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# CONTENTS

PREFACE ...................................................................................................................... v

*Jonathan Davey and Amy Gatienby*

Chapter 1  ARGENTINA ............................................................................................ 1

*Juan Antonio Stupenengo and Paula Omodeo*

Chapter 2  AUSTRALIA ............................................................................................. 13

*Geoff Wood, Anne Petterd and Sally Pierce*

Chapter 3  AUSTRIA .................................................................................................. 25

*Philipp J Marboe*

Chapter 4  BELGIUM .................................................................................................. 36

*Frank Judo, Aurélien Vandeburie, Stijn Maeyaert, Kenan Schatten and Klaas Goethals*

Chapter 5  BRAZIL ..................................................................................................... 49

*Marcos Ludwig, Mauro Hiane de Moura and Filipe Scherer Oliveira*

Chapter 6  CANADA .................................................................................................. 59

*Theo Ling, Daniel Logan and Randeep Nijjar*

Chapter 7  CHILE ....................................................................................................... 75

*José Luis Lara and Antonia Schneider*

Chapter 8  EUROPEAN UNION .................................................................................. 86

*Clare Dwyer, Michael Rainey and Kina Sinclair*

Chapter 9  FINLAND .................................................................................................. 100

*Anna Kaasniemi-Laine, Johanna Lähde, Laura Nordenstreng-Sarkamo and Marjut Kaariste*

Chapter 10 FRANCE .................................................................................................... 112

*Vincent Brenot and Emmanuelle Mignon*
## Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>GERMANY</td>
<td>125</td>
</tr>
<tr>
<td></td>
<td>Olaf Otting, Udo H Olgemöller and Christoph Zinger</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>ITALY</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>Filippo Pacciani and Ada Esposito</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>MEXICO</td>
<td>151</td>
</tr>
<tr>
<td></td>
<td>Javier Arreola E and Vanessa Franyutti J</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>PORTUGAL</td>
<td>163</td>
</tr>
<tr>
<td></td>
<td>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>RUSSIA</td>
<td>176</td>
</tr>
<tr>
<td></td>
<td>Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>SOUTH AFRICA</td>
<td>189</td>
</tr>
<tr>
<td></td>
<td>Andrew Molver and Gavin Noeth</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>UNITED KINGDOM</td>
<td>206</td>
</tr>
<tr>
<td></td>
<td>Amy Gatenby, Andrew Carter, Bill Gilliam, Louise Dobson and Paul Minto</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>UNITED STATES</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>John R Prairie and J Ryan Frazee</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>VENEZUELA</td>
<td>237</td>
</tr>
<tr>
<td></td>
<td>José Gregorio Torrealba R</td>
<td></td>
</tr>
<tr>
<td>Appendix</td>
<td>ABOUT THE AUTHORS</td>
<td>245</td>
</tr>
<tr>
<td>Appendix</td>
<td>CONTRIBUTING LAW FIRMS’ CONTACT DETAILS</td>
<td>263</td>
</tr>
</tbody>
</table>
It is our pleasure to introduce the sixth edition of The Government Procurement Review.

Our geographic coverage this year remains impressive, covering 19 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

In the United Kingdom and European Union, the topic of Brexit still looms large. It is apparent that the United Kingdom will continue to observe the importance of procurement law both during and beyond the planned transitional period. Her Majesty’s Government has pronounced itself committed to the need for continued regulation of procurement, which is already reflected in the fact that three of the nine chapters of the Public Contracts Regulations 2015 concern domestic matters, as opposed to transposition of the EU Directives.

As indicated through a series of non-legislative procurement policy notes, the United Kingdom is seeking to regulate or alter procurement behaviour across a broad range of areas, including transparency and advertising, access for small and medium-sized enterprises (SMEs), and compliance with changing data-protection laws. At the time of writing, the government is consulting on possible measures to take into account, for procurement law purposes, the payment behaviour of larger firms in relation to their subcontractors, and increasing transparency and accountability. We believe that, whichever direction Brexit takes, detailed regulation of public procurement in the United Kingdom will continue.

Another prominent topic is the test for availability of damages in procurement cases, with the Supreme Court seemingly at odds with the EFTA Court on whether all or only ‘sufficiently serious’ breaches trigger a right to damages.

Looking further afield, other trends and developments that have caught our eye include:

- a pendulum swing towards deregulation in the United States on the back of President Donald Trump’s drive to reduce regulation;
- the possible renegotiation of NAFTA, including the incorporation of anti-corruption provisions (Mexico and Canada);
- a desire to open up procurement to SMEs and use public procurement as a tool to drive socio-economic transformations (South Africa and Chile);
- the growing importance of electronic procurement internationally (Chile and Venezuela); and
- an increasing recognition of the importance of public procurement in international trade deals (for example, the CETA between Canada and the EU, the CPTPP (although at the time of writing, continued US participation remains in doubt) and NAFTA).
When reading chapters regarding EU Member States, it is worth remembering that the underlying rules are set at the EU level. Readers may find it helpful to refer to both the European Union chapter and the respective national chapter to gain a fuller understanding of the relevant issues. To the extent possible, the authors have sought to avoid duplication between the European Union chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this sixth edition as well as the tireless work of the publishers in ensuring a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the fifth edition and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2018
Chapter 1

ARGENTINA

Juan Antonio Stupenengo and Paula Omodeo

I  INTRODUCTION

Argentina is a federal country, which means that government only has jurisdiction over matters expressly delegated to it by the provinces through its Constitution. Provinces have jurisdiction over all other matters that have not been delegated, including those intended for the exclusive provincial environment, such as matters related to contracts entered into by the provincial and municipal governments to satisfy their own requirements.

Despite this preventing the existence of a legal framework for all public contracts with government bodies in Argentina, certain common principles are applicable to public contracts with both the federal government and the provinces, municipalities and the city of Buenos Aires. Procurement is thus analysed at the federal level in this chapter.

The General Regime for Public Procurement (GRPP) was approved by means of Decree 1023/2001, issued on 13 August 2001 by the federal executive by exercising legislative powers delegated to it by the legislative under the terms of Section 76 of the Constitution. After the inauguration of the current government, on 15 September 2016 the federal executive issued Decree 1030/16, approving the new regulation of the GRPP (the Regulation of the GRPP) and abrogating the existing Decree 893/12. Finally, on 27 September 2016 the National Procurement Office issued Dispositions 62-E/2016 and 65-E/2016, by means of which the Contracting Procedure Manual (CPM) and the electronic contracting system were approved.

Notwithstanding the above, at the federal level there are several specific regimes that regulate certain public contracts. Among these, Law No. 27,328 and its regulation enacted Decree 118/17 on public–private partnership contracts, by which the aforementioned contractual modality was approved, containing specific regulations on public procurement.

II  SCOPE OF PROCUREMENT REGULATION

i  Public authorities with jurisdiction over government procurement matters

The GRPP is organised on the basis of two different approaches to procurement matters: the centralisation of public procurement contracts and regulation, and the decentralisation of the operational management of government contracts.

---

1 Juan Antonio Stupenengo is a partner and Paula Omodeo is an associate at Estudio Beccar Varela.
According to the regulation mentioned above, the regulating authorities are:

a. the National Procurement Office, a body subordinated to the federal executive that serves as the governing entity for the GRPP and its Regulation. Under Section 23(a), it is empowered with functions such as:

- submitting public procurement and organisational policies;
- drafting laws and regulations regarding public procurement;
- issuing explanatory, interpretative and complementary rules; and
- drafting general specifications documents; and

b. different operating units for public procurement, which operate in each of the authorities governed by the GRPP and its Regulation (Section 23(b)). Under Section 12 of the GRPP, these units have different powers and duties, such as:

- interpreting or modifying public contracts based upon public interests;
- deciding the expiry or termination of public contracts;
- modifying public contracts up to 20 per cent of the total amount of the contract, under agreed conditions and deadlines, and by adjusting the contract terms; and
- monitoring, inspecting and directing public contracts by applying sanctions to bidders and contractors.

ii. Types of government contracts subject to the GRPP

The GRPP and its Regulation are applicable to certain contracts entered into by the central administration (namely the federal executive and its ministries, departments and other central government bodies) and its agencies, comprising social security institutions. They are also applicable to contracts entered into by the national universities.

Therefore, the GRPP and its Regulation are not applicable to, inter alia, contracts entered into by the judicial or legislative branch, and contracts entered into by corporations in which the federal government has shareholding, such as YPF and Aerolíneas Argentinas. All of these entities are empowered to adopt their own procurement rules. Notwithstanding this, it should be noted that many of these specific procurement regulations are similar to those contained in the GRPP and its Regulation.

From an objective perspective, the contracts that are governed under the GRPP and its Regulation are the following: sales, supplies, services, consulting, leasing, swaps, concessions of state goods and assets, and, in general, any other agreement that is not expressly excluded by the GRPP.

Among the contracts excluded are those regarding public works, public works concessions, public service delegations, licences and those related to sovereign debt transactions. The GRPP and its Regulation are supplemented by certain sector-specific procurement legislation, including legislation applicable in the public utilities fields.

The GRPP and its Regulation are also not applicable either to public–private partnership contracts, which have been recently regulated by Law No. 27,328 (the PPP Law) and Decree 118/17 E 1/2017. According to this regime, public–private partnership contracts are an alternative form of public procurement whereby federal state entities or agencies and private or public companies enter into a public contract with the aim of developing projects of public

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2 Section 2, GRPP.
3 Section 2, Decree 1030/16.
4 Section 4, GRPP.
5 Section 5, GRPP and Section 3, Decree 1030/16.

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interest in the fields of infrastructure, housing, activities and services, productive investment, applied research or technological innovation. 6 Although public–private partnership contracts are not governed by the GRPP and its regulation, the PPP Law and Decree 118/17 contain much of their principles and rules, such as the obligation to hold a public tender and guarantee the principles of transparency, publicity, dissemination, equality, concurrence and competence. 7 Nevertheless, in certain aspects, the PPP Law and Decree 118/17 differ from the GRPP and its Regulation (e.g., with regard to the prohibition of resorting to the mechanism of direct award).

Through Resolutions 3300-E/2017 and E 147-E/2018, issued by the National Roadways Direction, the first international public tender under the PPP Law and Decree 118/17 was launched for the building and maintenance of road corridors.

III SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The Regulation of the GRPP sets forth that the National Procurement Office is empowered to enter into framework agreements with private sector providers to ensure the direct supply of goods and services to governmental entities, in accordance with the form, terms and other conditions established in such agreements.

Once the framework agreement has been signed and entered into force, the contracting entities are required to buy exclusively under such framework agreement, interacting directly with the provider that has been selected by the National Procurement Office. 8

This obligation applies to all jurisdictions and contracting entities that operate in each ministerial jurisdiction, unless they themselves can demonstrate that the goods or services included in the existing framework agreement do not fulfil their needs or that they could solely obtain more advantageous conditions. In these circumstances, an entity must inform the National Procurement Office. 9

ii Joint ventures

Under Argentine law, joint ventures are contractual arrangements developed to perform a certain activity, execute a specific contract or render a service for a limited period of time. They do not involve the establishment of a separate legal entity.

According to the GRPP, bidders can submit tenders individually, or as part of a group, joint venture or association, or with a different legal person.

Notwithstanding this, and according to the above-mentioned PPP Law, which governs public–private partnership contracts, individuals and companies may enter into a cooperative agreement with a public authority provided they are developing a project of public interest.

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6 Section 1, Law No. 27,328.
7 Sections 1, 7 and 12 of the PPP Law.
8 Section 25(f), Regulation of the GRPP; and Section 126, CPM.
9 Section 126, CPM.
IV THE BIDDING PROCESS

i Procedures

The GRPP provides for three different procurement procedures to award government contracts:

a a public bid (the principal method of procuring), which implies a broad call to tender;

b a private bid, which consists of an invitation to tender addressed to certain specific bidders already enrolled with the National Procurement Office Registry; and

c direct award, where there are no competitive procurement procedures. This exceptional procedure is applicable only to cases expressly authorised by the GRPP, including:

• whenever the contract is valued at below 1.3 million pesos;
• whenever, according to the applicable rules, it is not possible to apply a different procedure;
• whenever the service to be hired or asset to be acquired are exclusively carried out or produced by a certain company, artist or specialist (e.g., goods or services that are covered by exclusive IP rights);
• in the event of the failure of a previous tender or competitive procedure;
• whenever, for duly proved urgency or emergency reasons, it is not possible for the contracting entity to call for a public or private bid; and
• whenever the procuring entity is contracting for the repair of machinery, vehicles, equipment or engines whose disarmament, removal or prior examination is essential to determine the necessary repair.10

The procedure to be used in each case of direct award depends on the threshold value of the contract. If the contract to be awarded is valued at below 75,000 pesos, the contracting authority is free to award the contract at its own discretion. If the contract to be awarded is valued at over 75,000 pesos but less than 1.3 million pesos, the contracting entity is authorised to award a contract without a competitive procedure. If the contract to be awarded is valued at over 1.3 million pesos, a competitive procedure is required. In this case, if the contract is valued at over 1.3 million pesos but less than 6 million pesos, the contracting authority shall call for a private bid, submitting invitations to tender to bidders already enrolled with the National Procurement Office Registry. Public contracts valued at over 6 million pesos must be awarded after a public bid procedure, which implies a broad call to submit offers and a general announcement.

Finally, under the public–private partnerships regime, Decree 118/17 states that the mechanism of direct award is not applicable in any case.11

ii Notice

The GRPP and its Regulation set forth that, in cases of open tendering, procuring entities must publish notices of invitation to tender in the official publication of the government (i.e., the Official Gazette) and either on the National Procurement Office’s website12 or in the Electronic Contracting System.13 In practice, the invitation to tender is also commonly published in the relevant national or local newspapers. The aforementioned publication must

10 Section 25(d), GRPP.
11 Section 12, Subsection 3.
13 https://comprar.gob.ar.
take place over two days, and at least 20 or seven days in advance of the date fixed for the opening of the bids, depending on whether the call is published or not on the website. For international public tenders, at least 40 days before the date fixed for the opening of the bids, notices of an invitation to tender must be published on the official website of the United Nations (UN Development Business) or the World Bank (DG Market).

In the case of private bids, the contracting authority must send invitations to at least five suppliers that are already enrolled with the National Procurement Office Registry for the category of goods or services to be awarded. Such invitations must be sent a minimum of seven days in advance of the date for the opening of the bids. In addition, calls for private bids shall be advertised on the National Procurement Office official website as of the date on which invitations were sent.

In the case of direct awards, the contracting authority must send invitations to at least three suppliers and, in certain cases, make available procurement information on the National Procurement Office’s website.

In accordance to the Regulation of the GRPP, certain information and documents must be published on the National Procurement Office’s official website, such as notices of invitation, drafts of specification documents, specification documents that are in force and their clarifications, minutes of a bid’s opening, comparison tables of bids, opinions on the evaluation of the bids and the objections raised against them, awards, contracts and any other data that the regulations establish.

The Regulation of the GRPP provides a list of the information that the procuring entities must always include in the notice of invitation to tender in the case of an open tender. Such information includes:

- the individual details of the procuring entity;
- the type of procedure (i.e., whether or not it is an open tender);
- the identification number of the procurement administrative record;
- the prices of the tender documents;
- the place and time frame for consultation of the tender documents; and
- the email address of the procuring entity.

Regarding the public–private partnerships regime, Decree 118/17 states that the notice of invitation to tender must be published in the Official Gazette of Argentina for the term of three days. The last publication must take place within a minimum of 60 calendar days in advance of the date fixed for the presentation of the bids or for obtaining of tender documents, whichever is first. In addition, the notice of invitation to tender must be published on the website of the Subsecretariat of Public–Private Participation and on the website of the contracting authority.

Additionally, in the case of international bidding, the call must also be made through the publication of a notice on the United Nations website (UN Development Business), on the World Bank website and on the Inter-American Development Bank website, without

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14 Section 40, Regulation of the GRPP.
15 Section 32, GRPP; and Sections 40 and 42, Regulation of the GRPP.
16 Section 41, Regulation of the GRPP.
17 Section 44, Regulation of the GRPP.
18 Section 47, Regulation of the GRPP.
19 Section 17, CPM.
distinction (in any case, for a term of three days with a minimum of 60 calendar days in advance of the date fixed for the presentation of the bids or for obtaining of tender documents, whichever is first).

Additionally, depending on the nature of the project, the contracting authority may order the publication of the invitation to tender in mass circulation media in the country or abroad.  

### iii Submitting and amending bids

Prior to the submission of a bid, it is necessary to obtain a certificate of good standing for contracting with the federal government, established in Resolution 1814/2005 of the Federal Administration of Public Revenue and to register before the Suppliers System of Information (SIPRO). At the provincial and municipal levels, the prior registration of bidders in different local registries of suppliers is also mandatory.

According to the Regulation of the GRPP, bids must be submitted at the place and within the time frame specified in the tender documents. Therefore, the procuring entity must reject any bid that is submitted after such deadline. Bids can also be submitted by mail, according to the rules stated in the GRPP.

The submission of a bid implies, for the bidders, full knowledge and acceptance of all of the rules and clauses governing the tender; therefore, such rules and clauses cannot be validly challenged after such submission.

According to the Regulation of the GRPP, as a principle, the bid shall not be amended after the expiry of the bid submission term. The amendment of bids is exceptionally accepted to correct some correctable errors, such as data or information already included in databases of public bodies, being written in a foreign language, or, in general, when it does not alter the principle of equal treatment of bidders.

To be admitted, every bid must accomplish certain formal requirements, such as the bid being written in Spanish, the original bid being signed on every page by the bidder or his or her representative, or the bid being submitted with the number of copies stated in the tender documents. The bidder must also establish a special address where every notification must be issued within the tender, and the price offered that, as a rule and unless something different is stated, must be established in the national currency. Any other information or document that may be required in the tender documents must be also included. Although there is not an established fee to submit a bid, suppliers must give a guarantee that the offer will be maintained for the duration of the tender. The maintenance bid guarantee is 5 per cent of the final price of the bid.

Unless a different term is established in the tender documents, bidders must maintain their bids for at least 60 calendar days from the date of the opening of the bids. Such term can be automatically extended, for the same 60-day period, every 60 days. A bidder who has

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20 Section 12, Subsection 8.
21 Section 51, Regulation of the GRPP; and Section 22, CPM.
22 Section 22, CMP.
23 Section 52, Regulation of the GRPP.
24 Section 53, Regulation of the GRPP.
25 Section 78(a), Regulation of the GRPP.
decided not to maintain his or her bid for a new time period must give notice of such decision at least 10 days before the expiry term. As a consequence, the bidder will be excluded from the public tender, but will not lose the maintaining bid guarantee.26

The bids must be opened at the place, date and time stated in the tender documents, at a public event.27 The original version of each bid must be available to the bidders for the following two days.28

V ELIGIBILITY

i Qualification to bid

According to the GRPP and its Regulation, the following persons cannot enter into contracts with the public administration:

a bidders who have been sanctioned by the National Procurement Office for infringements committed in previous tenders or whose previous public contracts were terminated by the government due to a fault of the supplier;29

b companies in which agents or employees of the federal state have sufficient shareholding so as to form their social policy; their successors, transformations, mergers or spin-offs, and even those companies that are controlled by or are the controller of any of them;30

c bidders who have been convicted for the commission of intentional crimes are disqualified for a period equal to twice the length of the sentence imposed for their crimes;31

d bidders who do not meet their tax and social security obligations;32

e bidders that, within a term of three years prior to the submission of the bid, were sanctioned for abuse of dominant position, dumping or any other form of unfair competition;33

f bidders that have breached previous public contracts;34

g companies that have been convicted abroad of bribery or transnational bribery practices under the terms of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; these companies will not be eligible for a period equal to twice the sentence;35 and

h human or legal persons that were included in the lists of disabled persons of the World Bank or the Inter-American Development Bank, as a result of corrupt practices referred to in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.36

Regarding the public–private partnerships regime, Decree 118/17 states that the offer must be rejected when the bidder is included in the list of ineligible persons of the World Bank or the Inter-American Development Bank as a result of conducts or practices of corruption, or

26 Section 54, Regulation of the GRPP.
27 Section 59, Regulation of the GRPP.
28 Section 60, Regulation of the GRPP.
29 Section 28(a), GRPP.
30 Section 28(b), GRPP; and Section 68(a), Regulation of the GRPP.
31 Section 28(d), GRPP.
32 Section 28(f), Regulation of the GRPP.
33 Section 68(f), Regulation of the GRPP.
34 Section 68(g), Regulation of the GRPP.
35 Section 68(h), Regulation of the GRPP.
36 Section 68(i), Regulation of the GRPP.
in the case of convicted persons, with final judgment, in Argentina or abroad, for practices of bribery or transnational bribery under the terms of the Convention for Combating the Bribery of Foreign Public Servants in International Business Transactions of the Organisation for Economic Co-operation and Development (OECD).\(^{37}\)

**ii  Conflicts of interest**

Regarding the subjective grounds for disqualification listed above, those under (b) tend to prevent potential conflicts of interest.

**iii  Foreign suppliers**

Foreign suppliers are allowed to submit bids exclusively within international tenders. In this scenario, due to the nature of the object or the service to be hired, the call to bid is extended to interested parties and bidders from abroad. According to the GRPP, a ‘foreign bidder’ is a bidder whose principal place of business is outside Argentina and that lacks a branch duly registered in Argentina.\(^{38}\)

As mentioned above, notices of invitation to take part within an international public tender must be published on the official website of the United Nations (UN Development Business) or the World Bank (DG Market), at least 40 calendar days before the date fixed for the opening of the bids.\(^{39}\) Under the public–private partnerships regime, in the case of international bidding, such notice must take place for a term of three days with a minimum of 60 calendar days in advance of the date fixed for the presentation of the bids or for obtaining of tender documents, whichever is first.\(^{40}\)

Foreign suppliers are only allowed to bid within a national tender as long as they have already incorporated a branch or subsidiary in Argentina.

If, for certain grounded reasons, the contracting authority needs to purchase a specific asset or hire a certain service from abroad because such is not available Argentina, it may invite foreign suppliers to take part in direct awarding.

In procurement proceedings related to the construction of public works, as well as in cases related to the contracting of consulting services, Law No. 18,875 prohibits the participation of foreign construction and consulting services providers unless they enter into joint venture agreements with local companies. This restricted participation of foreign providers can only take place if the government has previously called for an international public bid.

**VI  AWARD**

**i  Evaluating tenders**

The period for evaluating tenders runs from the time that the procurement administrative record is sent to the Evaluation Commission up to the time of the notification of the evaluation report to all the bidders.\(^{41}\)

\(^{37}\) Section 24.

