Alliant and NITAAC CIO SP3. Solicitations under these contracts are issued to contract holders; companies that do not have these vehicles cannot compete as prime contractors and instead must participate as subcontractors. Thus, category management favours established contractors who hold these contracts and requires newcomers to invest time and resources to obtain them through competition or strategic transactions.

GSA schedule consolidation

For decades, the largest government-wide multiple award schedule contracts have been the US GSA's FSS, 24 of which are administered by GSA with another dozen or so health-related schedules administered by the Department of Veterans Affairs (VA). GSA is in the midst of an effort to consolidate its 24 schedule contracts into a single schedule contract featuring 12 categories, 83 subcategories and approximately 300 special item numbers (SINs), a move that is expected to increase efficiency and value for both buyers and sellers. In 2020, GSA completed the transition of updating current contracts to conform to the terms and conditions of the consolidated Multiple Award Schedule (MAS) vehicle. In July 2020, GSA began the process of working with companies holding multiple FSS contracts to determine the best option for consolidation. GSA still has to decide the future of its transactional data reporting (TDR) pilot programme, which was established in 2016 for a handful of schedule contracts as a possible replacement of the burdensome commercial sales practices disclosure and price reductions clause requirements.

E-commerce platform for COTS

The US government is developing e-commerce marketplaces run by private companies designed for the purchase of commercial off-the-shelf (COTS) products under the simplified acquisition threshold (currently USD250,000).

In 2020, the project entered a pilot phase and appears to be at least a year away from implementation. If this programme is successful, any federal agency will be able to use these web-based marketplaces to order COTS products.

Several policy issues remain to be worked out.

- Companies running the marketplace will be able to sell their own products, worrying some that they will have an unfair advantage on the marketplace.
- The companies selected to run the marketplaces must properly secure the data they collect from users and ensure it is not used for a competitive advantage.
- The marketplaces must also eliminate marketplace products sold by debarred companies and identify countries of origin for products so government customers can comply with the appropriate country of origin requirements when purchasing products.

The current e-commerce pilot will test how the marketplace works for purchases below the micro-purchase threshold (USD10,000). The test is expected to last at least through 2021.

"Other transactions agreement" for prototypes and research and development

In the past few years, Congress has determined that the DOD needs improved access to the innovative technology of non-traditional government contractors in places such as Silicon Valley that may be reluctant to deal with the regulatory burden and risk that comes with being a government contractor. Congress has expanded the authority and flexibility of the DOD to enter into "other transactions agreements" (OTAs) for new research and development and new prototypes.

OTAs are appealing because they are exempt from the Federal Acquisition Regulation (FAR) and feature a streamlined competitive procedure that has limited bid protest review. The prototype reforms include the authority to enter into sole-source contracts for mass production if the prototype demonstration is successful. The Defense Innovation Unit (DIU) has been very active in connecting DOD activities with R&D dollars with non-traditional government contractors under this authority. Commercial technology companies interested in expanding sales in the government marketplace might explore this as a point of entry.

Compliance Requirements

While compliance priorities can change when administrations change, the Biden administration is expected to continue and expand the below compliance requirements.

Cybersecurity and CMMC

One area of increasing compliance requirements for US contractors is cybersecurity. New regulatory requirements have been imposed within the past few years and the DOD continues to aggressively roll out a new cybersecurity certification requirement known as CMMC. In 2020, the DOD released three Defense Federal Acquisition Regulation Supplement (DFARS) clauses that implement CMMC (DFARS 252.204-7021) and a companion requirement that will allow the DOD to conduct audits of contractor compliance with cybersecurity requirements (DFARS 252.204-7019 and 7020).

Previously, the DOD issued a contract clause at DFARS 252.204-7012 that requires compliance with National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171. This DFARS clause requires contractors that possess contractor defence information to comply with 110 separate security controls in SP 800-171, ranging from password security to physical access. Most significant is the requirement for each organisation to develop and submit a system security plan to the DOD.

In addition to compliance with security controls and the provision of a system security plan, the DFARS clause also required that contractors report cybersecurity incidents to the DOD within 72 hours of discovery, co-operate with any DOD investigation regarding such incidents, and flow down the clause to lower-tiered subcontractors.