\(^{38}\) Section 26(b), Subsection 2, GRPP.

\(^{39}\) Section 32, GRPP; and Sections 40 and 42, Regulation of the GRPP.

\(^{40}\) Section 12, Subsection 8, Decree 118/17.

\(^{41}\) Section 61, Regulation of the GRPP.
The Evaluation Commission is a consultative body whose main function is to issue a non-binding opinion over the submitted bids. It is composed of three members and their alternates, all of whom must be appointed by the highest authority of the contracting entity. The following cannot be appointed to the Evaluation Commission: persons who decided the opening of the public tender, and persons who have the power to finally approve the whole procedure.42

The opinion issued by the Evaluation Commission must analyse the formal requirements of the bids, the subjective evaluation of the bidders (that is, whether they meet the requirements stated in the GRPP, its Regulation and in the tender documents), and the objective evaluation of all the submitted bids. The latter analysis must objectively take into consideration all the requirements established by the tender documents for the admissibility of the bids. Regarding the admitted bids, the Evaluation Commission must take into account the different aspects provided in the specification documents in order to compare them and determine their order of merit.43

According to the GRPP, the contract must be awarded to the ‘most suitable offer’, taking into consideration the price, the quality of the good or service, and the bidders’ economic, financial and technical capabilities. Therefore, the analysis of the Evaluation Commission and the procuring entity must not be exclusively based on the economic aspects (i.e., the lowest price) but rather on the three above-mentioned aspects.44

The non-binding opinion of the Evaluation Commission must be published on the official website of the National Procurement Office, and duly notified to all of the bidders within a term of two working days from its issuance.45 As discussed below, the non-binding opinion may be challenged by the bidders as well as anyone who invokes and proves his or her interest in the subject matter of the opinion.

ii National interest and public policy considerations

Law No. 25,551 gives preference to the acquisition of ‘goods of national origin’, being those goods produced or extracted within the territory of Argentina, as long as the cost of imported materials or inputs does not exceed 40 per cent of its gross production value.46

In general terms, the preference provided under Law No. 25,551 is granted to bids that, in offering ‘goods of national origin’, have the same or a lower price than those bids involving goods that are not of national origin, after the price of the latter is increased by 7 per cent when such offers are made by companies classified as small and medium-sized enterprises, and 5 per cent when made by other companies.47

42 Sections 62 and 63, Regulation of the GRPP.
43 Section 27, CPM.
44 Section 15, GRPP.
45 Section 73, Regulation of the GRPP; and Section 28, CPM.
46 Sections 1 and 2, Law No. 25,551.
47 Section 3, Law No. 25,551.
VII INFORMATION FLOW

According to the GRPP and its Regulation, the principles of openness and publicity are general principles that govern all procurement procedures. This is why many provisions of the GRPP and its Regulation refer to the flow of information regarding public procurement:

- the GRPP states that any interested party has the right to access the public procurement administrative record, except for those documents protected by confidentiality rules or that are declared to be either confidential or secret by the procuring entity. During the period of evaluation of the tenders, bidders and third parties are not entitled to have access to the record; and
- regarding the draft of the tender specifications, even when commonly prepared and approved by the procuring entity with no prior mandatory public consultation, the GRPP states that, when the complexity or the amount of the procurement so justifies, such entity may allow a preliminary stage, before the bid call, for receiving comments from any interested party about the tender specifications draft.

Despite the procuring entity not being bound by the comments issued by potential bidders, prior to approving the tender specification it must consider all the bidders, and justify the reasons whether they are admitted or not.

Regarding the tender documents, the GRPP states that anyone can have access to them or purchase them either from the offices of the procuring entity or from the website of the National Procurement Office. Nevertheless, it must be noted that it is very common that the tender documents – especially those of a technical nature – are only accessible through purchasing them at the offices of the contracting entity. Under the public–private partnerships regime, Decree 118/17 states that the tender documents can also be accessed from the website of the Subsecretariat of Public–Private Partnership.

Suppliers can submit written questions to the procuring entity for clarification of the tender documents. Unless otherwise stated, any questions can be submitted up to three days before the date fixed for the opening of the bids. Following these questions, the procuring entity may issue explanatory circulars (up to two days before the date fixed for the opening of envelopes) or amendments to the tender documents (up to one day before the date fixed for the opening of envelopes) that are construed as amendments to the tender specifications and become mandatory for both contracting authorities and bidders. Both types of documents are available to all interested suppliers. Under the public–private partnerships regime, Decree 118/17 sets forth that such questions can be submitted up to seven days before the fixed date for the opening of the bids, unless a different term is stated in the tender documents.

Regarding submitted bids, originals must be exhibited for all bidders for two days as of the date of the bid opening. Bidders may obtain a copy.

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48 Section 3(d), GRPP.
49 Section 4, Regulation of the GRPP.
50 Section 26, Regulation of the GRPP.
51 Section 48, Regulation of the GRPP.
52 Section 12, Subsection 11.
53 Section 49, Regulation of the GRPP.
54 Section 50, Regulation of the GRPP.
55 Section 12, Subsection 11.
56 Section 60, Regulation of the GRPP.
VIII CHALLENGING AWARDS

i Procedures
The Regulation of the GRPP only provides for a special procedure for challenging the non-binding opinions of the Evaluation Commission. It does not provide for a specific procedure for challenging an award. Despite this, as outlined below, awards may be challenged either by any of the unsuccessful bidders or by any other aggrieved person through the general administrative and judicial review procedures established in the Administrative Procedures Act, approved by Law No. 19,549 and its regulation.

ii Grounds for challenge
Challenges are submitted before the public administration or before the judiciary. In cases in which a challenge is filed before an administrative body (that is, the procuring entity itself or its superior administrative authority), the challenge may refer to the illegitimacy of the procedure, the illegitimacy of the award of the incorrect evaluation or assessment of the tender. Besides, in those cases where a challenge is submitted before the administrative body, it may also be based on the fact that one bid is preferable over another for reasons unrelated to the legal aspects, such as, for example, the quality of the goods or services, the reputation of the bidder.

The grounds for challenge are considerably more restricted if filed before a court of justice. In such case, the judicial claim should be based exclusively on grounds of illegitimacy either related to the procedure or to the award. Moreover, not all forms of illegitimacy will secure the success of a judicial claim, since judges tend to be very strict in their approach to these types of cases. The federal courts have traditionally adopted a deferential approach regarding government procurement challenges.

iii Remedies
We must distinguish between the remedies provided for challenging an opinion of the Evaluation Commission from those provided for challenging an award.

According to the Regulation of the GRPP, as mentioned above, Evaluation Commission opinions may be challenged by bidders (within three calendar days of such notification) and by any other aggrieved person (within three calendar days of an opinion's publication on the official website of the National Procurement office), and in any case, if applicable, by previously providing the challenge guarantee (that is, the guarantee that is usually required for the viability of the claim so as to assure its seriousness).

The contracting entity must make a decision on the merits of those complaints in the same resolution whereby the public contract is awarded.

57 Section 73, Regulation of the GRPP; and Section 29, CPM.
58 Sections 73 and 78(d), Regulation of the GRPP.
59 Section 74, Regulation of the GRPP.
Regarding challenges of awards, the Administrative Procedures Act, approved by Law No. 19,549 and its regulation provide different remedies for filing a complaint.

\( a \)
The challenger has the option to first file a complaint before the contracting entity. In this case, the challenger shall request the procuring entity to reconsider its decision. The complaint should be filed before the awarding authority (which is usually the procuring entity itself) within 10 calendar days of the notification of the award.\(^{60}\)

\( b \)
If the previous complaint was not filed or if, having been filed, it has been rejected, the challenger must file another administrative complaint before the superior administrative authority. In this case, the complaint should be filed before the authority that awarded the contract (which is usually the procuring entity itself) within 15 calendar days from the notification of the rejection of the previous remedy.\(^{61}\)

\( c \)
If the complaint before the superior administrative authority is rejected, the challenger shall request the federal judiciary, within 90 working days, to review the award on grounds of its illegality.\(^{62}\) If the judiciary nullifies the challenged award, the procuring entity can opt to re-award the contract in full adherence with the considerations set out in the court's ruling or to cancel the procurement proceedings. Note that the court itself does not have the power to award the contract to the claimant.

As a rule, the filing of such claims does not trigger, \textit{per se}, a suspension of the procurement process. However, on its own initiative or by means of a request from a claimant, the contracting entity may suspend the process for public interest reasons, to avoid the causation of damages to the aggrieved party, or when a nullity has been duly invoked and accredited by the petitioner.\(^{63}\) If the contracting entity rejects the suspension request, the claimant is entitled to file before the judiciary a request for preliminary measures to obtain the provisional suspension of the public procurement proceedings while the complaint is pending.\(^{64}\)

\section*{IX INTERNATIONAL PUBLIC PROCUREMENT}

Regarding international public procurement, Argentina is an observer of the World Trade Organization's Agreement on Government Procurement, whose fundamental aim is to liberalise government procurement markets.

In the regional sphere, the state parties of Mercosur, including Argentina, signed the Mercosur Public Procurement Protocol to provide suppliers and service providers established in the Mercosur Member States with a guarantee of non-discriminatory treatment in any procurement processes carried out by public entities of any of the state parties. The Congress of Argentina approved the Protocol through Decision 23/10 of the Common Market Counsel; however, the state parties decided to subject the Protocol to a review process that is currently ongoing.

Finally, it must be mentioned that, unlike its predecessor, the new Regulation of the GRPP does not contain any provision aimed at governing public procurements that take place in foreign countries.

\(^{60}\) Section 74, Regulation of the GRPP.
\(^{61}\) Section 89, Decree 1759/1972.
\(^{62}\) Section 25(a), Law No. 19,549, Administrative Procedure Act.
\(^{63}\) Section 5, Regulation of the GRPP; and Section 12, Law No. 19,549, Administrative Procedure Act.
\(^{64}\) Law No. 26,854.
I INTRODUCTION

i Legislation

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

Commonwealth – key legislation and official guidance

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

Official guidance on Commonwealth procurement is primarily contained in the Commonwealth Procurement Rules (CPRs) and the Public Governance, Performance and Accountability Rule 2014, which are issued under the PGPA Act.

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

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

At the Commonwealth level, substantial further official guidance is given for conducting defence procurement. Defence procurement is largely subject to the same legislation and official guidelines as other Commonwealth procurement. Additionally, the Department of Defence issues a Defence Procurement Policy Manual (DPPM) and other guidelines and policies applying to defence procurement.

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

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

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

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

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

WTO Agreement on Government Procurement

In addition to the above, Australia has been an observer of the World Trade Organization (WTO) Agreement on Government Procurement since 4 June 1996, but is not a member. The Commonwealth government has been working towards Australia’s accession to the Agreement, and Australia submitted its accession offer for the Agreement on 16 September 2015. Australia submitted a revised offer on 30 September 2016 and a second revised offer in June 2017 (in response to feedback and questions received from the WTO Committee on Government Procurement in respect of the 2016 revised offer).

Fundamental procurement principles

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

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

Other governments apply procurement principles largely consistent with those in the CPRs.
II YEAR IN REVIEW

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

Policy and guidance

Division 2 of the CPRs (see Section III) has been amended to include additional requirements for ‘covered’ Commonwealth procurements with effect from 1 March 2017. In summary, these changes are as follows:

a where an Australian standard applies to goods or services being procured, tender responses must demonstrate the capability to meet that Australian standard and contracts must contain evidence of the applicable standard;

b officials must make reasonable inquiries to ensure that a procurement is carried out considering relevant regulations or regulatory frameworks (including labour regulations, and occupational health and safety requirements); and

c for procurements above A$4 million in value, officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party.

Division 1 of the CPRs was also updated to include an express requirement on all Commonwealth entities to consider and manage their procurement security risk in accordance with the Australian government’s Protective Security Policy Framework (PSPF). The PSPF provides guidance and best practice advice to assist agencies to identify their responsibilities to manage security risks pertinent to their people, information and assets. It comprises 36 mandatory requirements for agencies, covering issues of governance, personnel security, information security and physical security. The objective of these mandatory requirements is to ensure that official resources and information provided to agencies is safeguarded at all times and a culture of protective security is embedded.

From 1 January 2018, the CPRs incorporate new notification requirements that are needed when conducting a multi-stage procurement. Specifically, the initial approach to market for a multi-stage procurement must include the criteria that will be used to select potential suppliers for each stage, as well as any limitation on the number of potential suppliers that will be invited to make submissions.

In anticipation of Australia’s accession to the WTO Agreement on Government Procurement, the Government Procurement (Judicial Review) Bill (the Bill) was introduced into the Australian parliament in May 2017. The Bill will establish an impartial and independent complaints mechanism for suppliers participating in government procurement processes and, importantly, enable the Federal Circuit Court and the Federal Court of Australia to grant an injunction or order payment of compensation in relation to a contravention of the CPRs (so far as the CPRs relate to ‘covered procurements’). If passed, the Bill will provide suppliers with a statutory basis to challenge alleged non-compliance with the CPRs. In June 2017, the Senate referred the Bill to the Finance and Public Administration Legislation Committee for inquiry and report and the Committee recommended that the Senate pass the Bill. It viewed the legislation as a necessary step towards meeting Australia’s international law obligations in relation to the WTO Agreement on Government Procurement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership of 8 March 2018. At the time of writing, the Bill remains before the House of Representatives.
ii Case law

Litigation concerning government procurement is infrequent. Historically, decisions have primarily reinforced existing principles.

In the past year, only one significant decision has been handed down, in the case of Roo Roofing Pty Ltd v. Commonwealth. This decision related to an interlocutory application in a class action proceeding concerning the Commonwealth’s abandoned Home Insulation Program (HIP). The plaintiffs in the action claim, inter alia, that the Commonwealth engaged in misleading or deceptive conduct under what was then the Trade Practices Act 1974 (Cth) in carrying on a business in trade or commerce through various statements and announcements it made regarding the HIP before its premature termination. The Commonwealth applied for summary judgment in relation to this claim, relying on Australian courts’ traditionally narrow interpretation of when government will be regarded as ‘carrying on a business’. Its application was rejected, with the Victorian Supreme Court concluding it was not ‘fanciful’ that some elements of the activities undertaken by the Commonwealth in connection with the HIP (including issuing work orders, selecting eligible tradespeople, setting terms on which work would be performed and paying contractors for that work) had a real connection with commercial activity and a context that bore a business or commercial character. These comments are interesting given the view of some commentators that Australia’s competition and consumer laws should be amended so that they apply to a broader range of Commonwealth commercial activity, including government procurement.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

a departments and agencies that do not have a legal identity separate from the Crown. Complying with the procurement laws and policies in most cases is mandatory for these bodies; and

b other government-created bodies that have a legal identity separate from the Crown (e.g., bodies created by statute or government-owned companies). Treatment of these bodies differs. Sometimes they may choose whether to subject themselves to the procurement laws and policies. In other cases they can be directed to comply.

ii Regulated contracts

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

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

a grants;

b investments and divestments;

c sales by tender;

d loans;

3 Ibid., [114] and [115].
purchases of goods or services for resale, or of goods or services used in the production of goods for resale;

any property right not acquired through the expenditure of public money (e.g., a right to make a claim for negligence);

statutory or ministerial appointments; or

engagement of employees.

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

At the Commonwealth level, the CPRs contain rules in two divisions. Division 1 applies to all procurements regardless of value. Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The Division 2 rules require a higher level of transparency (e.g., stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement).

The procurement thresholds are:

- for non-corporate Commonwealth entities, other than for procurements of construction services, A$80,000;
- for prescribed corporate Commonwealth entities, other than for procurements of construction services, A$400,000; or
- for procurements of construction services by non-corporate Commonwealth entities and prescribed corporate Commonwealth entities, A$7.5 million (a reduction from A$9 million).

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

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

- where, in response to an approach to the market, no suitable submissions were received;
- for reasons of extreme urgency;
- for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals or unsolicited innovative proposals; or
- where the property or services can only be supplied by a particular business and there is no reasonable alternative.

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

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

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

For defence procurement, there is further policy guidance issued about the basis upon which defence procurement might be conducted on a sole sourcing basis.
Contracting parties are generally free to agree to vary a contract or transfer the contract to a different supplier. However, in the case of contract variations, the customer will need to consider whether the extent of the variations is so substantial as to constitute a different procurement to the one already conducted. If so, the variation may fall outside the sole sourcing rules and require a new approach to the market.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

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

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

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

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

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

ii Joint ventures

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

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

The National Public Private Partnership Policy and Guidelines, endorsed by the Council of Australian Governments on 29 November 2008, address partnering with the private sector for the provision of public infrastructure and related services, including on procurement. The Commonwealth, and state and territory governments have agreed that PPPs must be considered for any project with a value in excess of A$50 million.
PPPs typically incorporate a significant consideration of whole-of-life costs, allowing the government to lock in long-term allowances for project maintenance, asset and quality control. In most PPPs, the government allocates the risk of additional future costs to the private sector concessionaire. This impacts the procurement approach. For example, the concessionaire usually has discretion to determine how to best manage these risks (e.g., by subcontracting them to a builder or operator, pricing for risks or building in contract measures to give relief for risks).

V THE BIDDING PROCESS

i Notice

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

At the Commonwealth level, as part of the CPRs’ requirement to show accountability and transparency in procurement, the CPRs require that each agency publish, by 1 July each year, the agency’s annual procurement plan containing details about planned approaches to market on the AusTender website. AusTender must also be used to publish multi-use list opportunities, open tenders above the procurement threshold and, where practicable, request documentation.

The CPRs also require details about awarded and amended contracts to be published on AusTender if the contract is valued at or over the reporting threshold, which is A$10,000 for non-corporate Commonwealth entities. For prescribed Commonwealth entities bound by the CPRs, the reporting threshold is A$400,000 for procurements other than procurement of construction services, or A$7.5 million (reduced from A$9 million) for procurement of construction services.

ii Procedures

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

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

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

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

The majority of procurements conducted have online lodgement requirements. For example, at the Commonwealth level most tenders are required to be lodged via AusTender. Defence procurements will require lodgement via AusTender or other electronic means where appropriate. If, for example, the request for tender documents involves security classified or other sensitive information, then lodgement via hard copy or physical delivery to a tender box may be used.
iii Amending bids

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

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

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

VI ELIGIBILITY

i Qualification to bid

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

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

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

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

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

ii Conflicts of interest

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

Defence procurements and PPPs usually contain more detailed terms for handling conflicts of interest. Procurement terms will typically contain a prohibition on improper assistance, and on a bidder using recently departed customer personnel or a contractor who may have been involved with the project. What is an actual or apparent conflict of interest is, is typically left as a matter for the judgement of the customer.
iii Foreign suppliers

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

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

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

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

VII AWARD

i Evaluating tenders

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

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

ii National interest and public policy considerations

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

a for procurements over A$4 million, the new requirement in Division 2 of the CPRs that officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party;
the Australian Industry Participation (AIP) National Framework, which applies to major Commonwealth government procurements (generally above A$20 million), pursuant to which, tenderers for certain Commonwealth procurements are required to prepare and implement an AIP Plan; and

c the Workplace Gender Equality Procurement Principles and User Guide require government agencies to obtain a letter of compliance from certain tenderers (employers with 100 or more employees) that indicates compliance with their obligations under the Workplace Gender Equality Act 2012 (Cth).

VIII INFORMATION FLOW

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

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

IX CHALLENGING AWARDS

There is no specific legislation or court system for challenging public procurement decisions. However, as noted in Section I, this may shortly change upon Australia’s accession to the WTO Agreement on Government Procurement. Historically, legal challenges to procurement decisions have been infrequent and, in the absence of serious wrongful conduct by a government body, challenges do not tend to succeed.

Procurement decisions are unlikely to be undone unless the complainant acts quickly (and usually before a contract is entered into between the government body and the preferred bidder).

i Procedures

There are processes for handling procurement complaints. They are purely administrative, and the complainant has no legal rights. However, they can provide a quick resolution.

At a Commonwealth level, the CPRs require government bodies to have a fair, equitable and non-discriminatory procurement complaint handling procedure.

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

The Procurement Coordinator has no authority to compel a government body to reconsider the conduct or outcome of tender processes for which that body is accountable.
Legislation also allows a complaint about procurement to be made to the Commonwealth Ombudsman. The Ombudsman has powers to investigate and make a recommendation but no power to change a decision.

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

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

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

ii Grounds for challenge

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

Administrative and private law actions may be available to provide a remedy for a procurement complaint. For example, administrative law may allow a claim based on denial of natural justice, a lack of procedural fairness or on the legitimate expectation doctrine; or legislation allowing the review of administrative decisions made under an enactment. However, these cases are rare, as procurement decisions are not usually found to have been made under an enactment. Depending on the circumstances, private law remedies may be available. For example:

a most procurements will be conducted under a tender process contract. Where a process contract has been created, an action in breach of contract may be available if the government body fails to follow the procurement process;

b if the government body has acted in a misleading manner in conducting the procurement, it may be liable for misleading conduct in breach of the Competition and Consumer Act 2010 (Cth), or under corresponding state and territory fair trading legislation. However, there are differences between jurisdictions in whether the government can be liable under the legislation; or

c the doctrine of estoppel may be available to provide redress for a tendering complaint where representation, reliance and detriment can be shown to have occurred.

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

Hughes Aircraft Systems International v. Airservices Australia4 established that under Australian law, a public tender could be governed by a ‘process contract’. In Hughes, the process contract contained the express tender terms (which included confidentiality obligations that were found to have been breached) and the implied term that the government body was to evaluate all tenders fairly and in good faith (which was breached as tenderers were not treated fairly).

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

iii Remedies

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

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

No fines are available for breach of procurement procedures.

For private law causes of action, the remedies may be quite limited. For example, powers to review an administrative law decision may only grant the court the power to require that the decision be remade (which may not change the outcome). Damages are also not an available remedy for all administrative law actions. However, as noted in Section II, if the Government Procurement (Judicial Review) Bill is passed in its current form, compensation may be payable for contravention of the CPRs in relation to a covered procurement.

X OUTLOOK

The focus in government procurement over the next few years is likely to remain on Australia’s accession to membership of the WTO Agreement on Government Procurement. The proposed implementation of a formal review procedure for suppliers aggrieved by a procurement decision is the most significant change expected as a result of this agreement. It is not clear what effect (if any) the changes to the CPRs regarding ‘consideration of Australia’s national interest’ will have on Australia’s accession process.

Finally, the Foreign Affairs and Aid Sub-Committee of the Australian parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade tabled a report in parliament in December 2017 for the Committee’s inquiry into establishing a Modern Slavery Act in Australia. The Committee recommended that the Australian government introduce a Modern Slavery Act similar to that established in the United Kingdom. If passed, legislation of this kind is likely to compel government agencies to procure goods and services from organisations that comply with the requisite reporting requirements. The current Australian government has committed to passing legislation by the end of this year.

5 (1997) 147 ALR 419.
Chapter 3

AUSTRIA

Philipp J Marboe

I INTRODUCTION

The main sources of law for public procurement in Austria are the Federal Public Procurement Act 2006 (BVergG), as amended by the draft BVergG 2018, and the Federal Act on the Award of Contracts in the Fields of Defence and Security (BVergGVS), as amended by the draft BVergGVS 2018. Due to the country’s federal structure (federal state, provinces and municipalities), there are a further nine separate public procurement acts at the regional level.

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

The BVergG continues to transpose the 2004 Public Sector Directive, the 2004 Utilities Directive and the Remedies Directive. However, in 2018 a draft Public Procurement Reform Act (PPRA 2018) was presented, which provided for the implementation of the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive and the 2014 Concession Contracts Directive. Though not enacted to date, it is likely that the draft PPRA 2018 shall be promulgated essentially as proposed. Therefore, the following analysis is based on the draft PPRA 2018. Thus, the Federal Act on the Award of Concession Contracts (BVergGKonz) is also to be mentioned as a main source of law for public procurement in Austria. In addition, the case law of the Federal Administrative Court (FAC), the nine administrative courts, the Supreme Administrative Court (VwGH), the Supreme Constitutional Court (VfGH) and the Court of Justice of the European Union (CJEU) applies.

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

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

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II YEAR IN REVIEW

The past year was marked by the ongoing failure of the Austrian government to implement the 2014 Procurement Directives. However, in February and June 2017, and in March 2018, the government submitted draft bills. The latter tackled the entirety of the issues provided for in the aforementioned Directives. As the draft PPRA 2018 was therefore ‘big’, the Austrian legislator also opted for a totally new BVergG 2018 rather than merely further amending the current law.

The key changes are as follows:

a extension of the applicability of the negotiated procedure with prior notice;

b introduction of the new procedure ‘innovation partnership’;

c common cross-border procurement procedures of (two or more) EU/EEA contracting authorities;

d compulsory e-procurement as of 18 October 2018;

e codification of the intercommunal cooperation;

f codification and extension of in-house procurement;

g new category of ‘special services’ replacing the former distinction between ‘priority services’ and ‘non-priority services’ accompanied by proposed thresholds of €750,000 in the classic sector and of €1 million in the utilities sector;

h extension and tightening of exclusion grounds;

i enhanced consideration of ecological, social and innovative aspects;

j new obligation to cancel contracts under certain conditions;

k extended application deadline in proceedings for a declaratory judgment;

l new definition of preliminary works prior to the procurement procedure and provision on conflicts of interest;

m further strengthening of the most economically advantageous tender principle; and

n clarification of the extent of permissible modifications of existing contracts (‘safe harbour rule’).

Concerning jurisprudence, one ruling in particular stood out in the preceding year as to its relevance to foreign bidders. The FAC held that it was unlawful to discriminate against bidders of EU Member States other than Austria. Consequently, the disposal and recycling of waste may also be carried out in approved facilities outside Austria. Permits on waste collection and waste treatment issued in an EU Member State other than Austria must be recognised by the contracting authority in the same way as respective Austrian permits provided that they are equivalent. If the respective waste activities constitute a ‘free trade’ according to the Austrian Industrial Code (GewO), the bidder may not be obliged to initiate a recognition procedure pursuant to the GewO.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

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2 W139 2158106-2, 23 August 2017.
A body governed by public law is an entity that is controlled, financed or supervised by contracting authorities and established for the specific purpose of serving needs in the general interest, and not having an industrial or commercial character.

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

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

In addition, the BVerfGKonz sets forth specific rules and provisions applicable for awarding service and works concession contracts. Pursuant to Paragraph 1 of Sections 5 and 6 of the BVerfGKonz, service and works concession contracts are contracts of the same type as service and works contracts, except for the fact that the consideration for the services or works to be carried out consists either solely of the right to exploit the services or construction, or of such a right together with a specific amount of payment. According to Section 7 of the BVerfGKonz, on concessions comprising both services and works, the provisions of the contract type that constitutes the main subject matter of the concession contract shall apply. The term of concession contracts must be determined. If the term exceeds five years, it must not pass the period in which the concessionaire is able to generate the capital expenditures plus a return. Generally, the BVerfGKonz leans on the structure of the BVerfG, but imposes a less strict regime. For instance, the contracting authority is generally free to shape the award procedure of the concessionaire as long as the provisions of the BVerfGKonz are observed. Likewise, the remedy regime is similar to that of the BVerfG, assigning the competence to the BVwG.

The BVerfG does not apply when the special provisions of the BVerfGVS prevail. The latter provides special rules for defence and security procurement. It covers the supply of military or sensitive equipment, including any parts, components or subassemblies thereof. Moreover, the BVerfGVS regulates works, supplies and services directly related to the aforementioned equipment, and works and services for special military purposes, or sensitive works and sensitive services. However, neither the BVerfG nor the BVerfGVS are applicable to public contracts when they come under the exemption pursuant to Article 346(1)(a) of the TFEU. Pursuant thereto, EU countries may not be obliged to provide information whose disclosure is, in their opinion, contrary to its vital security interests. Austria has exercised this exemption right in Section 9, Subparagraph 4 of the BVerfG and Section 9, Paragraph 1, Subparagraph 1 of the BVerfGVS.
Pursuant to the respective Commission Delegated Regulations (EU) on the application thresholds for the procedures for the award of contracts,3 the following application thresholds for the procedures for the awards of contracts apply:

<table>
<thead>
<tr>
<th>Category</th>
<th>Directive(s)</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public service and public supply contracts</td>
<td>Public Sector Directive</td>
<td>From €144,000 (specified contracting authorities, e.g., ministries) to €221,000</td>
</tr>
<tr>
<td>Public service and public supply contracts</td>
<td>Utilities Directive</td>
<td>€443,000</td>
</tr>
<tr>
<td>Public service and public supply contracts</td>
<td>Defence Directive</td>
<td>€443,000</td>
</tr>
<tr>
<td>Public works contracts</td>
<td>Public Sector Directive</td>
<td>€5.548 million</td>
</tr>
<tr>
<td>Public works contracts</td>
<td>Utilities Directive</td>
<td>€5.548 million</td>
</tr>
<tr>
<td>Public works contracts</td>
<td>Defence Directive</td>
<td>€5.548 million</td>
</tr>
<tr>
<td>Concession contracts</td>
<td>Concession Contracts Directive</td>
<td>€5.548 million</td>
</tr>
</tbody>
</table>

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

Moreover, within the scope of the BVergG, contracts that do not exceed a value of €100,000 may be awarded directly. Direct awards with a prior market survey are applicable to supply and service contracts with a contract value less than €130,000 in the classic sector and €200,000 in the utilities sector, respectively; the contract value of works contracts must not exceed €500,000. When resorting to direct awards with a prior market survey, the contracting authority is obliged to publish a notice prior and subsequent to the awarding procedure. The course of the awarding procedure may be determined by the contracting authority, but in due consideration of the general principles of the TFEU.

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

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

The applicability of these exemptions must be demonstrated and documented by the contracting authority, and is subject to review proceedings before the administrative courts. The majority of the above-mentioned exceptions correspond to the exceptions provided for

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3 Section 12, Paragraph 1 and Section 185, Paragraph 1 of the BVergG; Section 11, Paragraph 1 of the BVerGKonz; and Section 10, Paragraph 1 of the BVerGVS.
the utilities sector, irrespective of minor differences (e.g., in relation to contracts on financial services). However, certain exemptions are reserved to the utilities sector exclusively, such as specific contracts awarded for purposes of resale or lease to third parties.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

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

Contracting authorities are entitled to conduct tender procedures jointly. Moreover, the BVerG allows the establishment of central purchasing entities. One such entity is the Austrian Federal Purchasing Agency (BBG). Its main task is to provide procurement services to the federal state, the provinces and municipalities, as well as to associations formed by the previously mentioned bodies. The BVerG 2018 introduces new provisions in order to foster joint cross-border tender procedures, including through central purchasing.

ii Joint ventures

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

Section 10, Paragraph 3 of the BVerG 2018 codified the aforementioned exemption under the designation of ‘public-public cooperation’. In order to rely on the exemption, the involved contracting authorities must aim at the fulfilment of common goals, pursue exclusively public interest and perform by their cooperation less than 20 per cent of the respective activities on the open market.

Another important exemption is the ‘in-house’ exemption, which corresponds to the jurisdiction of the CJEU (in particular, Teckal and Stadt Halle). However, the BVerG 2018 extends and also differentiates its scope. Pursuant to Section 10, Paragraph 1, contracts that a contracting authority award to a legally distinct entity do not come under the BVerG if the contracting authority exercises over the distinct entity in question a control that is similar to that over its own departments, if the entity carries out more than 80 per cent of its activities with the contracting authority or authorities that control it, and if there is no private ownership or participation in the entity. However, the BVerG 2018 introduces a

4 C-480/06, Commission v. Germany.
5 C-107/98, Teckal Srl v. Comune di Viano.
6 C-26/03, Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna.
narrow exemption from the interdiction of private participation. According to Section 10, Paragraph 1, Subparagraph 1 c, non-controlling and non-blocking forms of private capital participation required by national legislative provisions that do not exert a decisive influence are admissible. Further, the BVergG 2018 widens the scope of the ‘in-house’ exemption to the ‘bottom-up’ and ‘affiliate’ in-house awards.

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

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

V  THE BIDDING PROCESS

i  Notice

Contracts that come under the procurement regulations must be advertised in the OJEU. In addition, they have to be published at a nationwide level. With regard to tenders of a public authority at a regional level, the legislator provides its own regional publication platform. Contracts not exceeding the thresholds are advertised on national portals exclusively.

ii  Procedures

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

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

In principle, the negotiated procedure (with prior notice) may be chosen unless an open or restricted procedure with prior notice has resulted in any tenders, or in any tenders appropriate for the purchase. However, the original terms and conditions for the contract must not be modified and amended materially. Moreover, the negotiated procedure may be selected if the special characteristics of the contract do not allow an open or a restricted procedure, or the services of the contract cannot be stipulated in contractual specifications. The BVergG 2018 has widened the possibilities to choose the negotiated procedure with prior notice.

In the negotiated procedure without prior notice, the contracting authority calls upon economic operators designated preliminarily to submit an offer. Subsequently, the terms and conditions of the contract are negotiated. The admissibility of this procedure is subject to particular conditions, such as, for instance, extreme urgency, recurrence of similar circumstances or if only one specific economic operator is able to execute the contract.
The competitive dialogue is most appropriate if solutions to particularly complex projects are sought. This is the case when the contracting authority is not capable of determining the technical specifications or legal or financial conditions of the project.

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

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

Under an innovation partnership procedure, introduced by the BVergG 2018, the contracting authority uses a negotiation procedure to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing ‘product’ on the market.

iii Amending bids

Whether amendments to bids are admissible, and the scope thereof, depends on the tender procedure chosen. In open or restricted procedures, bidders are not allowed to amend their bids when the time limit for receipt of tenders has expired. However, queries to the contracting authority for clarification are admissible provided that all bidders are treated equally. In contrast, in negotiated procedures, generally, the entire content of the contract is negotiable. However, such negotiations must not modify the essential characteristics of the contract.

VI ELIGIBILITY

i Qualification to bid

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

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

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

a a final judgment against them or natural persons on their managerial body because of participation in a criminal organisation, corruption, fraud or money laundering;

b bankruptcy or composition (reorganisation) proceedings against them, or bankruptcy proceedings rejected in the absence of sufficient assets;

c liquidating or winding up the business;

d guilt of grave professional misconduct, in particular violation of provisions of labour or social laws, according to evidence available to the purchaser or a final judgment against the tenderers or natural persons on their managerial body challenging their professional conduct;

e violation of their obligations to pay social security contributions or taxes and levies;

f a conflict of interest cannot be eliminated through less drastic measures (newly introduced by the BVergG 2018);

g whose performance in earlier public contracts has shown major or permanent deficiencies (newly introduced by the BVergG 2018); or
however, in certain cases, tenderers may be permitted to participate in a procedure despite one of the above-mentioned exclusion grounds if they provide evidence of ‘self-cleansing’. To do so, they are obliged to clarify the facts and circumstances in a wide-ranging manner by actively collaborating with the investigating authorities, and by taking technical organisational and personal measures that are suitable to prevent further criminal offences or misconduct.

ii Conflicts of interest

Pursuant to Section 25, Paragraph 1 of the BVerG, economic operators that have participated in the preparation of the tender procedure must be excluded if their participation would distort equal and fair competition. However, prior to any exclusion, the contracting authority is obliged to afford the economic operator the possibility to prove that his or her participation will not distort equal and fair competition. In addition thereto, the BVerG 2018 introduced a new obligation imposed on the contracting authority to take appropriate measures in order to prevent conflicts of interest. According to Section 26, Paragraph 2 of the BVerG, such a conflict of interest is established if personnel of the contracting authority involved in the tender procedure might have, directly or indirectly, a financial, economic or other personal interest that may impair their impartiality and independence. This means a considerable tightening of the respective former legislation.

iii Foreign suppliers

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

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

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

VII AWARD

i Evaluating tenders

Tenders may be evaluated either on the basis of the most economically advantageous tender or merely on the lowest price. If the most economically advantageous tender is chosen, all awarding criteria must be specified and notified. These may refer to quality, price, running costs, aesthetic and functional characteristics, environmental characteristics, technical merit, cost-effectiveness, after-sales services and technical assistance, delivery date and delivery period, or period of completion. Awarding criteria may also refer to the whole life-cycle of the subject matter of the contract. In addition, for the sake of transparency, the contracting authority is compelled to notify the weighting that is linked to each awarding criteria.
Ultimately, the award should be made in accordance with what the individual contracting authority considers the most economically advantageous solution among those offered. The BVergG 2018 strengthens the preference of the ‘most economically advantageous principle’. The latter may henceforth be based on the lowest cost or best price–quality ratio.

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

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

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

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

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

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

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

Subject to the type of proceedings and the means of communication of the decision concerned, there are distinct time limits. Applications for review proceedings must be filed – according to the BVergG 2018 concerning henceforth sub-threshold procurements and procurements above the thresholds, likewise – within 10 days if the decision was transmitted by electronic means or fax. Applications for declaratory decisions have to be submitted within six months from the moment in which the applicant had or should have had knowledge of
the challenged decision (e.g., award). Both the previously much shorter term of six weeks form knowledge and the term of six months subsequent to the challenged decision had to be amended by the legislator (in BVergG 2018) due to the CJEU’s MedEval ruling. According to the CJEU, it would contravene the principle of effectiveness if the claim of damages is subject to an ‘absolute’ six-month time limit (stemming from procurement law). However, the sanction to cancel the contract or to declare the contract null and void is still subject to an (absolute) application term of six months subsequent to the challenged decision.

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

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

Challenges are quite frequent in Austria. As to the chances of success, in the reporting period from 1 February 2016 to 31 January 2017, 36 per cent of appeals filed with the FAC were granted.

For each application, a fixed basic fee has to be paid. The amount depends on the contract and the type of proceeding, and varies from €308 to €6,156. The basic fee may be further increased (e.g., trebled when the estimated contract value is more than 10 times higher than the relevant thresholds) or reduced (e.g., quartered in the case of applications for review of tender documents).

The decision deadline for the courts is six weeks.

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

The courts may declare contracts null and void. If they refrain from doing so, they must impose fines instead. In 2015, a sanction of €367,000 was imposed on BBG, constituting the highest fine imposed to date. In 2016, the VwGH held that an imposed fine still has to be paid even if the incriminated contract has been terminated.

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

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

7  C-166/14, MedEval – Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH.
X  OUTLOOK

In order to put an end to Austria’s persistent failure to transpose the 2014 Procurement Directives (for which the deadline was 18 April 2016) a comprehensive and detailed draft bill was presented in February and June 2017, and once again in March 2018. Due to constitutional requirements, the PPRA 2018 is subject to approval by the nine provinces to become effective. Since the latter allegedly have given their principal consent, a speedy adoption seems within reach. As to the date of the probable entry into force of the PPRA 2018, June 2018 appears likely.
Chapter 4

BELGIUM

Frank Judo, Aurélien Vandeburie, Stijn Maeyaert, Kenan Schatten and Klaas Goethals

I INTRODUCTION

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

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

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

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

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

a publication obligations (in principle, contracts below the threshold levels are only to be announced in an annex of the Belgian Official Gazette);²
b the extended possibility to apply the negotiated procedure without prior publication (which is possible for all contracts with a value up to €144,000,³ and for research and development services, placement services and transport support services up to €221,000); and
c the standstill period, which does not apply to contracts below the European threshold levels, except for works contracts of half this estimated value.⁴

1 Frank Judo is a partner, Aurélien Vandeburie is a counsel, Stijn Maeyaert is an associate, and Kenan Schatten and Klaas Goethals are junior associates at Liedekerke.
2 Moniteur belge/Belgisch Staatsblad.
3 €443,000 in the utilities sector.
4 €2,774,000.
Directive 2009/81/EC on defence and security procurement has been transposed into national law through the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and through two Royal Decrees implementing this Act. This legislation entered into force during the course of 2012.

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

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

II YEAR IN REVIEW

From a legislative perspective, 2017 was an important year, as the replacement of the regulatory framework on public procurement could finally be completed. The new procurement legislation transposes the 2014 European Directives and entered into force on 30 June 2017. Several new concepts were introduced, such as life-cycle costing, the European single procurement document and the innovation partnership. Consistent with the Directive, a ‘self-cleaning mechanism’ was put in place, which gives candidates the opportunity to demonstrate their reliability, despite the existence of an exclusion ground. Generally, it appears that, notwithstanding a few minor differences, the new Belgian procurement legislation is very similar to its European counterpart.

Further, in order to comply with European law, Belgium recently adapted thresholds that determine whether a procurement contract needs to be announced at the European level. As of 1 January 2018, these thresholds are fixed at €5.548 million for works and €221,000 for services and supplies (€144,000 for federal contracting authorities). The thresholds have other (indirect) consequences as well, since they determine whether the negotiated procedures may be applied or if a contract can be modified during its performance (de minimis).

At the federal level, a cooperation mechanism was created that facilitates jointly organised procurement contracts for supplies and services. For each of these contracts, one of the participating contracting authorities will be solely responsible to administer all the aspects of the award phase, whereas afterwards every contracting authority is individually responsible for the performance phase.

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5 Royal Decree of 23 January 2012 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and Royal Decree of 24 January 2012 on the entry into force of the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and on the rules on motivation, information and legal remedies for these contracts.
7 Ministerial Decree of 22 December 2017, modifying the European publication thresholds concerning public procurement.
8 Royal Decree of 22 December 2017, concerning the federal centralised procurement contracts.
supposed to monitor the performance of the supplies or services it ordered in the context of the agreement. Moreover, a full-fledged electronic platform will be created for these agreements, which will be used throughout both the award and the execution phase. This should especially benefit small and medium-sized enterprises.

In terms of case law, 2017 was significantly less eventful than previous years. Nevertheless, some decisions are worth mentioning.

The Council of State for instance refused to grant direct effect to the provisions of Directive 2014/24/EU on self-cleaning. A contracting authority had excluded one of the candidates from the tender process without giving the concerned undertaking the opportunity to prove its reliability. It estimated that this was not necessary because the 2014 Directive had not yet been implemented, even if the transposition deadline had already expired, since the provisions of the Directive on self-cleaning are not unconditional and sufficiently precise. The Council of State followed this reasoning.9

In another case, concerning the supply of beverages, the Council of State ruled that a contracting authority may not require beers of a specific brand, as this entails that only one brewery will be able to meet the tender requirements. According to the Council of State, the contracting authority should at least have examined whether the products offered by the other candidates could be qualified as equivalent to the ones required in the tender documents.10

Further, it was decided that a contracting authority is obliged to send all requests to tenderers to justify their potentially abnormal prices by registered letter. If that is not the case, and such a request is sent by normal letter, the contracting authority may not refuse the tender in question for the sole reason that the prices are abnormal.11

The Council of State also estimated that the rules on public procurement apply to an agreement that grants rights in rem on land of a public authority to a (private) contractor, if this agreement obliges the contractor to construct a building project that has to meet specific and detailed requirements imposed by the public authority. In this regard, it has to be verified whether the public authority has a decisive influence on both the design and the realisation of the project. According to the Council of State, it is irrelevant that the project can be qualified as a public–private partnership, since this qualification does not exclude the (compulsory) application of the public procurement legislation.12

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

The Belgian legislature has opted for a double approach: first of all, a non-exhaustive list of bodies and categories of bodies governed by public law is set out in the Act (including the state, regions, communities, provinces, municipalities and associations formed by one or

11 Council of State, 7 March 2017, No. 237.572, BVBA A.A.
more of these entities). Second, consistent with the European directives, public procurement rules are applicable to a category of bodies ‘governed by public law’, which are defined based on a set of cumulative criteria in the Act.

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

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

### ii Regulated contracts

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

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

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

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

Land agreements are not subject to public procurement obligations. However, as there are no specific rules, obligations regarding the award of land agreements can be said to correspond to the basic standards regarding advertising and contract award embodied in the European Commission Communicative Interpretation on the Community Law applicable to contract awards not subject to the provisions of the Public Procurement Directives (2006/C 179/02).13 Other principles of administrative law to be taken into account in this regard are the requirement of due care and the principle that decisions have to be duly motivated.

Neither are ‘in-house’ contracts governed by the 2016 public procurement obligations. The new rules have indeed incorporated the criteria established by the CJEU, and exclude from their application contracts: in which the contractors are monitored by the contracting authority in the same way as an entity belonging to the contracting authority itself; where more than 80 per cent of the activities of the legal person are performed for the contracting authority or another legal person monitored by the contracting authority; and in which the

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monitored legal person is not financed, even partly, by private funds, unless such private funds do not allow any significant influence on the legal person. All of the conditions must be cumulatively met to exclude the obligation of compliance with the 2016 rules.

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

### IV SPECIAL CONTRACTUAL FORMS

#### i Framework agreements and central purchasing

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

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

#### ii Joint ventures

There are no specific rules in Belgium regarding the establishment of contracts that initiate public–public joint ventures. As a general principle, these contracts will fall under the scope of the public procurement regulation if their actual objective is to provide works, supplies or services within the meaning of the latter regulation.¹⁵ This is, however, not the case if the in-house criteria are fulfilled.