With the exception of the system security plan, the DOD expects contractors to self-certify compliance with cybersecurity requirements. That is changing with the introduction of CMMC. Under CMMC, contractors will need third-party assessors to certify a contractor to a certain level of compliance. Level 1 contains the most basic security controls, while level 5 is the most stringent and level 3 is similar to current requirements under SP 800-171.

Even though CMMC requirements will continue to develop throughout 2021 and 2022, the DOD has made clear there will be no exceptions for small businesses, business that do not handle covered defence information, or contractors that solely sell commercial products and services. Only contractors that solely provide commercial off-the-shelf products will be exempted from CMMC. While only a few contracts will initially be impacted, the DOD expects CMMC to be required to perform every DOD contract in the next five years. The DOD has also identified initial contracts in which prime contractors and subcontractors will be required to obtain a CMMC certification.

Contractors not doing business with the DOD must comply with much less stringent government-wide requirements embodied in FAR 52.204-21. This clause requires contractors to engage in basic cybersecurity hygiene; much of which they are likely doing. Even so, contractors may be subject to agency-specific clauses that are much more stringent and could mirror, or even exceed, the requirements placed on DOD contractors. Further, non-DOD agencies are reviewing the implementation of CMMC and at least some are expected to also adopt it as a requirement.

US supply chain reforms

New legislation and regulations have tightened supply chain requirements for government contractors. In 2018 (and through regulations issued in late 2019), Congress banned the use of products or services from Kaspersky Labs (or other related entities).

Regulations limiting the use and sale of certain Chinese telecommunications products and services were issued in 2019 and 2020. In 2019, the US government enacted regulations limiting contractors' ability to sell certain products and services from identified Chinese companies – including Huawei Technologies Company, ZTE Corporation, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company or Dahua Technology Company – to the US government. The ban covers the types of products and services these companies typically provide. Then, in 2020, the US government banned the use of those products and services no matter whether such use was connected with a US government contract or a physical location where US government contracts are performed. In other words, the ban of the use of the products or services is expected to be enterprise-wide (though only impacting the entity that has contracts with the US government) and unconnected with the location or nature of contract performance.

Contractors are also now required to disclose, on at least an annual basis, whether they use any of the identified products/services in performance of a government contract.

Under the SECURE Technology Act, Congress established a Federal Acquisition Security Coun-

cil (FASC). The FASC will identify and recommend which supply chain standards, guidelines and best practices should be addressed by NIST; identify executive agencies to provide shared acquisition services to support "supply chain risk management activities"; and develop criteria for sharing information among executive and non-executive federal agencies, and non-federal agencies "with respect to supply chain risk". The FASC will create standards for excluding companies or products that pose an unreasonable supply chain risk, an action that can be appealed by contractors in federal court.

Buy American and other domestic preference requirements

The previous and current administration have placed an emphasis on supporting the US manufacturing base by promoting the enforcement and expansion of domestic preference and domestic sourcing requirements. The Buy American Act requires federal agencies to provide a price evaluation preference, typically between 6% and 12%, to domestically produced items over items imported from countries not subject to a trade agreement with the United States. On 19 January 2021, the FAR Council revised these rules to, among other things, increase the price preference for domestically produced items from 6% to 20% and from 12% to 30% for small businesses. There is no change to the 50% preference for the DOD. This rule is pending final review by the Biden administration.

Enforcement Risks

The federal government has numerous tools at its disposal to combat procurement fraud, including the False Claims Acts (FCA) (civil and criminal) and the Suspension and Debarment process. The government continued to make considerable use of these tools in the past year. The government also continued to build up a major new enforcement initiative to identify and prosecute collusion and other antitrust violations in public procurement at the federal, state and local levels.

The Civil False Claims Act

The Civil FCA is an anti-fraud statute dating back to the US Civil War era. Its key features include trebled damages for the full amount of each false claim, statutory penalties per false claim (which can include individual contract invoices), and rules that allow individual "qui tam" whistle-blowers to bring and maintain actions in the name of the government and to share in any recovery. Under the FCA, a failure to disclose non-compliance with a material legal or contractual requirement can make a claim false.