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

### V THE BIDDING PROCESS

#### i Notice

All contracts, whatever their value, must be advertised in advance in the Belgian Public Tender bulletin (BDA), which is an annex to the Belgian State Gazette. Since 2011, the BDA

¹⁴ Court of Justice, 19 June 2008, No. C-454/06, Pressetext Nachrichtenagentur.

has been integrated in the electronic platform e-Notification in order to facilitate electronic purchasing. Contracts meeting the European threshold levels are also to be published in the Official Journal, with an exception made for contracts awarded on the basis of a negotiated procedure without prior publication.

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

ii Procedures

Belgian legislation distinguishes between the following types of procurement procedures:

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

The tendering authority can in principle freely choose between the open and the restricted procedure. The grounds for use of the competitive procedure with negotiation, the competitive dialogue and the innovation partnership are the same as the grounds stipulated in the European directives. Moreover, the negotiated procedure without prior publication can be applied for services and supplies with a value up to €144,000, and for research and development services, placement services and transport support services up to €221,000.

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

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

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

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16 https://enot.publicprocurement.be.
17 These contracts are in principle outside the scope of the Public Procurement Directives.
18 €443,000 in the utilities sector.
Electronic purchasing has become quite successful in Belgium. There is one official channel for Belgian public procurement contracts: the website e-notification.\(^1^9\) Companies can find all Belgian public procurement notices on this platform.

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

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

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

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

### iii Amending bids

After the closing date for submission of tenders in the open or restricted procedures, it is no longer possible to amend the bids. The tendering authority may only contact tenderers to ask for clarifications or to complete the offer, as long as the content of the offer itself is not modified.\(^2^0\)

During the competitive procedure with negotiation and the negotiated procedure without prior publication, the offers may be amended, as long as the object of the contract remains the same, and the principles of transparency and equal treatment are respected.\(^2^1\) There are no specific legal provisions concerning changes at the preferred bidder stage. However,
it is generally accepted that ‘substantial’ changes to the contract are no longer possible at that stage, taking into account the aforementioned principles. The tendering authority has a margin of discretion to decide whether changes are to be considered substantial.

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

VI ELIGIBILITY

i Qualification to bid

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

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

ii ESPD

The European Single Procurement Document (ESPD) is a standard form issued by the European Commission, according to which candidates demonstrate that they do not present any grounds for exclusion and they meet the selection criteria established by the contracting authority. It may be necessary for the candidate to bring additional proof. Being considered a common and preliminary proof, it largely facilitates the procedures and access to public procurements throughout Member States.

iii Conflicts of interest

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

In accordance with the case law of the Court of Justice, a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services can only be excluded from a tender if he or she has been hand, allows a tenderer who merely deposited an unsigned offer and, therefore, strictly speaking missed the deadline, to ‘regularise’ the situation afterwards by uploading a signed copy so that he or she can still join the negotiated procedure (Council of State, 10 December 2013, No. 225,775, N.V. Pit Antwerpen).
given the opportunity to prove that, in the circumstances of the case, the experience that he or she has acquired in the course of the research, experiments or studies is not a reason for distorting competition.

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

VII AWARD

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

These award criteria must be notified in advance.

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

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

According to the established case law of the Council of State, contracting authorities are not currently supposed to disclose information about the evaluation methodology. This was recently confirmed by a preliminary ruling of the European Court of Justice, as long as the determination of the method of evaluation by the tendering authority is not possible for demonstrable reasons before the opening of the tenders (see above).

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

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

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

Social and environmental considerations can be taken into account under strict conditions. Environmental considerations can in principle only be applied as award criteria
insofar as they are related to the subject matter of the contract. The Brussels-Capital Region has adopted a Regional Act\(^{22}\) in this field. This example was followed by the federal government in 2014, when the recommendation of 16 May 2014 gave very specific guidelines to federal authorities on how to implement social and environmental considerations. A similar recommendation has been adopted for the Walloon region.

VIII INFORMATION FLOW

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

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

\(a\) every non-selected candidate about the reasons for the non-selection, by sending a copy of the relevant part of the motivated decision;

\(b\) every tenderer with an irregular or unacceptable tender about the reasons for the exclusion of their offer, by sending a copy of the relevant part of the motivated decision; and

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

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

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

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

\(^{22}\) Regional Act of 8 May 2014 concerning the use of social considerations in public procurement.
CHALLENGING AWARDS

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

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

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

Procedures

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

Legal proceedings may be installed by any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

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

The following legal proceedings are possible.

Suspension and annulment procedure

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

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

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

A judiciary decision suspending the effects of a decision can only be temporary. It will only be applicable until the competent judge renders its decision on the annulment request. Such annulment procedure has to be introduced within a period of 60 days following the

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

24 If the competent judge is a civil judge, the standstill period is limited to proceedings in the first instance.
day of the notification of the decision. In practice, tendering authorities will often withdraw the tender decision after it has been suspended, in order for the annulment procedure to lose its purpose.

**Claim for damages**

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

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

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

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

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

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

**ii Grounds for challenge**

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

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

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

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

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

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

In accordance with Directive 2007/66/EC, the judge may also decide to reject the request if he or she decides, after having examined all relevant aspects, that overriding reasons relating to a general interest require the effects of the contract to be maintained. In the latter case, the judge may impose other penalties. In accordance with the Directive, these alternative penalties consist either in the imposition of fines on the contracting entity, or in the shortening of the duration of the contract. The fine is limited to 10 per cent of the contract value (VAT excluded).25

X OUTLOOK

With the 2014 Directives26 a new era of public procurement legislation began. The Belgian authorities have fully implemented these directives; the Public Procurement Act, the Concessions Act and the correlative Royal Decrees have now all been adopted. As all new tenders (published after 30 June 2017) are automatically subject to this new legislation, the coming years should be rich in terms of case law.

Special attention should be given to the major changes and the new concepts implemented through the new legislation, such as the life-cycle costing and the self-cleaning mechanism, which will surely give rise to many interesting questions.

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25 This amount is reduced to 5 per cent of the contract value in case of a concession (VAT excluded).
Chapter 5

BRAZIL

Marcos Ludwig, Mauro Hiane de Moura and Filipe Scherer Oliveira

I INTRODUCTION

The Brazilian Constitution establishes that, as a rule, all purchases and sales made and all services and works hired by the public administration shall be preceded by a public bid. Federal Law No. 8,666/1993, which must be observed by all three branches of government, sets forth the general framework applicable to all public bids in the country. The Constitution also establishes principles by which the Brazilian public administration is bound: legality, impersonality, morality, publicity and efficiency. Federal Law No. 8,666/1993 added to these the concepts of ‘strict adherence to the request for proposal’ (RFP), and ‘objective judgement’ as principles that must be observed in public bids. As a consequence, the winning bidder is not the only entity legally attached to the terms and conditions set forth in the RFP: the administration is also forbidden to deviate from its terms throughout the tender process and the subsequent execution of the contract awarded thereby.

Different statutes regulate specific public bids and contracts. Federal Law No. 8,987/1995, for instance, sets the general framework applicable to public services and public works concessions and permissions. As concessions usually involve long-term contracts, and as public services are of utmost relevance for the Brazilian economy and for the well-being of its citizens, this statute continues to be of high importance in the local legal framework. In 2004, Federal Law No. 11,079/2004 introduced public–private partnerships (PPPs) into the Brazilian legal system; in their national version, they roughly consist of (1) a public services or public works concession in which the compensation to be paid to the private party will result from a combination between tariffs charged from citizens and direct payments made by the administration; or (2) a long-term contract for the rendering of services to the administration, coupled with the execution of a construction project or the supply of goods.

In 2011, Congress passed Federal Law No. 12,462/2011, which created the Differentiated Government Procurement Regime (RDC). This regime was created in order to expedite the bidding procedures for the infrastructure works necessary for Brazil to host the 2014 FIFA World Cup and the 2016 Olympic Games in Rio de Janeiro. Subsequently, however, such statute was repeatedly amended to allow the regime to be applied to other public projects, such as:

a infrastructure works included in the Growth Acceleration Programme (PAC) created by the federal government;

b works and engineering services related to public healthcare;

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works and engineering services for the construction and reform of criminal facilities; 
actions in public safety; 
works and engineering services related to urban mobility and logistics infrastructure; and 
actions executed by entities dedicated to science, technology and innovation.

In 2016, the Bill of the State-Owned Companies (Federal Law No. 13,303/2016) created a specific framework for public bids held by such entities that is supposed to be more flexible than the general rules on the basis that state-owned companies compete in the market. In the same year, a new governmental programme called the Investment Partnership Programme (PPI) was launched to coordinate the most important infrastructure projects at the national level, and to serve as a one-stop shop for investors and other interested private parties. The PPI comprises a council, headed by the President himself and formed by central and sectoral line ministries, alongside presidents of federal banks (BNDES, Caixa and Banco do Brasil); and a Secretariat, staffed to exert advisory functions to the council, with support from the state-owned company EPL.

II YEAR IN REVIEW

In the wake of the Operation Car Wash investigation and the elements it has made public, there have been attempts to enhance public governance and improve public tender processes. Several public enterprises and mixed-economy companies have edited internal regulations, adapting their purchase procedures to Federal Law No. 13,303/2016. Moreover, bills aiming at producing a general overhaul in public tender and contracting regulations have progressed in Congress – most notably Bill No. 6,814/2017, which, after having been approved by the Senate, is now under scrutiny at the Chamber of Representatives. If converted into law, it will supersede, among others, Law Nos. 8,666/1993 and 12,462/2011.

Also relevant are ongoing attempts to correct concessions awarded during the previous administration, which, due to a combination between incorrect modelling and supervening events, were rendered unprofitable. Under Federal Law No. 8,987/1995, the federal government would be required to make such contracts lapse before it could award these projects to a different party – a burdensome and contentious procedure. In order to enable them to be resumed as soon as possible, Provisional Measure No. 752/2016 allowed said concessions to be ‘returned’ to the federal administration in order to be subsequently recontracted with a different private party. In 2017, this Provisional Measure was converted into Federal Law No. 13,448/2017. It is still unclear, though, whether the Presidency will have to issue a decree before such law can produce effects or not.

Probably the most relevant judicial decision involving public contracts was rendered by the Supreme Federal Court in the Extraordinary Appeal No. 760,931. A divided Court confirmed that, under Federal Law No. 8,666/1993, the administration may not be held jointly or secondarily liable for labour law violations committed by its contracted parties. In obiter dicta, it was suggested that the administration could be held secondarily liable only if it could be clearly demonstrated that it had been negligent in the exercise of its oversight powers. Such negligence, however, could not be presumed, and the burden of demonstrating that no failure had occurred could not be automatically shifted to the administration upon mere request: interested parties would bear the burden of producing such evidence.
III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The Brazilian Constitution states that entities directly or indirectly controlled by the federal, state or municipal governments must comply with the applicable government procurement rules. In other words, federal, state and municipal governments, autonomous government entities, public foundations, regulatory agencies, state-owned companies, and mixed capital companies controlled by the government are subject to those rules.

States and municipalities are allowed to pass their own legislation regarding public bids as long as they do not deviate from certain parts of the regime set forth in Federal Law No. 8,666/1993 (or in other laws regarding public bids passed by the National Congress).

In an exemption to the general rule, Petrobras, the state-owned oil company, adopted a simplified bidding proceeding under the Decree 2,745/1998. Although the simplified rules follow the general ideas structured in Federal Law No. 8,666/1993, Decree 2,745/1998 has been heavily criticised over the years, especially following the Operation Car Wash investigation. Decree 2,745/1998 enlarges the possibility of direct hiring, which has been suggested as one of the catalysts in Petrobras's involvement in corruption. Because of this, as of mid 2018, Petrobras and other state-owned enterprises shall follow the rules set forth in the State-Owned Enterprises Bill and create a new internal procedure for the purposes of procuring goods and services. Petrobras complied with this command in October 2017.

ii Regulated contracts

In Brazil, as a general rule, any contract involving a public entity (entities directly or indirectly controlled by the federal, state or municipal governments), such as contracts for supply of goods, services, works, transfer of lands, among others, must be regulated by government procurement rules and subject to a prior public bid and its principles.

However, Federal Law No. 8,666/1993 sets forth some exceptional and specific cases in which the prior public bid may be deemed unnecessary. For example, the competitive procedure can be dismissed in cases of extreme urgency, war or state of emergency, failed prior procurement, services or products estimated at less than US$5,000, providing materials to army forces, transference of real estate between public entities, among others. In addition, the competition can be considered unfeasible and, as a result, unnecessary, when the nature of the product or service required is singular and only one supplier has the expertise needed by the public administration. In such cases, the public entity must justify the reasons why the public bid is unnecessary, appointing the situation of emergency, the singularity of the object of the contract, the study of the market, etc.

The transference of the contract to third parties is only accepted when the RFP and the contract itself expressly allows so, and usually it is subject to the prior consent of the public entity, who will check if the new party meets the requirements of the RFP and the contracts. Therefore, any merger, spin-off, partial or total subcontracting, association with other company, total or partial assignment or transfer of the contractual object that is not previously authorised in the RFP or the contract can lead to its termination, according to Brazilian law.
IV  SPECIAL CONTRACTUAL FORMS

i  Framework agreements and central purchasing

Central purchasing is still a relatively new concept in Brazil and has only been implemented in a few contexts. For example, aside from other state-level initiatives, in 2014 a Central Purchasing Department was created under the Ministry of Planning for common purchases at the federal level, but its activities have so far been limited.

A more widely used framework relevant to common purchases is the reverse auction and, especially, its electronic version. These procedures were created in 2002 and 2005 and have been paramount ever since. Among the reasons for their large acceptance was the possibility to use the online system ‘Portal de Compras Governamentais’ (ComprasNet), and the inversion of phases so that only the winning bidder would have its qualification documents analysed. The use of this online system is not mandatory, but many bidding authorities have preferred it for its agility and convenience.

Further, when using such online system, providers file their common qualification evidence (legal and tax regularities and financial economic requirements) within the Unified System for the Registry of Providers (SICAF), dispensing them to supply the same documentation again in each new bid. Bidding authorities at the federal level are obliged to previously consult SICAF before purchasing common goods and services. Besides SICAF, other bodies and entities can maintain complementary supplier registries, such as the ‘CADTEC’ within the Ministry of Defence.

ii  Joint ventures

When allowed by the RFP, a group of bidders can participate jointly in a bid. The common structure required for this participation is the consortium or the commitment to create a consortium, and if the group of bidders win, they are required to either create a special purpose company (SPE) or a consortium before signing the public contract.

The bidders are bound by the rules on public contracts since they provide a bid bond or offer a proposal to a given item of the RFP, and penalties can apply if they refuse to participate in the bid after such actions. The consortium can provide jointly the technical qualification documents, and must maintain *pro rata* the minimum net worth required in the RFP (which can be up to 30 per cent higher for consortia). Further specific rules applying to the SPE or the consortium are set out in each RFP, including provisions about subcontracting with a consortium member.

PPPs are a type of concession, in Brazil, and require a competitive tender for the selection of the private partner. However, the RFP may allow the winning bidder to contract with third parties, in which case such contract may require the prior consent from the bidding authority, but by default does not require a new tendering process. In very specific cases, the RFP may also allow the use of qualification evidences from this contracted party.

V  THE BIDDING PROCESS

i  Notice

The public authority must publish the bidding notice as an RFP in the Official Gazette. In the RFP, the public authority defines all the conditions for the bidders’ participation, the bidding and contracting time frames, acts and procedures adopted in the course of the
bidding proceeding and, eventually, the guarantees required to the bidders. In addition, the
RFP must contain a draft form of the intended public contract, designs and other forms
relevant to the RFP or the future public contract.

Moreover, the public authority must define the tender model adopted for the public
bidding in the RFP. Federal Law No. 8,666/1993 allows the following models:

a. competitive bidding (most commonly used);
b. price quotations (preferred for routine purchases using a pre-selected list of providers);
c. invitation to bid (for lower value purchases);
d. bidding contests (for technical, scientific or artistic works); and

e. auction (used for selling of goods).

With regard to the auction, Federal Law No. 10,520/2002 prescribes simplified conditions to
procurement for the purchase of ordinary goods and services by the public authority (Federal
Decree 5,450/2005 also prescribes conditions to the electronic version of auctions).

Pursuant to the principle of the entailment to the bidding notice, which is one of the
most important principles prescribed in Federal Law No. 8,666/1993, the conditions set
forth in the RFP bind the public authority and the bidders during the bidding proceeding
and the performance of the public contract.

ii Procedures

Following the publishing of the RFP, the bidders must present their qualification
documentation and commercial (and technical, if applicable) proposals in the form and date
prescribed in the RFP’s conditions. The qualification documentation serves to evidence the
due legal existence and the financial good standing of the bidders and to attest that the
bidders comply with the conditions and requirements established by the public authority in
the RFP to perform the future public contract. Foreign bidders, when allowed to participate,
must present documentation from their jurisdictions, observing the rules related to the public
appositive prescribed in Hague Convention (in force in Brazil since August 2016).

Through the ordinary procedure prescribed in Federal Law No. 8,666/1993, the analysis
of the bidders’ qualification takes place before the opening of the commercial proposals.
The public authority will rank only the qualified proposals under the RFP’s conditions, and
adjudicate the winning bid in accordance with the criteria chosen for the bidding proceedings,
which may be best price; best proposal in technical terms; or a combination of best price and
best technical proposal.

In addition to the procedure established in Federal Law No. 8,666/1993, there are
some special procedure forms set forth in specific legislation. For instance, in the case of
reverse auctions, after the presentation of the relevant documentation by the bidders, the
public authority should initiate a phase of oral bidding or an electronic auction with the
purpose of increasing the value of the proposals offered by the bidders. The main difference
in that case is the inversion of phases of the bidding proceeding, which means that the public
authority will analyse the qualification documentation of the winning bidder.

It is worth mentioning that the trend to simplify the bidding procedure (such as the
inversion of phases prescribed to reverse auctions) has been incorporated in the Brazilian
public procurement framework. Specific legislation on the regulatory agencies for certain
market sectors (such as telecommunication and oil and gas) already prescribed the adoption
of simplified procedures to the bidding proceedings that were not concerned with the hiring
of civil engineering works. In addition, the recent Federal Law No. 13,303/2016 established that all state-owned companies should adopt simplified bidding rules in their internal proceedings.

iii Amending bids
In accordance with the ordinary procedure, after the presentation of the relevant documents to the public authority, bidders are not able to change or amend their qualification documents or commercial proposals.

VI ELIGIBILITY
i Qualification to bid
The main qualification requirements to be met by each bidder include legal, tax and labour regularity, and technical and financial requirements:

a Legal regularity: constitution documents and power of attorney or corporate resolution appointing a legal representative with powers to represent the bidder (additional requirements may be set, such as a corporate structure diagram for groups of bidders and power of attorney to a legal representative in Brazil for foreign bidders).

b Tax and labour regularity: certificates of compliance issued by tax authorities within the federal, state and municipal levels, by labour guarantor funds (FGTS) and by labour judicial courts.

c Technical requirements: companies’ registration with the competent association, if any, and evidence that the bidder is fit to perform the activities in conformity with the characteristics, quantities and deadlines of the bid’s object.

d Financial requirements: certificates that the company is not insolvent or under judicial restructuring proceedings, good financial conditions according to current financial statements and overall liquidity ratios, and minimum net worth (which may be increased by 30 per cent in the case of consortia).

These requirements must be met in the exact form established in the RFP. Public bidding is a very strict and formal procedure in Brazil, which may give cause to disqualification due to minor defects in the documentation. The Brazilian Administrative Law entitles bidders to file administrative and judicial defences and appeals to preserve their rights, such as in cases of wrongful disqualification of proposals and non-compliance with the RFP with applicable legal requirements.

ii Conflicts of interest
The RFP can provide requirements to avoid conflicts of interest, such as, for example, the prohibition on bidders hiring staff from the bidding authorities. The RFP may also have provisions for the bidders with requirements or limitations on contracting with third parties.

Further, Federal Law No. 8,666/1993 establishes that the author of a basic or executive project cannot participate in the bids to execute such project or to provide goods necessary to the project. The Law also prohibits public servants who work for the administrative entity promoting the RFP to be bidders.

Additionally, in some states, such as São Paulo, private individuals can be allowed an exclusive authorisation to perform previous studies and project planning for a PPP, within the expression of interest (EOI) procedure. In such cases, when an exclusive authorisation
is granted, the private individual authorised may not participate in the future bidding, nor can the future bidders be affiliated to such party, to avoid conflicts of interest. These limitations do not apply to EOI within the federal level, when authorisations are granted in a non-exclusive manner.

iii  Foreign suppliers

When allowed by the RFP to participate directly, foreign entities functioning in the country should provide an authorisation decree duly registered with the competent body according to the company's activity; and foreign entities not functioning in the country must establish a legal representative in Brazil with express powers to be served and to respond administratively and judicially.

In such cases, equivalent qualification evidence available in the relevant jurisdiction should be provided and all foreign documents must be certified by a notary public as according to the originals and, if signed, must have the signatures certified by a notary public, and the notarisations must be legalised with the Brazilian consulate incumbent in the jurisdiction. Legalisation of documents is not needed in the event the acquirer is from a country party to the Apostille Convention. Further, documents must be translated into Portuguese by a sworn translator in Brazil.

When submitting documents that are equivalent to Brazilian documents and in case there are no equivalent documents, the foreign entity must obtain a statement from the applicable consulate declaring that the documents are equivalent to Brazilian documents or that there are no equivalent documents, as the case may be.

If the foreign entity decides to set up a local subsidiary to participate in the bid, attention must be given to the requirements of technical qualification, since the RFP can request evidence of the company's or its employees' track record. When consortia and SPEs are allowed, these requisites may be supplied by a Brazilian partner.

Depending on the activity, there may be limitations or restrictions for foreign suppliers in areas such as nuclear energy; newspapers, magazines and other publications; television and radio networks; health services; business on frontier zones and rural lands; post office and telegraph services; domestic flight concessions and the aerospace industry.

VII  AWARD

i  Evaluating tenders

For competitive biddings, only the proposals presented by the bidders qualifying under the RFP should be ranked, and the winning bid should be adjudicated according to the criteria chosen for the public bid described in the RFP, which may be one of the following:

a  best price;
b  best proposal in technical terms; or
c  a combination of best price and best technical proposal.

For reverse auctions, following the presentation of the initial proposals by the bidders, an oral bidding or an electronic auction takes place, in order to allow the bidders to improve their bid. The main difference of this modality is the inversion of the phases of qualification and competition described above, with only the qualification documentation of the winning bidder being analysed.
Under Federal Law No. 8,987/1995, which establishes the regime for concessions and permissions of certain public services, the possible criteria may be one of the following:

- lowest tariff;
- highest offer;
- best technical proposal, with the price established in the RFP;
- lowest tariff combined with the best technical proposal;
- highest offer combined with the best technical proposal;
- highest offer after the technical proposal qualification; or
- a combination of two of the lowest tariff, highest offer and highest offer after the technical proposal qualification.

Federal Law No. 11,079/2004, which created the PPP, sets as awarding criteria the lowest tariff with predetermined government compensation or the lowest government compensation with a predetermined tariff.

### National interest and public policy considerations

As provided for by Law No. 12,349/2010, national products and services can be preferred in public biddings in certain cases, such as those related to science and IT systems considered strategic for the federal government. Such preference must be disregarded whenever the price of the Brazilian product or service exceeds the price of the foreign product or service by at least 25 per cent.

Under Complementary Law No. 123/2006, micro-enterprises and small businesses may also be given preference in certain bids, when the winning bid is up to 10 per cent better than their proposals. In these cases, such companies must be given the opportunity to present a new bid and improve their price.

### INFORMATION FLOW

The Brazilian public authority must carry out the bidding proceeding through an administrative proceeding that should observe the guiding principle of transparency. This means that the public authority should disclose all available information not only to the bidders, but also to the public in general. That is why the public authority must publish the RFP in the Official Gazette. As a rule, all bidders are informed of the decisions of the administration and of the results of an RFP at the same time, so there is no asymmetry of information. Brazil also has an Information Access Law (Federal Law No. 12,527/2011), which allows any person to solicit the access of documents and general information with the administration.

Once the public authority publishes the RFP, the interested parties can raise questions or challenge the conditions of the bidding procedure. Additionally, Federal Law No. 8,666/1993 sets forth that any citizen may file an opposition to the RFP in case of irregularities or any violation of the law.

### CHALLENGING AWARDS

All formal decisions issued by the authority in charge of the bidding process may be challenged administratively and judicially in Brazil.
It is common for some level of litigation to occur in public bids. Bidders commonly file administrative appeals and (less frequently, but still commonly) judicial lawsuits in order to challenge bids’ final or partial results (such as decisions that find certain bidders qualified to continue in the bidding process).

The chances of success of a challenge to any given decision will obviously depend on the quality of the facts and argument of law. Administrative authorities are usually more conservative in their interpretation of the law, so they tend to adhere more to literal interpretations than the judiciary.

Litigation in public bids is one of the most common reasons why bidding processes are stalled, sometimes for long periods, as injunctions may be granted to freeze the proceedings until the judiciary resolves the case. How long a dispute will take to be resolved varies dramatically depending on the complexity of the case and whether the challenge was brought administratively or judicially (administrative proceedings are usually very quick and may be resolved in a matter of few days, while judicial proceedings may take several months).

Disputing an award administratively will typically not involve the payment of fees. Also, administrative challenges do not need to be written by licensed attorneys, and this may contribute to keeping costs low. On the other hand, judicial litigation does involve payment of fees (which are usually calculated considering the amount in dispute), require the involvement of a licensed attorney and, in the event the plaintiff loses the dispute, he or she may have to pay attorneys’ fees to the opposing party’s counsel.

i Procedures
Federal Law No. 8,666/1993 sets the general framework for administrative appeals in bidding processes; it states that a bidder may file an administrative appeal to a higher administrative authority within five days from the date in which a decision was officially rendered. As a default, only challenges to decisions that qualify or disqualify bidders to continue in the contest and that decide the winner of the bid entail the suspension of the proceeding until the appeal is decided; however, the competent authority may determine the suspension of the proceeding in other cases if it considers it to be in the public interest. The RFP usually defines who is the competent authority to review an administrative appeal.

Judicial challenges are commonly brought by bidders in the form of a writ of mandamus, in which the bidder (plaintiff) alleges that there was a clear violation of a given right that may be demonstrated by documental evidence only. Parties usually prefer the writ of mandamus because it has an expedited procedure compared to the other types of civil lawsuits that can also be filed in more complex cases. A writ of mandamus can be filed up to 120 days after the date on which a party discovered the violation of the right that will be litigated.

Judicial review of administrative decisions can also be initiated by any citizen (in the form of a ‘popular lawsuit’, a special type of lawsuit provided for in Federal Law No. 4,717/1965 that allows any citizen to request the nullity of acts that cause harm to the Public Administration) and by the public prosecutors.

Audit courts also review awards and performance of contracts executed by the Public Administration and may determine the suspension of a given act or contract (which must be subsequently decided by the legislative branch). Audit courts are inspecting bodies that assist the legislative branch in controlling the acts taken by the Public Administration that entail expenditures of public money.
ii Grounds for challenge
Decisions in public bids may be challenged for violations of the rules set forth in the RFP or violations of any applicable laws, or both.

iii Remedies
Courts have wide discretion in establishing the applicable remedies in the course of litigation. For instance, they may grant injunctions suspending acts or allowing acts to occur, and annul acts or decisions taken by the administration in the course of the public bid.

Judicial review of administrative acts, however, is typically limited to the analysis of the legality of such acts. Courts are not allowed to second-guess decisions regarding discretionary administrative acts with regard to their convenience or efficiency, but they may scrutinise whether or not the administration has abused its discretion.

X OUTLOOK
Following severe political and economic turbulence in 2016, which recovered slightly in 2017, 2018 is a year of great expectations in Brazil. The general consensus is that the economy could grow by 3 per cent with inflation under control and stable interest rates. This optimism is largely owing to the federal government’s continued push for liberal measures (including substantial modifications to labour laws and simplification of tax laws) in the hope of increasing the country’s economic agility. Because of this policy, the wave of high-profile bids and concessions inaugurated last year is expected to continue throughout 2018; for example, Eletrobras, the state-owned energy giant responsible for a third of Brazilian energy, is expected to be privatised.

Moreover, the federal government has elected, as one of its 15 priority projects for 2018, a major reform in the public tender law in order to simplify and expedite bidding procedures.

2018 is also an election year for the highest political offices in the country and, consequently, there is high pressure for infrastructure works to be concluded before the elections. This contributes to an increase in the volume of business in this sector.

At the state level, several states (including some with the biggest political and economic relevance, such as Rio de Janeiro and Rio Grande do Sul) are in financial dire straits and are formulating plans that involve selling their last state-owned companies in order to relieve their debts.
Chapter 6

C ANADA

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I  INTRODUCTION

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

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

Different provinces have taken alternative approaches to procurement. Most provinces have enacted little legislation respecting government procurement and leave it largely up to public agencies to develop internal policies by which public purchasing will take place. Some provinces have enacted more comprehensive legislation. For instance, Quebec has enacted an Act respecting contracting by public bodies that, along with its regulations, prescribes specific
rules that apply to public purchasing by all public agencies in Quebec. In the same vein but to a lesser extent, Nova Scotia, New Brunswick, Saskatchewan, and Newfoundland and Labrador have enacted government procurement legislation of broad provincial application. Ontario has taken something of a hybrid approach. The Broader Public Sector Accountability Act 20105 authorises an executive committee of Ontario to issue directives governing public procurement, which resulted in the Broader Public Sector Procurement Directive being issued in 2011. The Directive does not have the force of law, but nevertheless applies as a general best practice to all designated public agencies in Ontario. The international trade agreements to which Canada is a signatory do not have the force of law in the provinces. That said, the provinces have entered into domestic treaties among themselves; these treaties are binding and subject to dispute resolution processes. As is the case federally, each province has its own body of case law regarding government procurement.

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

II YEAR IN REVIEW

i CETA

In October 2016, the Comprehensive Economic and Trade Agreement (CETA), a proposed trade agreement between Canada and the European Union, was signed by both parties.6 In February 2017, CETA was approved by the European Parliament and, in May 2017, legislation to implement CETA in Canada was granted royal assent.7 On 21 September 2017,

5 SO 2010, c 25.
Canada

CETA entered into force provisionally.\(^8\) As such, most of the agreement now applies, with very few exceptions. CETA will be fully implemented once all EU Member States ratify the deal in accordance with their respective domestic constitutional requirements.\(^9\)

CETA affects virtually every sector of the economy on both sides of the Atlantic, including the government procurement sector. The Ministry of International Affairs has previously stated that ‘access to Canadian government procurement was one of the main reasons, if not the main reason, that the EU agreed to negotiate a trade agreement with Canada’.\(^10\) Under CETA, Canada and the EU have committed to open up procurement to a wide range of government entities and to ensure that their respective procurement activities are conducted in a non-discriminatory, impartial and transparent manner. In Canada, CETA opens up procurement at the federal, provincial and municipal levels. CETA likewise opens up procurement at the central, regional and local level in the EU. Under CETA, Canada has also committed to develop a single electronic point of access (online portal) to provide EU suppliers with access to information about procurement opportunities in Canada (similar to the online portal already maintained by the EU).

\[ \text{ii} \quad \text{CPTPP} \]

In February 2016, 12 nations, including Canada and the United States, signed the Trans-Pacific Partnership (TPP), a free trade agreement.\(^11\) On 30 January 2017, the United States notified the TPP signatories of its intention to withdraw from the TPP, effectively ending the agreement as it then existed.\(^12\) The remaining TPP signatories participated in discussions for a new agreement and, on 8 March 2018, they signed the finalised Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).\(^13\) Following this, each CPTPP signatory will now undertake its own domestic ratification procedures.\(^14\)

\[ \begin{align*}
\text{8} & \quad \text{European Commission, ‘EU-Canada trade agreement enters into force’, 20 September 2017: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723 (last accessed 28 February 2018).} \\
\text{9} & \quad \text{Ibid.} \\
\text{11} & \quad \text{Global Affairs Canada, ‘Trans-Pacific Partnership (TPP): www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ppp-ppt/text-texte/toc-tdm.aspx?lang=eng (last updated 20 December 2016; last accessed 28 February 2018). The 12 parties to the TPP were Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.} \\
\text{12} & \quad \text{Office of the United States Trade Representative, ‘The United States Officially Withdraws from the Trans-Pacific Partnership’, January 2017: www.usitc.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP (last accessed 28 February 2018). Without the United States, the TPP could not enter into force as it required ratification by at least six states that together have a GDP of more than 85 per cent of the GDP of all signatories.} \\
\text{13} & \quad \text{The CPTPP is currently undergoing translation and legal review, after which the text of the agreement will be made public.} \\
\end{align*} \]
The CPTPP is expected to incorporate the provisions of the TPP, with the exception of a limited set of provisions that will be suspended. The government procurement provisions of the TPP are expected to remain largely unchanged in the CPTPP; therefore, the CPTPP is expected to provide parties with improved access to each other’s government procurement markets. The government procurement provisions of the TPP include core commitments relating to national treatment and non-discrimination, access to information about procurement opportunities, and fair and transparent procurement procedures.

iii CFTA
On 1 July 2017, the Canadian Free Trade Agreement (CFTA) entered into force, replacing the Agreement of Internal Trade that had governed interprovincial trade since 1995. The CFTA introduces rules to make it easier and less costly for companies to sell goods and services across Canada. In addition, the CFTA:

a) extends trade rules to cover goods and services in all emerging sectors of the Canadian economy;
b) establishes a reconciliation programme to align regulations, remove barriers and reduce business costs; and
c) aligns with international rules to ensure that Canadian businesses receive treatment as favourable as foreign businesses.

The CFTA also introduces rules intended to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers. Key features of the CFTA include an expansion of the scope of government entities covered by open procurement rules, the establishment of a new independent bid protest mechanism, and the development of an electronic Canada-wide single point of access (online portal) to access information about procurement contracts.

iv NAFTA
In May 2017, the United States formally announced its intention to renegotiate NAFTA with Canada and Mexico. Renegotiations began in August 2017 and are ongoing at the time of writing. NAFTA came into effect on 1 January 1994 and introduced extensive government procurement rules. Chapter 10 of NAFTA requires each Member State to accord national and non-discriminatory treatment to suppliers of goods and services from

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other Member States, and requires signatories to conduct government procurement in a fair and transparent manner. Chapter 10 has been, and continues to be, a topic of discussion in the NAFTA renegotiations.

v Provincial government procurement legislation

In December 2016, the Newfoundland and Labrador government enacted new legislation to modernise the procurement framework in the province. The Public Procurement Act will repeal and replace the Public Tender Act, which has governed the public procurement process in Newfoundland and Labrador since 1990. At the time of writing, the Public Procurement Act has not yet entered into force.

Key features of the new legislation include increased oversight over a broader range of procurement activity; more transparency in the procurement process; increased consistency in procurement practices; and greater flexibility for public bodies in making decisions to award contracts. The new legislation will enable public bodies to consider a broad range of factors in making a decision to award a contract and to determine which bid offers the ‘best value’. The introduction of the concept of ‘best value’ will be a significant departure from the framework established under the Public Tender Act, which generally requires public bodies to award contracts to the bidder offering the lowest price.

On 1 December 2017, the Quebec government’s Bill No. 108: An Act to facilitate oversight of public bodies’ contracts and to establish the Autorité des marchés publics, entered into force. Bill No. 108 establishes a new agency, the Autorité des marchés (the Authority), to oversee all public procurement in the province. In addition, the Bill provides the Authority with the responsibility to apply the Act respecting contracting by public bodies as regards ineligibility for public contracts, prior authorisation to obtain public contracts, or subcontracts and contractor performance evaluations in relation to the performance on contracts. Bill 108 confers various powers on the Authority, including the powers to audit and investigate and, following an audit or investigation, to make orders or recommendations, or suspend or cancel a contract. The Authority is empowered to examine the compliance of a tendering or awarding process for a public contract on its own initiative, after a complaint is filed by an interested person, or on the request of the chair of the treasury board of Canada or a bidder. The Bill also introduces several amendments to the Act respecting contracting by public bodies, including a requirement that public bodies publish a notice of intention before entering into certain contracts by mutual agreement and a requirement that public bodies establish a procedure for receiving and examining complaints that they receive regarding their procurement activities.

vi Consultation: Expanding Canada’s toolkit to address corporate wrongdoing

In July 2015, PSPC introduced the Integrity Regime to help ensure that the government of Canada does business with ethical suppliers in Canada and abroad. Under the Integrity Regime, suppliers that have been convicted of certain offences are declared ineligible or

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19 Available at: www.assembly.nl.ca/Legislation/st/statutes/p41-001.htm (last accessed 28 February 2018).
21 CQLR c C-65.1.
suspended from doing business with the Canadian government. Between September and December 2017, the government conducted a public consultation to seek input on potential enhancements to the Integrity Regime and on a possible Canadian ‘deferred prosecution agreement’ (DPA) regime. In February 2018, a summary report was prepared by the government. According to the report, while participants expressed support for the Integrity Regime’s objective, the majority of participants stated that additional discretion and flexibility needed to be built into the Integrity Regime to take into account aggravating and mitigating factors in the determination of an appropriate period of debarment. Further, the majority of participants supported having a Canadian DPA regime, acknowledging that DPAs could be a useful additional tool for prosecutors to use at their discretion in appropriate circumstances to address corporate criminal wrongdoing. The government is currently reviewing the feedback received during the consultation, and considering whether enhancements to the Integrity Regime and the introduction of a Canadian DPA regime are warranted.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

Government procurement rules likewise apply in general to all public bodies at the provincial level. Although the details may differ from province to province, the procurement rules that have been developed by the Supreme Court of Canada apply generally to all public bodies in Canada. This includes the Contract A/Contract B framework described above for tenders, and the corresponding duties that are incumbent upon the purchaser, such as the duty to conduct fair competition.

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


Regulated contracts

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

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

Major military procurements may be subject to the Industrial and Regional Benefits Programme, which requires successful bidders to make investments in advanced technology in certain sectors and areas of Canada in amounts sometimes equal to the value of the specific contract. Where procurement is deemed to be subject to the federal Defence Production Act, the underlying documents will be exempt from the rigorous disclosure requirements applicable under federal laws, which helps to ensure that sensitive technology and information are appropriately protected.

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

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

- the need is one of pressing emergency in which delay would be injurious to the public interest;
- the estimated expenditure does not exceed C$25,000 (and it would not be cost-effective to solicit bids) or C$100,000 for specific types of contracts;
- the nature of the work is such that it would not be in the public interest to solicit bids; or
- only one person is capable of performing the contract.

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25 GCRs, s 3.
26 RSC 1985, c D-1.
27 GCRs, s 6.
The rules are generally more flexible on the provincial level, where the circumstances in which public entities are not required to hold a competitive procedure will be governed by applicable trade agreements, legislation and, to a lesser degree, policies and directives.

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

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements and central purchasing on behalf of other public authorities are viable and in some cases encouraged methods of procurement in Canada. In practice, government entities in Canada employ procurement practices that run the gamut between centralisation and decentralisation. For example, New Brunswick’s Procurement Act requires all provincial government departments and various other public bodies to purchase services and supplies through the Ministry of Government Services unless certain narrow exceptions apply. On the other hand, public procurement at the federal level is conducted in a relatively decentralised manner. As long as the procurement processes conducted through such arrangements comply with the obligations referred to in this chapter, such as the duty to conduct a fair competition, the duty to disclose all material evaluation criteria and the duty to reject non-compliant tenders, as well as all applicable international trade obligations, procuring authorities and teams are free to establish framework and central purchasing agreements among themselves.

ii Joint ventures

Structural and cooperative or contractual public–public joint ventures (JVs) are both viable vehicles for procuring goods and services in Canada. Public bodies entering JVs may be found to be in a fiduciary relationship, which involves legal duties of fidelity and good faith. Public bodies seeking to avoid these duties may seek to structure their relationship as a ‘buying group’ instead. The common thread among these arrangements is that there are typically one or several parties who are responsible for procuring goods or services on behalf of the other participants. The precise obligations of the parties involved will depend on the form of legal vehicle assumed and the specific procurement framework in which the public bodies operate. Nevertheless, JVs, JV companies and buying groups are all bound by the rules on public contracting outlined in this chapter. Typically, all of the public bodies participating

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29 Re IBM Canada Ltd (2003).

30 Procurement Act, SNB 2012, c 20, s 2(1).
in a JV or buying group will be involved in the procurement process for which the JV or buying group was formed, obviating any concerns associated with one public body supplying another public body without a prior procurement process.

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

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

V THE BIDDING PROCESS

i Notice

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

- Alberta: Purchasing Connection and COOLNet;32
- British Columbia: BC Bid;33
- Manitoba: MERX;34
- Newfoundland and Labrador: the Government Purchasing Agency;35
- New Brunswick: New Brunswick Opportunities Network;36
- Nova Scotia: Nova Scotia Tenders;37
- Ontario: Supply Chain Ontario;38
- Prince Edward Island: Tender Opportunities;39
- Quebec: Le système électronique d’appel d’offres (SEAO);40 and
- Saskatchewan: SaskTenders.41

ii Procedures

Public agencies are generally permitted to use a broad range of approaches, provided they comply with the requirements of Canada’s trade agreements, the common law, and the agency’s own internal policies and procedures. Typically, a public agency will establish internal policies

33 www.bcbid.gov.bc.ca.
34 www.gov.mb.ca/tenders.
35 www.gpa.gov.nl.ca.
36 https://nbon-rpanb.gnb.ca.
38 www.doingbusiness.mgs.gov.on.ca.
41 www.sasktenders.ca.
and procedures governing the circumstances in which procurement may be conducted and the manner in which such procurement is to be conducted. These policies and procedures often provide guidance on the procurement documents and procedures, including:

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

Electronic bidding is permissible and offered on selected tenders.

iii  Amending bids

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

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

VI  ELIGIBILITY

i  Qualification to bid

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

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

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

ii Conflicts of interest

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

iii Foreign suppliers

Public bodies may open RFPs to foreign suppliers, and are required to do so under certain circumstances. The monetary thresholds referenced below are in effect during the period from 1 January 2018 to 31 December 2019 and revised periodically in accordance with their respective treaties.

As a signatory to NAFTA, Canada has agreed to provide suppliers of the United States and Mexico with equal opportunity to compete for certain contracts involving specified classes of goods and services bought by a prescribed list of over 100 federal government entities. NAFTA is not applicable to provincial or municipal governments, or to private industry or private individuals. The value of the government procurement must meet certain monetary thresholds for the equal opportunity requirement under NAFTA to apply. With regard to procurements by federal government departments and agencies, the monetary thresholds are in most cases C$106,000 for goods, services or any combination thereof, and C$13.7 million for construction services contracts. With regard to federal government enterprises, the monetary thresholds are C$530,000 for goods, services or any combination thereof, and C$16.9 million for construction services contracts. Between Canada and the United States, the monetary threshold for the procurement of goods by departments and agencies is C$32,900.

As a signatory to the GPA, Canada has agreed to provide suppliers of more than 40 trading partners in Europe, Asia and North America the right to bid without discrimination.

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42 See Regulation respecting certain supply contracts of public bodies, CQLR c C-65.1, r 2, s 7; and Regulation respecting service contracts of public bodies, CQLR c C-65.1, r 4, s 7.
on a broad range of public sector tender calls by federal government entities. The GPA is not applicable to provincial or municipal governments, or to private industry or private individuals. The monetary thresholds applicable to procurements by federal government agencies, departments and enterprises are C$200,900 for goods, services or any combination thereof, and C$7.7 million for construction services contracts.44

As a signatory to CETA, Canada has agreed to provide suppliers of the European Union with equal opportunity to bid to provide goods and services to a wide range of Canadian government entities at the federal, provincial and municipal levels. In order for CETA to apply to a given government procurement, the procurement must have a value that is equal to or greater than a certain monetary threshold. With regard to procurements by federal government departments and agencies, the monetary thresholds are C$221,400 for goods, services or any combination thereof, and C$8.5 million for construction services contracts. With regard to federal government enterprises, the monetary thresholds are C$604,700 for goods, services or any combination thereof, and C$8.5 million for construction services contracts.45

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

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

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

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


45 Treasury Board of Canada Secretariat, ‘Contracting Policy Notice 2017-4 Canada-European Union Comprehensive Economic and Trade Agreement (CETA)’, available at: www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-4.html (last updated 5 July 2017; last accessed 28 February 2018). This threshold technically applies to procurement for the period from CETAs entry into force to 31 December 2017. At the time of writing, updated thresholds have not yet been provided by the Treasury Board of Canada Secretariat.
VII AWARD

i Evaluating tenders

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

Public entities are generally free to establish the terms by which they will evaluate bids. Where the estimated price of the contract is likely to be low, public entities typically evaluate bidders based on the lowest-priced bid. Otherwise, public entities generally evaluate bidders based on, inter alia, the best value, which gives them more leeway in taking into account other attributes besides just the price of the bid.