The federal government announced recoveries of more than USD2.2 billion under the FCA for the fiscal year (FY) ending 30 September 2020, and USD3 billion more soon after that period ended. The number of new FCA cases filed was a record high, the vast majority of which were filed by whistle-blowers. Many observers expect the Department of Justice's (DOJ's) FCA enforcement activity to increase under the Biden administration.

While the substantial majority of the government's recoveries have come in the healthcare field, the FCA remains a potent threat for federal procurement contractors. Indeed, more new DOD-related FCA cases were filed in FY 2020 than in any year since FY 2013.

Notably, the DOJ continued its recent emphasis on holding senior executives and company owners accountable for companies' false claims by requiring them to pay portions of settlement amounts.

Suspension and debarment

The federal government has a policy of working only with contractors it deems to be "responsible", meaning not only that they have the

financial and technical capacity to perform but that they have the business integrity and ethics needed to be a reliable partner. Companies and individuals who engage in criminal or fraudulent activity or otherwise demonstrate a lack of business integrity and ethics may be suspended or debarred from federal work.

The Interagency Suspension and Debarment Committee (ISDC) recently released its annual report regarding suspension and debarment activity in FY 2019. Based on the report, the total numbers of referrals and suspensions increased in FY 2019 compared to FY 2018, but proposed debarments and debarments continue to decline.

The ISDC also noted that in FY 2019, agencies better utilised pre-notice letters to notify individuals or entities that the Suspension and Debarment Official (SDO) was considering action. Pre-notice letters – including show cause letters, requests for information and similar types of letters – are used to inform an individual or entity that an agency is considering potential SDO action. Use of this tool is important as it allows the recipient an opportunity to respond before formal SDO action.

Procurement Collusion Strike Force

2020 marked the first full year of the DOJ's new Procurement Collusion Strike Force. The Strike Force was established in November 2019 as an interagency partnership to investigate and prosecute antitrust crimes that undermine competition in government procurement and grant and programme funding at the federal, state and local levels. The formation of the Strike Force came on the heels of a major bid-rigging settlement in 2018 involving guilty pleas from five South Korean petroleum and refinery companies that admitted to working together to suppress and eliminate competition in fuel supply contracts with the US government over an 11-year period.

The Strike Force was set up to investigate and prosecute allegations of bid rigging, price fixing and market allocation in public procurement across the United States. The DOJ has identified specific market dynamics that are ripe for collusion, including markets dominated by a small group of major sellers, markets for products that are standardised or offer few substitutes, markets where purchases are repetitive and regularly scheduled, and where procurements are rushed in response to emergencies, as well as markets where employees frequently shift from one competitor to another. The Strike Force touts that it uses data analytics to proactively identify suspicious bid patterns that warrant further investigations. One area that may be the subject of heightened scrutiny at the federal level is the formation of teaming agreements, subcontracting relationships and joint ventures. The consequences of antitrust violations can be severe, including civil liability, criminal penalties, and suspension and debarment from public contracting.

According to the DOJ, the Strike Force opened more than two dozen grand jury investigations in its first year. After adding resources and installing new leadership, the Strike Force can be expected to be a growing presence in the coming years.

Holland & Knight LLP has more than 1,300 lawyers and a reputation for understanding clients' business issues and staying abreast of the knowledge and trends that shape their industries. Interdisciplinary practice groups and industry-based teams provide clients with access to attorneys throughout the firm, regardless of location. Holland & Knight's government contracts group guides clients through all phases of the procurement process, including forming teaming arrangements, responding to solicitations and compliance with contractual requirements and the Federal Acquisition Regulation. The firm provides guidance in handling bid protests, prime/subcontractor litigation, claims and disputes, and defence of enforcement matters, including suspension and debarment matters, False Claims Act litigation, FCPA compliance, and government audits and investigations. The group represents government contractors of all sizes and across a wide array of industries, and works closely with the firm's government contracts M&A practice, which is among the largest in the country.

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