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

ii National interest and public policy considerations

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

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

VIII INFORMATION FLOW

Public entities holding a competitive bidding process are subject to a duty to disclose all material information about the contemplated contract to all bidders. In general, what is deemed material for the purposes of the disclosure duty is any information that could influence a bidder’s decision to bid or influence the price quoted by the bidder. As noted above, this also includes criteria that the purchaser will be relying on when evaluating bids.
Public entities often provide unsuccessful bidders with the opportunity to learn why they lost a contract and why another bidder won. Pursuant to freedom of information legislation, the federal, provincial and in some cases municipal governments and their agents are required to furnish certain information upon request to persons entitled to such information. In many cases, this includes information about why the public entity awarded public contracts to certain parties and not to others. Debriefing unsuccessful bidders gives them an opportunity to improve their bids on future tenders and keeps purchasers accountable with regard to their obligations.

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

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

IX CHALLENGING AWARDS

i Procedures

A supplier that seeks to complain about a federal government procurement process has a number of choices, which can be taken simultaneously, serially or individually. To begin with, it can sue under the common law of Canada (typically for breach of contract and any applicable tort grounds). The supplier can also sue for breach of the GCRs. The supplier can also complain to the Canadian International Trade Tribunal (CITT) for a breach of Canada’s obligations under applicable trade agreements such as NAFTA, the GPA, CETA and the CFTA. The GCRs and Canada’s trade agreements all contain different language, meaning that the federal government is subject to a host of obligations that may look similar in substance but that diverge in nuanced ways. Further, the CITT’s procedural approach to complaints is significantly less formal than that of the courts. A dissatisfied supplier suing the federal government has at its disposal a range of choices with regard to complaint procedures.

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


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breaches of these policies cannot found a lawsuit. Nevertheless, breaches of policies can be relevant to determining whether some wrongdoing occurred. The rules of the procurement process may also include a dispute resolution process.

Awards are challenged primarily by parties who bid on the contract at issue.

The CITT hears complaints respecting procurement involving the federal government covered by NAFTA, the GPA, CETA, the CFTA and certain other international trade agreements. Section 6 of the Canadian International Trade Tribunal Procurement Inquiry Regulations\(^\text{47}\) provides that a complaint must be filed with the CITT within 10 working days from the date on which the potential supplier first became aware, or reasonably should have become aware, of its ground of complaint to either object to the contracting authority or file a complaint with the CITT. The CITT provides quick remedies, usually issuing its decision within 90 days of the complaint having been made. Costs vary depending on the complexity of the matter.

Besides communicating directly with the contracting authority, courts are the preferred forum for all other procurement-related complaints. Limitation periods on judicial proceedings differ depending on the court and jurisdiction. The Limitations Act (Ontario) assigns a basic limitation period of two years.\(^\text{48}\) Costs vary depending on the complexity of the matter.

ii Grounds for challenge

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

iii Remedies

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

Apart from civil liability for breaching government procurement rules, bid rigging is a criminal offence under Canada’s Competition Act.\(^\text{49}\) Bid rigging occurs when two or more persons agree that, in response to a call for bids, one or more will not submit a bid, withdraw a bid or submit a bid arrived at by agreement, and the person requesting the bids is not informed beforehand about the agreement made between the parties. Parties found guilty of bid rigging may be liable to a fine in the discretion of the court, imprisonment for a term of up to 14 years, or both.\(^\text{50}\)

\(^{47}\) SOR/93-602.
\(^{49}\) RSC 1985, c C-34.
\(^{50}\) Ibid., s 47.
X OUTLOOK

New inter-provincial and international free trade agreements, and new provincial public procurement legislation indicate that there will be significant changes to the public procurement landscape in Canada in the near future. These developments are aimed largely at opening up Canadian procurement markets while making the public procurement more transparent and consistent, and all stakeholders more accountable to the public.
Chapter 7

CHILE

José Luis Lara and Antonia Schneider

I INTRODUCTION

Chile's public procurement market has undoubtedly generated great interest among foreign investors and entrepreneurs during the past decade. Since the last major reform of the regulatory framework, which occurred in 2003, the public procurement market has undergone explosive growth: 7.7 billion Chilean pesos was traded on the Public Market website during 2017, which represents a 20.1 per cent increase compared with 2016, and amounts to a saving of more than 5.9 per cent in the use of public resources in comparison to 2016.

Chile's success is due to the following causes:

- a clear and stable regulatory framework;
- an open investment regime that promotes and ensures safe trading conditions for foreign investors;
- numerous free trade agreements that avoid international double taxation;
- an independent judiciary; and
- a government that over the past few decades has openly promoted foreign investment and entrepreneurship.

While it is true that, depending on the specific contract in question, the public procurement market is subject to regulatory fragmentation, there are principles and rules that are applicable to all public contracts. Many of these are contained in the Constitutional Organic Law of General Basis of the Government No. 18,575. For instance, the Law establishes as a general rule that every contract has to be preceded by a public tendering process where the contractor will be selected. It also mandates that free competition among competitors must be secured at every public tendering procedure. Moreover, it requires that the tendering procedures must be transparent, and it also regulates conflicts of interest, prohibiting the participation of any party that is conflicted.

Additionally, many rules and principles are also included in Chile's laws that regulate each public contract, such as Law No. 19,886 in the case of supply contracts; the sale, maintenance and leasing of movable property; and service contracts concluded by public entities.

These, and many other reasons that will be discussed in this chapter, explain the success of the Chilean public procurement market over the past decade.

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1 José Luis Lara is a partner and Antonia Schneider is a junior associate at Philippi Prietocarriñosa Ferrero DU & Uria. This chapter is an update of last year’s version prepared by José Luis Lara and Antonia Schneider.

2 www.chilecompra.cl.
II YEAR IN REVIEW

While the public procurement sector did not undergo any particular modifications in 2017, the year was marked by efforts made by the Office of Public Procurement to improve the use of technology, with the incorporation of a new fully electronic bidding form and the improvement of the MercadoPúblico online bidding platform.3 In addition to the latter, the Office of Public Procurement launched two new sites to enhance the exposition of market data,4 giving the public access to information concerning the amount of money traded and the items being bought, and increasing transparency in a conflict-prone market.

In relation to the latter, the authority issued Guideline No. 28, which contained moral recommendations for buyers of the public market, all of which are consistent with the efforts made in order to avoid the misuse of dominating market positions between buyers, such as municipalities or other authorities and the offeror.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Broadly speaking, the rules on public contracts are intended to govern government procurement processes. Thus, the enforcement of these rules is obligatory for the executive branch, every public service and the municipalities, as this follows on from the Constitutional Organic Law of General Basis of the Government. The application of the Law on Administrative Contracts of Supply and Services is also obligatory.

Notwithstanding the foregoing, Congress, the judiciary and the General Comptrollership have been voluntarily submitted to the mechanism recognised in the Law on Administrative Contracts of Supply and Services. Consequently, the basic rules on public procurement are applicable in practice to the entire state apparatus, regardless of which branch is concerned.

Finally, even though state-owned enterprises are covered by the constitutional principle whereby they are ruled by the legislation that regulates private entities, the jurisprudence issued by the General Comptrollership has ruled that the principles of public procurement are applicable. Likewise, the General Comptrollership has also ruled that the principles of public procurement are applicable to foundations and associations that participate in or belong to public entities, even though they have a private nature.

ii Regulated contracts

The Constitutional Organic Law of General Basis of the Government regulates any contract entered into with the government regardless of its subject or purpose. Under the Law, the contract must be preceded by a public tender; the principle of equality of competitors and free concurrence5 among them must be ensured in the public tender by the procuring entity; and the procuring entity may use only exceptionally a private tender procedure as a contracting mechanism, and must precede such procedure with a reasoned decision.

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3 www.mercadopublico.cl.
4 www.observatoriofiscal.cl; datosabiertos.chilecompra.cl.
5 In Chile, this technical expression refers to the duty of the state to ensure free competition among competitors, which is broader than equal treatment.
In general terms, Law No. 18,803 authorises the executive branch to enter into contracts under which it entrusts to private entities all actions to support its functions that do not correspond to the exercise of its powers. Contracts concluded under the Law must be preceded by a public tender and may also include arbitration clauses.

That said, it must be remembered that a special feature of Chilean legislation on public procurement is that each contract has a particular regulation. However, generally speaking, the following areas can be highlighted.

**Supply and services administrative contracts**
These contracts are regulated by Law No. 19,886 and Decree No. 250/2014 of the Ministry of Finance, and cover contracts of supply; contracts of sale, maintenance and leasing of movable property; and services contracts.

In addition, Law No. 19,886 is used in practice as a supplementary law to address any loopholes or gaps that exist in another specific rule’s treatment of different administrative contracts. As such, it is the law that is most often used in the public procurement market.

In Chile, this technical expression refers to the duty of the state to ensure free competition among competitors, which is broader than equal treatment.

**Contracts for the construction of state civil works**
These contracts are regulated by Law No. 19,886 and Decree No. 250/2014 of the Ministry of Finance, and cover contracts of supply; contracts of sale, maintenance and leasing of movable property; and services contracts.

In addition, Law No. 19,886 is used in practice as a supplementary law to address any loopholes or gaps that exist in another specific rule’s treatment of different administrative contracts. As such, it is the law that is most often used in the public procurement market.

In Chile, this technical expression refers to the duty of the state to ensure free competition among competitors, which is broader than equal treatment.

**Lease, sale or concession of state-owned immovable property**
Decree-Law No. 1,939 regulates the sale, lease, concession and occupation of state-owned immovable property, and entrusts the Ministry of National Property with negotiating, executing and overseeing these contracts. Generally, concessions may not be granted for a period longer than 20 years and leases for more than five years.

An arbitral tribunal will settle differences that may arise between the parties in connection with the execution of the concession contract.

**Contracts with the armed forces**
There are special rules regarding contracts related to war materials and military vehicles, and systems and equipment for information, command, communication, intelligence and computational services. The general legislation would not be applicable to contracts concerning goods and services necessary to prevent exceptional risks to national security or public security. Therefore, these contracts would be ruled by Law No. 13,196, Law No. 18,928 and Decree No. 124/2004 of the Ministry of Defence.
Municipal concessions

Municipal concessions are awarded to private entities for the administration of properties that belong to a municipality, and for municipal services (e.g., refuse collection). They may also be used for awarding to private companies the use of underground land for various purposes (e.g., underground parking).

Contracts for the provision of health services

Health services that the government contracts to private establishments would be ruled by special rules (Decree-Law No. 2,763).

Finally, it should be noted that as a general rule contractors cannot transfer public contracts. Article 14 of Law No. 19,886 states that the rights and obligations arising during the development of a tender procedure (and from the consequential contract) shall not be transferable unless a law expressly permits it. For example, Decree-Law No. 1,939 prohibits the transfer of leases for state-owned immovable property unless this is expressly authorised by the Ministry of National Property.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are covered by the legislation on contracts for supply and services (Decree No. 250/2014 of the Ministry of Finance). They consist of a large number of contract procedures with catalogues and lists elaborated by the Office of Public Procurement.

The products and services under these framework agreements are previously selected through a competitive public tender and, when they become effective, the procuring entity may contract directly through the Public Market website.

If the procurement process conducted through the framework agreement exceeds approximately US$65,000, the procuring entity shall convene a process called a large purchase. In this case, the procurement entity must give public notice to the market at least 10 days in advance about its intention to purchase. During this period, all interested competitors who are registered in the relevant specific list or catalogue may submit their offers, and the contractor will be chosen from among them as if the process were a public tender.

It is important to note that if a particular good or service is available under any of the catalogues or lists, the contracting entity is forced to purchase it through the existing framework agreements, and is forbidden to call for a public tender and contract directly.

As an exception, these rules are not mandatory for municipalities and the armed forces. However, in practice, the framework agreements have been used for these cases.

ii Joint ventures

Article 19 No. 21 of the Constitution prescribes that public entities are not allowed to develop economic or enterprise activities unless there is a special law that specifically allows this. As such, the possibility for public entities to participate in public–private partnerships or in joint ventures is in reality very limited.
In the case of state-owned enterprises, three circumstances must be considered:

a. state-owned enterprises can provide goods and services to public entities, but this must be done on an equal basis to private suppliers and in compliance with all legal provisions;

b. state-owned enterprises may participate in a tender process as part of a consortium with other private competitors on an equal basis; and

c. state-owned enterprises may participate in public–private partnerships or joint ventures with private parties to provide the government with a particular good or service (e.g., ENAP, the national oil company, holds public–private partnerships with private entities for the exploration and exploitation of natural gas).

Different laws specifically allow public–private partnerships or joint ventures. For example, Law No. 19,865 outlines a shared financial mechanism between municipalities and housing services with private entities for the award of properties, or the execution, operation and maintenance of urban works. In the same way, private entities can offer to public entities the realisation of different concessional projects, such as public work concessions for sewage system, water or geothermal energy services.

V THE BIDDING PROCESS

i. Notice

In compliance with the principles of transparency and the free concurrence of competitors, there is abundant case law on the duty of contracting entities to disseminate their tender processes as widely as possible. Thus, calls to tender processes will always be published in the major newspapers, and will also be posted on the websites of the respective procuring entities.6

The Public Market website deals with supply and services administrative contracts. Potential competitors can review on its website any procurement processes called by public entities.

ii. Procedures

Broadly speaking, there are four main procurement processes that can be used by public entities.

Framework agreements

As previously mentioned, these consist of a massive number of contract procedures with catalogues and lists elaborated by the Office of Public Procurement. For the elaboration of the catalogues, the Office of Public Procurement will call a tender process during which every bidder that complies with the requirements indicated in the tender bases will be selected. Once this list is finished, it is uploaded to the Public Market website, and public entities can contract directly through the website.

If the good or service required is available under a framework agreement catalogue or list, its utilisation is mandatory, and it is forbidden to call a tender process. As an exception, these rules are not mandatory for municipalities and armed forces. Nevertheless, in practice, the framework agreements have been used in these cases.

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6 For example, www.concesiones.cl regarding public work concessions.
Public tender
Under this contest procedure, a public entity makes an open call inviting interested actors to present their offers. It will then select and accept the most convenient offer from among these.

If the good or service is not available under the framework agreements, a public tender would as a general rule be used and, in the case of contracts above US$72,000, it is always mandatory to use the public tender procedure.

The public tender procedure can start with a pre-qualification or pre-selection stage to indicate which interested parties will be able to participate in the tender process. The evaluation at this stage must be based only on technical criteria. In any case, the tender is initiated with the publication of the tender bases on the Public Market website.

Following this, competitors can ask questions of and clarify doubts with the public entity, which must provide answers within a time frame that ensures a competitors have adequate time for preparing their offers. The offer submission must be made on the date and at the time previously indicated, and generally contains a technical offer and an economic offer.7

After this, the offer will be opened at a public event that guarantees adequate transparency and publicity. The procuring entity must then evaluate every offer on equal conditions, for which task it may appoint an evaluation committee.

Finally, the decision to select a competitor must be done in a transparent way, and must be communicated to the other, non-successful competitors.

Private bid
Under this contest procedure, a public entity invites certain competitors that, on the basis of certain bidding criteria, make offers, from which the public entity will select and accept the most convenient. This procurement mechanism only proceeds if there is a reasoned decision that authorises it, and only if there is a cause foreseen for it (e.g., when there are no participants in a public bid, in emergency situations, for confidential services or when the announcement of the procedure could affect national security).

Private bids follow the same procedure as public bids.

Direct contracting
Direct contracting is a contracting procedure where the contract conditions are negotiated directly with a private contractor without a previous tender process.

As in the case above, this procurement mechanism can only proceed after a reasoned decision authorises it, and only if it is strictly necessary due to the subject matter of the contract.

iii Amending bids
In relation to the pre-contractual stage, once the call to tender has been made, modifications to the contract or the timeline are allowed as a general rule, with the limitation that they cannot affect the essence of the tender bases or cause damages that affect the participation of competitors. The Comptrollership General has also ruled that if the nature of the tender bases is altered as consequence of multiple modifications, the procuring entity shall call a new tender process.

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7 For example, www.concesiones.cl regarding public work concessions.
Any modification to an offer is forbidden after its submission. In the same way, the awarded offer is not allowed to be modified prior to concluding the contract. Exceptionally, modification is allowed to correct formal errors, but only if this situation does not affect the equality of competitors.

With regard to the contractual stage, even though the legislation allows public entities to modify the contractual conditions (*ius variandi*), there are two limitations to the execution of this power:

a. the alteration of the contractual conditions cannot affect the essence of the tender bases, because these prevail over the contract. Thus, the only changes that are currently allowed by the Comptrollership General are quantitative ones, such as changes to timescales; and

b. the contractual modifications must respect the economic equality of the parties to the contract. As such, in cases of alteration of contract conditions, economic elements must be renegotiated.

**VI ELIGIBILITY**

**i Qualification to bid**

Interested parties may not participate in a public tender called by procuring entities that, at the date of the tender call:

a. are public officials of the procuring entity that calls for the public or private tender, or that maintain family ties with any such public officials;

b. have been judicially condemned, within the previous two years, for anti-union practices or actions affecting the fundamental rights of employees;

c. have been judicially condemned, within the previous two years, for bankruptcy offences; or

d. have been judicially condemned for a breach of contract with regard to a previous contract arising from negligence or lack of diligence in the discharge of their contractual duties, as long as the procuring entity that had previously contracted with the interested party had requested that the Office of Public Procurement suspend such parties.

Neither may those interested parties that, even having been awarded a contract under a public tender, have unpaid social security debts due to their workers at the time of the conclusion of contracts with public entities.

Any interested party who is not in one of the above-described situations shall be entitled to participate in the tender process, and may only be disqualified if it has not fulfilled the tender bases. Such disqualification shall be declared by the procuring entity through a reasoned decision, specifying the exact reason why an interested party was disqualified.

**ii Conflicts of interest**

Article 4 of the Law on Administrative Contracts of Supply and Services forbids procuring entities from concluding contracts with their public officials or their family members. In the same way, procuring entities are forbidden from contracting with companies or firms in whom their officials or their families have some degree of participation or relation.

In addition, those who have the task of evaluating the offers submitted in a tender may not have any conflicts of interest with the participants.
A conflict of interest is considered to exist if an official involved in the evaluation:

- has a personal interest in the outcome of the tender process or the execution of the contract;
- has a family relationship with one of the participants, or if a family member is involved in a company that participates as a competitor;
- has any friendship or enmity with one of the competitors; or
- the official has had professional or business relationships with one of the competitors during the previous two years.

iii Foreign suppliers

As a general rule, a procuring entity that calls a public or private tender cannot make any distinction between foreign and Chilean competitors or discriminate against foreign competitors. This is a consequent on the fact that Article 57 of the Civil Code states that the law shall not recognise any difference between Chilean and foreigner competitors.

Exceptionally, Article 4 of the Law On Administrative Contracts of Supply and Services states that a public entity is entitled to require that a foreign competitor that has been awarded a contract under a tender process must constitute a subsidiary in Chile or a local branch of the foreign company with whom the contract will be concluded. In similar terms, Article 9 of the Law on Public Work Concessions establishes the obligation of a foreign competitor that is awarded a contract under a public tender to constitute a subsidiary or a local branch in Chile as a precondition for the conclusion of the contract.

VII AWARD

i Evaluating tenders

The evaluation of offers will be conducted by a commission specially appointed for such purpose, and will involve an economic and technical analysis of both actual and future benefits and costs of the proposals submitted by those competitors whose offers have previously been declared admissible.

The criteria under which the offers will be evaluated must be those previously declared in the tender bases. Inter alia, the following may be considered as technical and economic criteria: price, experience, methodology, technical quality, technical assistance or support, after-sales services, deadlines, transportation surcharges, environmental considerations, energy efficiency, previous contractual behaviour and the accomplishment of formal requirements.

As prescribed in Article 10 of the Law on Administrative Contracts of Supply and Services, the contract will be awarded to the competitor who presents the best offer with regard to the procuring entity’s interests, considering the conditions and an evaluation of the economic and technical criteria established in the tender bases. It is noteworthy in this regard that numerous judicial decisions have pointed out that the cheapest offer is not necessarily the most advantageous, as this is just one of the criteria to be evaluated.

ii National interest and public policy considerations

As previously mentioned, a procuring entity that calls a tender process cannot differentiate or introduce discriminatory measures favouring national competitors, unless expressly authorised by law. As an example, Decree-Law No. 1,939 expressly prohibits the granting to foreigners of a concession or lease of public land that has been previously declared borderland.
VIII INFORMATION FLOW

As prescribed by Law 20,285 on Access to Public Information, all documents of public entities shall be public and, as such, may be requested by any interested party. All information about tender processes and contracts must be made available on the website of the Public Market or on the website of the respective procuring entity, or on both. Further, any news about or decision of a procuring entity about the development of a tender process shall be notified to the involved competitors and shall be made public. Thus, a procuring entity shall communicate simultaneously its decision on the evaluation of offers to each competitor, whether such competitor was awarded the contract or not. At the same time, it should be reported if offers have been found inadmissible for failing to meet the minimum requirements.

Exceptionally, tender processes called by the armed forces and the Ministry of Defence may be confidential if they have as their purpose the acquisition of war materials.

As an exception to the above, the offers of competitors are not considered to be public information. In fact, it is held by legislation and jurisprudence that these may contain private financial or technical information that can often be strategic for the company or even considered to be an industrial secret. Thus, offers are not published. Only the evaluation report of the admissible offers is handed to each competitor, and it is also published on the Public Market website.

IX CHALLENGING AWARDS

i Procedures

There are several ways to challenge an act or omission of an arbitrary or illegal nature committed by a procuring entity during a tender procedure or in the subsequent execution of the contract.

At both stages, the procuring entity can always be requested to make an administrative reconsideration of its decision, which should be conducted within five working days. In cases of refusal, it can be requested that the administrative hierarchical appeal be made known to its administrative superior. Likewise, a complaint of illegality, in which the procuring entity is accused of having committed arbitrary or illegal acts, can always be filed before the Comptrollership General.

During the pre-contractual stage, a special action exists to challenge an arbitrary or illegal act committed during the bidding process that may be brought before the Public Procurement Tribunal. Through this action for annulment, any arbitrary or illegal act committed by the procuring entity from the time it called for the public tender up to its award of the respective contract may be challenged. During this stage, complaints denouncing malpractices during tender processes can also be filed before the Office of Public Procurement, which acts as an enforcement body with regard to public entities that have called tender processes.

With regard to the execution stage of the contract, a constitutional action for protection can be brought before the Court of Appeal if such execution is injuring any constitutional right. Similarly, ordinary actions recognised under public law, such as an action regarding the pecuniary liability of the state and an invalidity action, can also be filed before the common tribunals.
The following table provides an outline of the actions that can be taken:

<table>
<thead>
<tr>
<th>Action</th>
<th>Entity involved</th>
<th>Deadline</th>
<th>Processing time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative reconsideration of a decision</td>
<td>The same procuring entity</td>
<td>Five business days</td>
<td>One to two months</td>
</tr>
<tr>
<td>Administrative hierarchical appeal</td>
<td>The same public entity that issued the challenged decision</td>
<td>Five business days (the appeal must be filed simultaneously with the administrative reconsideration of the decision)</td>
<td>One to two months</td>
</tr>
<tr>
<td>Complaint of illegality</td>
<td>Comptrollership</td>
<td>No deadline</td>
<td>Six to eight months</td>
</tr>
<tr>
<td>Action for annulment</td>
<td>Public Procurement Tribunal</td>
<td>10 business days</td>
<td>One year</td>
</tr>
<tr>
<td>Denouncement of malpractices</td>
<td>Office of Public Procurement</td>
<td>No deadline</td>
<td>Six months</td>
</tr>
<tr>
<td>Constitutional action to protect constitutional rights</td>
<td>Court of Appeal</td>
<td>30 calendar days</td>
<td>Three to five months</td>
</tr>
<tr>
<td>Common actions</td>
<td>Ordinary tribunals</td>
<td>Although there is no deadline to file common actions, there is a limit to the general procedure (statute of limitation)</td>
<td>Five years or more</td>
</tr>
</tbody>
</table>

Finally, it should be mentioned that there are several special arbitration proceedings with regard to some administrative contracts, such as in the case of public works concessions, contracts for shared urban financing and concession contracts for public land.

ii  **Grounds for challenge**

To substantiate a challenge, it suffices that the procuring entity that has called for a tender process, or with whom a contract has been concluded, has committed an action or omission of an arbitrary or illegal nature; and that the competitor or contractor has been affected as a result of that action or omission.

iii  **Remedies**

During the execution of a contract, the procuring entity is entitled to impose on the contractor fines for breaches of its contractual obligations or to enforce the guarantees established in its favour in the contract. Similarly, the public entity is allowed to terminate the contract early in cases of a serious breach of the contractor’s obligations or if the contractor becomes insolvent.

The contractor may challenge at an administrative or judicial level the decisions of the procuring entity that called a tender process or with whom the contractor concluded a contract. At the administrative level, the procuring entity usually will not grant a preliminary injunction preventing the conclusion or execution of the awarded contract. Therefore, in practice, a preliminary injunction will always have to be requested from the Public Procurement Tribunal or from the ordinary tribunals. In this regard, it should be mentioned that the tribunals are not very propitious in granting such measures at a preliminary stage of a challenge. Notwithstanding the foregoing, to settle the dispute, the tribunals will have broad freedom to grant the injunction requested by the petitioner’s request, even if this means annulling the tender process or the previously concluded contract.
X OUTLOOK

An amendment to the Law on Administrative Contracts of Supply and Services is yet to be announced, its main purpose being to extend the scope of the Public Procurement Tribunal and provide more detailed regulation on how to deal with conflicts of interest during the evaluation of the offer in a tender process.

The Office of Public Procurement has been focused on increasing the participation of small and medium-sized enterprises in the public procurement market, which has led to sales at the Office of Public Procurement reaching more than 59 per cent of the national amount. Following this and the continuous development of transparency and efficiency policies, the focus has been on the modernisation of the purchase platforms, including the strengthening of e-commerce. This is aimed at, among others, improving payment periods, which can constitute a major problem, particularly for small and medium-sized enterprises.

A new website is therefore being planned for the Public Procurement Tribunal, designed to allow the online processing of challenges, which is directly related to the recent Electronic Processing Law.8

8 Law No. 20.886.
I INTRODUCTION


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

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

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

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

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1 Clare Dwyer is a legal director, Michael Rainey is a managing associate and Kina Sinclair is an associate at Addleshaw Goddard LLP.
4 C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA.
5 C-8/81 Becker v. Finanzamt Münster-Immenstadt.
The EU is a signatory to the Agreement on Government Procurement (GPA) adopted under the auspices of the World Trade Organization. As such, economic operators from GPA states benefit from most of the provisions set out in the Directives (and, therefore, national laws derived from them). With the exception of the Defence and Security Procurement Directive.

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

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

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

II YEAR IN REVIEW

The past year has seen a gradual development of procurement case law with no major changes. The CJEU has considered the definition of ‘bodies governed by public law’ (which must comply with the Directives) and in particular when a wholly owned subsidiary is ‘established for the specific purpose of meeting needs in the general interest’, not having an industrial or commercial character. The judgment appears to extend the definition by taking account of the general interest activities of the parent contracting authority.

Case law has considered the application of eligibility requirements for bidders participating in procurement processes, with the CJEU ruling on issues such as:

a. the continued eligibility of a bidding consortium relying on one member’s certification where the certification was lost mid procedure;

b. circumstances in which a bidder can offer an alternative to precisely defined economic and financial standing requirements;

c. the extent to which a winning bidder can seek to rely on the experience of a new third party at the verification stage;

d. the extent to which it can rely on the experience of a consortium of which it was part in the performance of a prior public contract; and

e. requirements surrounding the declaration of a criminal conviction of a director that was not yet final.

The CJEU has also considered an authority’s duty to investigate abnormally low tenders. In the absence of a definition of ‘abnormally low’ in the applicable EU legislation, it fell

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to the authority (in this case, the Commission operating under the rules applying to EU institutions, although the concept is similarly undefined in the Directives) to determine the method for identifying abnormally low tenders, provided that the method was objective and non-discriminatory. There was nothing to prevent a method that compared tender prices to the estimated budget and, where two bids were below the budget, it was permissible to investigate only the bid that was considerably lower.

Further, the CJEU has ruled that national legislation requiring bidders to pay a financial penalty in order to be allowed to submit corrections to tenders is not in principle objectionable, provided that the level of the penalty is not manifestly disproportionate. There are limits to what can be corrected; bidders cannot be permitted to submit documents that were required on pain of exclusion and the corrections should not be so fundamental as to amount to the submission of a new tender.14

All Member States were required to fully transpose the 2014 Procurement Directives into their respective national laws by 18 April 2016. The Commission has referred four Member States to the CJEU for failing to meet this requirement.15

On 1 January 2018, new thresholds came into force for procurement procedures under each of the 2014 Procurement Directives, and the Defence and Security Procurement Directive.16

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

The 2014 Public Contracts Directive applies to most public law bodies, including ‘bodies governed by public law’ that have a separate legal personality; are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and are more than 50 per cent funded, managed or controlled by other public sector authorities.17

Private operators may, in limited circumstances, have to procure in accordance with the 2014 Public Contracts Directive; for example, where they award certain works contracts that are more than 50 per cent subsidised by authorities,18 in which case the authorities are obliged to secure compliance.

The 2014 Utilities Contracts Directive applies to contracts for utility activities awarded by entities regulated by the 2014 Public Contracts Directive plus entities operating on the basis of special or exclusive rights.19

Where a utilities market is directly exposed to competition and access to the market is not restricted, Member States may apply to the Commission for a derogation from the

14 C-523/16 and C-536/16 MA.TI. SUD SpA v. Società Centostazioni SpA; and Duemme SGR SpA v. Associazione Casa Nazionale di Previdenza e Assistenza in favore dei Ragonieri e Periti Commerciali.
16 See footnote 23.
17 Article 2(1)(4).
18 Article 13.
19 Article 4.
2014 Utilities Contracts Directive for contracts in pursuit of activities in that market. Derogations have been granted to a number of Member States in respect of, for example, postal services, electricity, and oil and gas.

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


ii Regulated contracts

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

<table>
<thead>
<tr>
<th>Goods and services contracts, design contests</th>
<th>2014 Public Contracts Directive</th>
<th>€144,000 (central government authorities listed in Annex I) or €221,000 (all other authorities)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods and services contracts, design contests</td>
<td>2014 Utilities Contracts Directive</td>
<td>€443,000</td>
</tr>
<tr>
<td>Goods and services contracts</td>
<td>Defence and Security Procurement Directive</td>
<td>€443,000</td>
</tr>
<tr>
<td>Social and other specific services contracts</td>
<td>2014 Public Contracts Directive</td>
<td>€750,000</td>
</tr>
<tr>
<td>Social and other specific services contracts</td>
<td>2014 Utilities Contracts Directive</td>
<td>€1 million</td>
</tr>
<tr>
<td>Services and works concession contracts</td>
<td>2014 Concession Contracts Directive</td>
<td>€5.548 million</td>
</tr>
</tbody>
</table>

Anti-avoidance rules prevent artificial splitting of contracts to bypass the Directives. Contracts for certain social and other specific services are regulated to a limited ‘light touch’ extent and, in particular, the obligation to follow one of the specified procedures does

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20 Article 34.
21 Article 1(2).
22 Article 5(1).
24 For example, 2014 Public Contracts Directive, Article 5.
25 2014 Public Contracts Directive, Article 74 and Annex XIV, 2014 Utilities Contracts Directive, Article 91 and Annex XVII. Some (but not all) of these services are also subject to lighter regulation under the
not apply, although one of the principal changes from the predecessor directives is that, above the thresholds, advertising and competition is required. These services include health, social, educational, social security and community services. Any service that is not expressly listed as being subject to the ‘light touch’ regime is fully regulated.

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

- the acquisition or rental of land;\(^\text{26}\)
- employment;\(^\text{27}\)
- certain research and development services;\(^\text{28}\)
- certain financial services.\(^\text{29}\)

There have been a number of CJEU cases deciding whether a transaction was properly classified as an (unregulated) land agreement or a (regulated) works contract.\(^\text{30}\) Often, the distinction turns on whether the economic operator is obliged to undertake the works\(^\text{31}\) or whether, while the parties envisage certain works being carried out, the economic operator is at liberty to construct something different or to leave the land undeveloped.

In some exceptional cases, authorities may negotiate contracts with economic operators without prior advertisement,\(^\text{32}\) for example, in the case of extreme urgency following a failed procurement process or where, for technical reasons, the contract may be awarded only to a particular economic operator. These exceptions are narrowly construed.

Where a public contract is substantially modified, this may amount to a completely new contract, which the authority must competitively tender under the Directives.\(^\text{33}\)

Where the Directives do not apply, some form of advertisement is generally required if there is certain cross-border interest in the resulting contract.\(^\text{34}\)

The 2014 Utilities Contracts Directive applies to the regulated activities listed in Articles 8 to 14 in the fields of gas, heat and electricity, water, transport, post, exploration for or extraction of coal and other solid fuels, and extraction of (but not exploration for) oil and gas. A utility's other activities are unregulated unless the utility is also a contracting authority for the purposes of the 2014 Public Contracts Directive, in which case those other activities are subject to the procedures in that Directive.\(^\text{35}\)

The Defence and Security Procurement Directive applies to contracts for the supply of military equipment, for works and services for military purposes and for the supply of equipment, works and services involving, requiring or containing classified information.

\(^{26}\) For example, 2014 Public Contracts Directive, Article 10(a).

\(^{27}\) For example, 2014 Public Contracts Directive, Article 10(g).

\(^{28}\) For example, 2014 Public Contracts Directive, Article 14.

\(^{29}\) For example, 2014 Public Contracts Directive, Article 10(e).

\(^{30}\) For example, C-220/05 Jean Auroux and others v. Commune de Roanne.

\(^{31}\) C-451/08 Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben.

\(^{32}\) For example, Article 32.

\(^{33}\) C-454/06 pressetext Nachrichtenagentur GmbH v. Republic of Austria and others. The 2014 Procurement Directives codify and amplify the case law (e.g., the 2014 Public Contracts Directive, Article 72).

\(^{34}\) See C-324/98 Teleaustria Verlag GmbH and another v. Telekom Austria AG, Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJEU 2006/C 179/02 (1 August 2006), and T-258/06 Germany v. Commission.

\(^{35}\) C-393/06 Ing Aigner, Wasser-Wärme-Umwelt GmbH v. Fernwärme Wien GmbH.
Works and services concession contracts in these fields are covered by the 2014 Concession Contracts Directive (which also has provisions determining which rules govern the award of mixed contracts (involving elements covered by each of these Directives)). Where the Defence and Security Procurement Directive applies, neither the 2014 Utilities Contracts Directive nor the 2014 Public Contracts Directive apply. The most sensitive defence contracts may still be awarded outside the scope of the Defence and Security Procurement Directive.

IV SPECIAL CONTRACTUAL FORMS

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

b purchasing through or from central purchasing bodies (the 2014 Public Contracts Directive; the Utilities Contracts Directive; and the Defence and Security Procurement Directive);\(^\text{37}\)
c dynamic purchasing systems (DPS) (the 2014 Utilities Contracts Directive and the 2014 Public Contracts Directive);\(^\text{38}\) and
d qualification systems (the 2014 Utilities Contracts Directive).\(^\text{39}\)

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

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

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

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

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

\(^{36}\) Respectively, Articles 33, 51 and 29.
\(^{37}\) Respectively, Articles 37, 55 and 10.
\(^{38}\) Respectively, Articles 52 and 34.
\(^{39}\) Article 77.
A Commission Interpretative Communication on institutionalised public–private partnerships recommends that authorities should simultaneously advertise the selection of the joint venture partner and the award of a contract to the joint venture. Contracts between authorities are in principle subject to the Directives. There are certain exceptions, although these all prohibit private participation or shareholdings.

The 2014 Utilities Contracts Directive has separate rules on joint ventures between utilities and on intra-group supplies.

V THE BIDDING PROCESS

i Notice

Most procurement processes are formally commenced by publication of a contract notice. All official notices under the Directives, such as prior information notices, contract notices and contract award notices, must be submitted electronically for publication in the Official Journal of the European Union (OJEU), which is accessible free of charge at Tenders Electronic Daily.

ii Procedures

The Directives envisage various contract award procedures:

a open procedure, a one-stage process where bidders must show their good standing and their tender proposals in a single bidding round;

b restricted procedure, a two-stage process where, based on financial standing, qualification and past experience, at least five bidders are shortlisted to tender;

c competitive dialogue procedure, a process generally used for complex procurements where the authority knows only the output that it requires and has not yet identified a solution;

d competitive procedure with negotiation or negotiated procedure with advertisement, a process generally used for procurements where the authority knows both the output and the likely solution, but wishes to negotiate the terms with bidders;

e innovation partnership for the development of innovative products; and

f exceptionally, negotiated procedure without advertisement.

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

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

42 Articles 29 and 30.


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

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

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


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

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

50 For example, 2014 Public Contracts Directive, Article 32.
For the procurement of social and other specific services under the ‘light touch’ regime, and where the 2014 Concession Contracts Directive applies, no procedure is specified.

There are minimum timescales for key stages in most procedures, particularly as regards the minimum period between the contract notice and bidders’ initial expressions of interest. These time periods may be shortened in some specified cases, and vary depending on the procedure adopted and which Directive applies.51

iii Amending bids

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

Authorities may in certain cases seek clarification or allow bidders to correct obvious errors.52 However, in the case of bids in the open procedure or restricted procedure, or final tenders in the competitive procedure with negotiation or negotiated procedure with advertisement, this does not allow negotiation or the submission of what should be viewed as a new tender.

The competitive dialogue procedure is slightly more flexible: the authority may, before tender evaluation, request that bids be clarified, specified and optimised. However, this must not involve changes to the essential aspects of the tender or the procedure that are likely to distort competition or have a discriminatory effect.53 After selection of the winning bid, negotiations are permitted to confirm aspects of the tender and finalise the contract terms, provided the essential aspects are not materially modified and, again, there is no risk of distortion or discrimination.54

VI ELIGIBILITY

i Qualification to bid

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

a personal standing (e.g., whether the bidder has been declared insolvent or convicted of money laundering or corruption offences);55

b enrolment on a professional or trade register as required in the bidder’s state of establishment;56

51 For example, 2014 Public Contracts Directive, Articles 27 to 31 and 47.
52 2014 Public Contracts Directive, Article 56(3) and 2014 Utilities Contracts Directive, Article 76(4). While there is no explicit provision in the 2014 Concession Contracts Directive or in the Defence and Security Procurement Directive the same rules would be expected to apply under the Treaty principles to amendments during procedures governed by those Directives.
53 For example, 2014 Public Contracts Directive, Article 30(6).
54 For example, 2014 Public Contracts Directive, Article 30(7).
55 For example, 2014 Public Contracts Directive, Article 57.
56 For example, 2014 Public Contracts Directive, Article 58(2).
c financial standing;\(^{57}\) and
d technical and professional ability.\(^ {58}\)

A bidder may rely upon the technical and professional ability or financial standing of other entities, which could include other members of a bidding consortium or nominated subcontractors.\(^ {59}\)

ii Conflicts of interest

The 2014 Procurement Directives contain express provisions on conflicts of interest. Authorities must investigate possible conflicts of interest where a member of the authority’s award panel is connected with a bidder, although they have some discretion as to how to deal with such conflicts.\(^ {60}\) Although the Defence and Security Procurement Directive does not contain an express provision, the obligation of non-discrimination imposes the same requirements in respect of procurements conducted under it.\(^ {61}\)

Where an economic operator was involved in design work before the start of the award process and then wishes to bid for the contract, it could have a knowledge advantage from having prepared the designs and it could, even without intending to, have influenced the design of the specification or procurement process in such a way as to favour itself. Authorities must consider these issues case by case and permit the economic operator the opportunity to explain why there is no conflict of interest in a given case;\(^ {62}\) a blanket ban on involvement of those with prior knowledge has been held to be disproportionate and in breach of the equal treatment principle.\(^ {63}\)

iii Foreign suppliers

The Directives do not prohibit non-EU suppliers from bidding for public contracts. The GPA requires providers from GPA states\(^ {64}\) to be given the same treatment as is afforded to national providers. Certain types of contracts are outside the GPA, including contracts for health services and defence contracts. Except for central government procurement, which is open to all GPA businesses, other procurements are only open to the extent that the bidder’s home state allows EU undertakings access to government procurement.

Special rules apply to utilities for the supply of goods (but not works or services). Where more than half the products (including software in telecommunications network equipment)

\(^{57}\) For example, 2014 Public Contracts Directive, Article 58(3).

\(^{58}\) For example, 2014 Public Contracts Directive, Article 58(4).

\(^{59}\) For example, 2014 Public Contracts Directive, Article 63.

\(^{60}\) For example, the 2014 Public Contracts Directive, Article 24.

\(^{61}\) See T-160/03 AFCon Management Consultants and others v. Commission, which was decided under internal Commission rules but the principles in the case are likely to apply to the Defence and Security Procurement Directive.

\(^{62}\) For example, the 2014 Public Contracts Directive, Articles 41 and 57(4)(f).

\(^{63}\) See joined cases C-21/03 and C-34/03 Fabricom SA v. Belgium, Paragraphs 25 to 36.

\(^{64}\) In addition to the 28 EU Member States, the other GPA states are Armenia, Canada, Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Moldova, Montenegro, the Netherlands (with respect to Aruba), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States. A revised and expanded GPA, modernising certain aspects of its rules, entered into force on 6 April 2014.
in a bid are from third countries with which the EU does not have reciprocal agreements and the bid is equivalent in price and quality to an EU bid, then the utility must favour the bid comprising EU products.\(^{65}\)

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

**VII AWARD**

\*i\* **Evaluating tenders**

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

Authorities must disclose, before receiving bids, the criteria that they will use for bid evaluation and the weightings of the criteria chosen.\(^{66}\) In general, the criteria and weightings should not be changed during the process.

The authority must, if a tender appears to be abnormally low, request explanations from the bidder, and may then reject the abnormally low tender.\(^{67}\)

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

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

Indirect means of discrimination are also prohibited. For example, if the specification is written in a particular way to favour national suppliers, this infringes the requirement of non-discrimination. Therefore, an authority should normally use a national technical specification transposing European standards; it can only use other national standards if there is no European standard.\(^{68}\)

The procurement may take account of social or environmental considerations, but this must be non-discriminatory and proportionate to the objectives being pursued.\(^{69}\) Any requirements must be relevant to the contract.\(^{70}\)

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\(^{65}\) 2014 Utilities Contracts Directive, Article 85.

\(^{66}\) For example, 2014 Public Contracts Directive, Article 67; C-532/06 *Emm G Lianakis AE and others v. Dimos Alexandroupolis and others*, Paragraphs 36 to 38.

\(^{67}\) For example, 2014 Public Contracts Directive, Article 69.

\(^{68}\) For example, 2014 Public Contracts Directive, Article 42(3), (4) and (5).

\(^{69}\) This is codified in, for example, the 2014 Public Contracts Directive, Articles 18(2) and 56(1), which permit authorities to exclude bidders that do not comply with their obligations in the fields of environmental, social and labour law.

\(^{70}\) See C-448/01 *EVN AG and Wienstrom GmbH v. Austria*, where the bidder was required to show it supplied volumes of ‘green’ electricity that went far beyond the authority’s actual requirement. The CJEU held this was unlawful.
There are limited ‘national interest’ exceptions in the Directives. For example, the Defence and Security Procurement Directive does not apply to contracts for the purpose of intelligence activities or that would oblige the Member State to supply information contrary to the essential interests of its security.71 These exceptions are narrowly construed.

VIII INFORMATION FLOW

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

Under the Directives, authorities are required to notify bidders of decisions and supply certain information. When they make an award decision, they must then ‘stand still’ for a minimum of 10 calendar days before signing the contract.72 This period allows unsuccessful bidders time to bring a legal challenge to prevent contract signing if they consider that the award decision is unlawful. Notices of award decisions to bidders must include scores, and a narrative summary of the characteristics and relative advantages of the winning bid.

IX CHALLENGING AWARDS

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

i Procedures

Rules governing challenges under the 2014 Procurement Directives are dealt with in the Public Sector Remedies Directive and the Utilities Remedies Directive, with those governing defence in the Defence and Security Procurement Directive itself. The Commission has reviewed the operation of these directives and has concluded that they are generally working well, so they will be maintained in their present form without further change at this stage.73 In this section, the general provisions common to all are considered and referred to as the ‘Remedies Provisions’, but references to article numbers are to articles of the Public Sector Remedies Directive.

Member States must ensure that decisions taken by authorities ‘may be reviewed effectively’,74 and ‘as rapidly as possible’, in accordance with the Remedies Provisions.75

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71 Article 13(a) and (b). See also 2014 Public Contracts Directive, Article 15.
72 For example, Public Sector Remedies Directive, Article 2a.
74 See C-440/13 Croce Amica One Italia Srl v. Azienda Regionale Emergenza Urgenza (AREU). The purpose of the review is to ensure that the EU public procurement rules are complied with, so that a simple examination of whether the decision is arbitrary will not suffice.
75 Article 1(1).
‘Decisions’ are construed broadly and can include a decision to admit a bidder. Member States may decide who is to carry out such reviews (‘review body’). The nature of review bodies varies considerably between Member States, and no bidder should assume that the relevant review body will be the national court. Member States may require that a bidder first seek review with the authority, or that a bidder be required to notify the authority of its intention to seek review.

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

The review procedures must be available as a minimum to any person ‘having or having had an interest in obtaining a particular contract’ (i.e., to bidders themselves) who can show that he or she has been or risks being harmed by an alleged infringement. This leaves scope for interpretation of what a risk of being harmed might mean; for example, must the bidder show that, but for the breach, it would have good prospects of being awarded the contract, or merely that it would have had a more than minimal prospect of being awarded the contract? However, the CJEU has clarified that a bidder who has been definitively excluded from a procedure by an authority (for failure to provide original documentation pertaining to financial standing) can be refused access to a review of the award decision in that procedure.

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

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

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

### Grounds for challenge

The Remedies Provisions say little about the grounds for challenge by bidders, providing simply that infringements of ‘Community law in the field of public procurement or national

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76 C-391/15 Marina del Mediterraneo, SL v. Consejeria de Obras Publicas y Vivienda de la Junta de Andalucia (5 April 2017).
78 C-583/13 eVigilo Ltd v. Priesgaisrines apsaugos ir gelbejimo departamentas prie Viduus reikalu ministerijos.
79 Article 3.
rules transposing that law80 can be challenged. This covers breaches of both national rules implementing the Directives and Treaty principles, such as equality, non-discrimination and transparency.

The number of challenges and prospects of success vary considerably from state to state.81 As noted above, the Commission may invoke a corrective mechanism when it ‘considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure’.82

iii Remedies
There are four main types of remedies that must be available to the review body under the review procedures. The first three are:83

a interim suspension of the award of the contract pending review by the first instance review body, which must continue at least for the standstill period; the review body’s decision as to whether to uphold this interim suspension can take into account the consequences of the continued suspension for all interests likely to be affected, as well as any public interest;

b set aside of an unlawful decision; this includes the power to amend the invitation to tender, the contract documents and other documents relating to the contract award procedure, to stop the procurement and to order a new procurement; and

c the power to award damages (compensation) to a person harmed by the infringement.

The fourth and arguably most powerful remedy is that of ineffectiveness. Ineffectiveness must be available in three situations:84

a if an authority has illegally awarded a contract without prior publication of a contract notice;

b if an authority has awarded a contract in breach of the standstill period or suspension of contract award, and a bidder has thereby been deprived of the possibility to complain about some other infringement that has affected the bidder’s chance of obtaining the contract; and

c where a Member State has permitted award of contracts without a standstill period under a framework or DPS.

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

Member States can provide that the consequence of ineffectiveness is retroactive cancellation of all contractual obligations, or may limit cancellation to future obligations only. If the latter option is chosen, the Member State must provide for the application of alternative penalties. If the general interest is in upholding the contract, so that the review body decides not to declare a contract ineffective, it must provide for alternative penalties.

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

80 Article 1(1).
81 See national chapters for details of numbers and prospects for challenge.
82 Article 3(1).
83 Article 2(1).
84 Article 2d.
X OUTLOOK

In 2018, we will continue to see national activity across the EU as Member States take steps to facilitate the mandatory transition to electronic procurement in their respective territories for all contracting authorities and all procurement procedures by October 2018. This will include the implementation of electronic communication, electronic submission, electronic auctions and electronic catalogues.

There are likely to be minor changes to the Directives as a result of the UK leaving the EU on 29 March 2019, such as the removal of UK-specific references. Negotiations on the terms of withdrawal and arrangements for the transitional period are ongoing. The draft withdrawal agreement provides for the Directives to continue to apply to ongoing UK procurements commenced prior to 31 December 2020, when the transitional period ends. However, the shape of the procurement regime that will apply between the remaining 27 EU member states and the UK in the long term will only become apparent once we have greater clarity on the terms of the post-Brexit trading relationship between the EU and the UK.
Chapter 9

FINLAND

Anna Kuusniemi-Laine, Johanna Lähde, Laura Nordenstreng-Sarkamo and Marjut Kaariste

I INTRODUCTION

In Finland, public procurement is regulated by the Act on Public Contracts and Concessions (the Act on Public Contracts), the Act on Public Contracts by Contracting Authorities in the Water, Energy, Transport and Postal Services Sectors (the Act on Public Contracts in the Utilities Sector) and the Act on Public Contracts in the Fields of Defence and Security. The key national legislation is based on the EU directives on public procurement, specifically the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive, the 2014 Concession Contracts Directive, the Defence and Security Procurement Directive and the Remedies Directive. The Agreement on Government Procurement (GPA) also applies to public procurement in Finland.

The Ministry of Economic Affairs and Employment is responsible for the preparation of legislation concerning public procurement, while the Market Court is a special court that handles public procurement cases. The Market Court’s rulings in public procurement cases can be appealed to the Supreme Administrative Court. Appeal requires leave to appeal in most cases.

In addition, the Finnish Competition and Consumer Authority (FCCA) supervises public procurement matters. In practice, supervision focuses on the most significant errors and misconduct in terms of transparency and non-discrimination, such as illegal direct award or intentionally preparing incomplete contract notices. All persons are entitled to submit a request for action to the FCCA but the FCCA can also investigate public procurement matters on its own initiative.

The Finnish public procurement legislation emphasises fundamental principles, which include equality and non-discriminatory treatment of participants. More specifically, the contracting authorities shall make use of the existing competitive conditions, ensure equality and non-discriminatory treatment among all participants in the procurement procedure, and act in a transparent way while meeting the requirements of proportionality.

1 Anna Kuusniemi-Laine is a partner, Johanna Lähde is a senior counsel, Laura Nordenstreng-Sarkamo is a counsel and Marjut Kaariste is a senior associate at Castrén & Snellman Attorneys Ltd.
2 1397/2016.
3 1398/2016.
II YEAR IN REVIEW

The new legislation came into force at the beginning of 2017 and the FCCA started its new task of supervision of public procurement. During its first year of public procurement supervision, the FCCA issued two decisions where it requested the contracting authorities to pay attention to grounds for direct award. At the beginning of 2018, the FCCA issued similar decisions and submitted two proposals to the Market Court to impose penalties to the contracting authorities due to direct award of procurement contracts.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The concepts of contracting authorities and contracting entities are defined in the Act on Public Contracts. In general, purchases of goods and services, or public works contracts with public funds made by the state, municipal authorities, church and public enterprises have to be tendered in accordance with the procurement legislation.

Procurement legislation also applies to bodies governed by public law. A body governed by public law means an entity that has a legal personality and is established for the specific purpose of meeting needs in the general interest, and not having an industrial or commercial character. It must be financed for the most part by another contracting authority, be subject to management supervision by another contracting authority, or have an administrative, managerial or supervisory board with most of its members appointed by another contracting authority.

The Ministry of Economic Affairs and Employment maintains a guiding list on which bodies are considered to be central government authorities. The list can be found on the public online portal, HILMA, on which contract notices are published.

In addition, the procurement legislation applies to any purchaser if it has received more than half of the value of the contract in aid from a contracting authority.

ii Regulated contracts

Public procurement legislation concerns the service, supply, public works or concession contracts the contracting authorities enter into with external suppliers. According to the Act on Public Contracts, public contracts are contracts of financial interest concluded in writing between one or more contracting authorities and one or more suppliers. Service concessions had already been governed by national procurement legislation prior to the 2014 Procurement Directives. Finland’s public procurement legislation also includes specific provisions for healthcare and social services contracts.

There are general exclusions from the scope of public contracts. The Act on Public Contracts does not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the law or when the protection of the basic security interests of the state so require. Further, the Act does not apply to public contracts when their objective is mainly applicable to military use. The Act also does not apply to contracts that are governed by different procedural rules and awarded, inter alia, pursuant to the particular procedure of an international organisation.

5 www.hankintailmoitukset.fi.
In addition, the Act on Public Contracts does not apply to contracts listed in Article 10 of the 2014 Public Contracts Directive.

In Finland, contracts under the applicable national threshold value are excluded from the scope of procurement legislation. The threshold value refers to the estimated value of the contract. National procurements (i.e., procurements with value exceeding the national threshold but below the EU threshold) must be made by competitive tendering procedures, but the process of deciding who shall be awarded a contract is not as strict as with procurements exceeding EU thresholds.

Finland has also adopted national thresholds for social and other specific services listed in Annex XIV of the 2014 Public Contracts Directive as well as for concessions. The national thresholds are €400,000 for social services, €300,000 for other specific services and €500,000 for concessions. If the value of the contract exceeds these national thresholds, the contracts must be made using the EU provisions set out in the Directive for social and other specific services and concessions. Thus, in Finland the threshold for using EU rules in relation to these services and concessions is lower than in the Directive.

The applicable national thresholds from 1 January 2017 are as follows:

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods and services contracts</td>
<td>€60,000</td>
</tr>
<tr>
<td>Concessions</td>
<td>€500,000</td>
</tr>
<tr>
<td>Contracts for social services listed in Annex XIV of the Public Sector Directive 2014/24/EU</td>
<td>€400,000</td>
</tr>
<tr>
<td>Contracts for other specific services listed in Annex XIV of the Public Sector Directive 2014/24/EU</td>
<td>€300,000</td>
</tr>
<tr>
<td>Works contracts</td>
<td>€150,000</td>
</tr>
<tr>
<td>Design contests</td>
<td>€60,000</td>
</tr>
</tbody>
</table>

In the sector for defence and security, the national threshold for goods and services contracts is €100,000, and for works contracts it is €500,000. In the utilities sector, only the EU thresholds apply.

Where the contracting authority wishes to change a contract or transfer a contract to a different supplier, a new bidding procedure may be required. It is established in national law whether a change is to be regarded as material.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Contracting authorities may employ framework agreements and joint procurements or make use of other partnership opportunities available in awarding public contracts in order to reduce the administrative work involved in procurement.

Suppliers for the framework agreement shall be chosen in a competitive bidding procedure organised in accordance with the Act on Public Contracts. Where a framework agreement is concluded with several suppliers, the contracting authority shall notify in the procurement documents the number of suppliers that shall be selected to the framework agreement. The contracting authority shall select the number of suppliers notified in the procurement documents, unless there are fewer suitable suppliers and admissible bids that meet the award criteria.
Contracts based on framework agreements shall be concluded with the original parties in accordance with the contract decision. The framework agreement may not be used in such a way as to distort, restrict or prevent competition. During the contract term, the parties may not make substantial amendments to the terms laid down in the framework agreement.

Pursuant to the Act on Public Contracts, the term of the framework agreement may not exceed four years, save in exceptional cases duly justified by the subject of the framework agreement.

Central purchasing bodies may be used for acquiring supplies or services intended for the contracting authorities owning them either directly or indirectly, or for awarding public contracts or concluding framework agreements for supplies, services or works intended for the contracting authorities. The central purchasing body shall operate to perform the aforementioned activities, having been established expressly to perform these activities or been prescribed the performance of these activities as part of its remit.

The largest central purchasing bodies are Hansel Ltd, which is the government’s central purchasing body, and KL-Kuntahankinnat, which is a central purchasing body for the municipalities. The establishment of central purchasing bodies has increased in recent years, especially among the hospital districts and municipalities. In 2016, the value of Hansel’s procurements was approximately €770 million, whereas the equivalent for KL-Kuntahankinnat was approximately €400 million.

ii Joint ventures

There is a specific provision concerning in-house procurements (such as from public–public joint venture companies) in the Act on Public Contracts, which is based on EU case law and the 2014 Public Contracts Directive. According to the Act, parent contracting authorities can make purchases from an in-house entity without a prior procurement process if two requirements are met: (1) the parent contracting authorities exercise sufficient control over the in-house entity; and (2) at most 5 per cent and €500,000 per year of the activities of the in-house entity come from other activities than those carried out in the performance of tasks entrusted to the in-house entity by the controlling contracting authorities. By following a regulated procedure, this amount may, in certain situations, be raised to 10 per cent.

These amounts show that the limit for sales to entities other than the controlling contracting authorities is much tighter than was required in the 2014 Public Contracts Directive. Finland has adopted tighter limits for reasons of competitive neutrality.

The same limits as stated above also apply to horizontal cooperation. Horizontal cooperation is regulated in the Act on Public Contracts and the provisions are based on the 2014 Public Contracts Directive. A public authority can supply another public authority without a tendering procedure if the contracting authorities are cooperating and jointly fulfilling their common obligations in relation to public interest. In order for the horizontal cooperation to be acceptable, no more than 5 per cent and €500,000 per year of the services provided within the cooperation can be supplied to entities other than those involved in the cooperation. By following a regulated procedure, this amount may, in certain situations, be raised to 10 per cent.

In the utilities sector, the limit for in-house entity sales to entities other than the controlling contracting authorities is higher and corresponds to the limit set out in the 2014 Utilities Contracts Directive. Thus, in the utilities sector this limit is 20 per cent. This also applies to horizontal cooperation in the utilities sector.
As regards public–private partnerships involving the procurement of goods, services (including concessions) or works, the private sector partner has to be competitively tendered when deciding on the partnership. Typically, the negotiated procedure or competitive dialogue is used for this purpose.

V THE BIDDING PROCESS

i Notice
Contracting authorities have to publish a contract notice of all contracts falling into the scope of application of the public procurement acts if no grounds for direct award are applicable. Contract notices are published on the HILMA website. This obligation covers contracts above national or EU thresholds. Notices are published on HILMA free of charge. Contracting authorities may also publish information in other media or contact potential suppliers directly after the notice has been published on HILMA.

Notice are published by completing an electronic standard form found on the HILMA portal. In addition to national forms, the portal includes the key standard forms needed for advertising the EU procurements both in the classical and utilities sector. HILMA forwards notices to the TED database. Certain EU notices need to be completed and published via the Simap website. All notices (including old notices) can also be found via the CREDITA website6 (old notices are filed on this website).

ii Procedures
According to the Act on Public Contracts, contracting authorities in contracts above the EU thresholds must follow one of the procedures prescribed in the 2014 Procurement Directives. The requirements for the use of these procedures are in line with the requirements set in the Directives.

In contracts that are above national thresholds but below EU thresholds, the procurement procedure is more flexible. The procedure is at the discretion of the contracting entity provided that the principles of openness, equality, non-discriminatory treatment and proportionality are observed.

In relation to contracts concerning social and other specific services and concessions, the contracts must be made using the EU provisions set out in the 2014 Procurement Directives for social and other specific services and concessions if the relevant national threshold is exceeded. In line with the 2014 Procurement Directives, the procurement procedures for these contracts are more flexible than in other EU procurements.

In the utilities sector, qualification systems may also be used. The procedures in the utilities sector follow the 2014 Utilities Contracts Directive rules.

The use of direct award procedures is – in line with the 2014 Procurement Directives – restricted by allowing such procedures only in specified and exceptional circumstances. In addition to the conditions set in the 2014 Procurement Directives, the direct award procedure may be used in individual cases in contracts for social services if the arrangement of a competitive bidding or the change of the service provider would be manifestly unreasonable, or particularly inappropriate from the point of view of the client in order to safeguard a significant care or client relationship.

6 www.credita.fi.
iii Amending bids

The contracting authorities must ensure equal and non-discriminatory treatment of all participants in the procurement procedure. Thus, after submitting the final tender, the bidders cannot make amendments to their tenders. This also means that if the tender includes errors or inconsistencies (for instance, regarding the price), the bidder cannot amend these errors on its own initiative.

The contracting authority may ask a bidder to clarify a tender, provided that this does not endanger the equal and non-discriminatory treatment of the participants. Therefore, clarifications that result in the bidder improving its tender are not allowed. It is at the discretion of the contracting authorities whether they request a bidder to clarify a tender. Case law further clarifies the grounds on which the contracting authorities may ask for clarifications. Only obvious faults may be corrected, and all bidders must be allowed to clarify their tenders in an equal manner. In addition, contracting authorities can make the tenders comparable if one of the tenders includes an obvious and reparable error, such as the quotation of prices in the wrong currency.

In Finland, the concept of preferred bidder in negotiations is not referred to in the Act on Public Contracts; thus, no specific rules govern the preferred bidder stage. In practice, a similar procedure can be used in the competitive dialogue and negotiated procedure, where the negotiations can be organised in several phases if this has been clearly described in the contract notice. After the first negotiation round, the candidates can submit their initial tender based on which the contracting authority can choose a ‘preferred tender’. The contracting authority can continue negotiations regarding a potential solution and specifications of the contract with one of the bidders. If the proposed solution does not appear to be viable, the contracting authority may continue negotiations with the rest of the bidders. In practice, use of the described procedure has been rare.

During the negotiation phase, changes to the contract cannot exceed what has been notified in the contract notice. For example, the initial scope of the object of the contract cannot be broadened during the negotiations.

VI ELIGIBILITY

i Qualification to bid

Contracting authorities must exclude a party from a procurement procedure due to criminal offences that correspond to the mandatory exclusion grounds set out in the 2014 Procurement Directives. In addition to the mandatory exclusion grounds set out in the 2014 Procurement Directives, contracting authorities must also exclude a party with a member of an administrative, management or supervisory body, or a person who has powers of representation, decision or control therein who has been subject of a conviction by a final judgment related to certain criminal offences within labour law. The mandatory exclusion grounds only apply to procurements exceeding the EU threshold, procurement of social services and other specific services exceeding national thresholds.

The contracting authority may also, at its discretion, exclude a party from a procurement procedure for the following reasons:

a the party is bankrupt or under proceedings for a declaration of bankruptcy, is being wound-up, is undergoing restructuring proceedings or is in any analogous situation;

b the party is guilty of grave professional misconduct, which renders its integrity questionable, and which the contracting authority can demonstrate;
c the party has not fulfilled obligations relating to the payment of taxes or social security contributions in Finland, or in the country of its establishment;

d the party has violated environmental, social or employment obligations set in Finnish or EU legislation, collective agreements or international agreements;

e the party has entered into agreements with other economic operators aimed at distorting competition and that the contracting authority can demonstrate;

f the party has a conflict of interest that cannot be effectively eliminated by other means;

g the party has participated in the preparations of the procurement in a way that it distorts competition and the distortion cannot be remedied by other, less intrusive means;

h the party has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, which led to early termination of that prior contract, damages or other comparable sanctions;

i the party has supplied essentially misleading information or no information regarding exclusion grounds to the contracting authorities; or

j the party has undertaken to:

• unduly influence the decision-making process of the contracting authority;

• obtain confidential information that may confer upon it undue advantages in the procurement procedure; or

• negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

The contracting authorities may set requirements relating to the party’s financial and economic standing, technical capacity, and professional ability and quality. All requirements must be proportional to the subject matter, purpose and scope of the contract. The required turnover cannot be more than two times the value of the awarded contract. In the defence sector, the contracting authorities can also set stringent requirements for bidders regarding information security. The contracting authority may exclude a party if it does not fulfil the requirements set for the bidder.

According to national case law, a bidder can also be excluded if the identity of the bidder or group of bidders is not distinctly clear. In the case in question, the Supreme Administrative Court stated that, as the application to bid and the final bid included contradicting information on several companies, it was not unambiguous who the bidder company was and whose resources were to be used.

ii Conflicts of interest

The Act on Public Contracts regulates conflicts of interest in several manners. First, the Act requires that if a candidate or tenderer takes part in the preparation of the procurement procedure, contracting authorities must ensure that this does not distort competition.

Second, the Act gives contracting authorities the possibility to exclude from the procurement procedure: a party that has a conflict of interest that cannot be effectively eliminated by other means; and a party that has participated in the preparation of the procurement procedure in a way that distorts competition, and the distortion of competition cannot be remedied.

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7 KHO:2015:64.
by other, less intrusive means. For example, according to national case law, an economic operator cannot participate in the drafting of the procurement documentation as this would give the participant an unjustified advantage.8

Third, the Act governs conflicts of interest via the principle of equal treatment. Based on national case law, conflicts of interest arise when the representative of the contracting authority has commitments, a seat on a committee, or a monetary interest in one of the bidder companies or its closely related subsidiaries. In such a case, the representative should recuse him or herself from participating in the procurement procedure.9

iii Foreign suppliers
The principles of equal treatment and non-discrimination set out in the GPA as well as in the Public Procurement Directives must be adhered to. Bidders from the GPA countries are not required to set up a local branch or subsidiary, or to have local tax residence in Finland. If the contracting authorities require the bidder to submit extracts of their trade register or other certificates, the bidder’s local corresponding documentation must be allowed.

VII AWARD
i Evaluating tenders
All tenders are opened simultaneously. In the open procedure, the suitability of bidders and the fulfilment of the obligatory minimum criteria are assessed first. In other procedures, the suitability of the bidders has already been assessed when selecting bidders to participate in the procedure.

Only the compliant tenders are compared and evaluated based on the preset criteria. The contract is awarded based on the most economically advantageous tender from the point of view of the contracting authority. The most advantageous tender can be identified on the basis of the lowest price, cost-effectiveness or the best price–quality ratio. It must be clearly stated in the procurement documents which comparison criteria will be used to award the contract as well as each criteria and their relative weighting. If the relative weighting of the comparison criteria is justifiably not possible, the comparison criteria shall be specified in order of importance.

The comparison criteria can relate to qualitative, environmental or social aspects and they can include, for example:

a quality;

b price;

c technical, aesthetic, functional and environmental characteristics;

d running costs;

e cost-effectiveness;

f after-sales services and technical assistance;

g the delivery date and delivery period;

h organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;

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8 MAO:771/14.
9 See, for example, MAO:540/13 and MAO:11/11.
If the contracting authority uses price as the sole award criterion in contracts other than supply contracts and the procurement exceeds the EU thresholds or, in the case of procurement of social services or other specific services, the procurement exceeds the national thresholds, it must state the reasons for this in the procurement documents or in the written report on the procurement. Such reasons cannot be appealed, but stating these reasons is mandatory.

Award criteria must be linked to the subject matter of the contract in question. This will be considered satisfied when the award criteria relate to the works, supplies or services to be provided under the contract in question in any respect and at any stage of their life cycle.

**ii National interest and public policy considerations**

Comparison criteria may relate to environmental or social aspects and they may include factors such as environmental characteristics and accessibility. In addition, the contracting authorities may reserve the right to participate in public procurement procedures in favour of sheltered employment programmes where most of the employees concerned cannot engage in occupations under normal conditions. The contract notice must clearly indicate that the contract is reserved for sheltered workshops or programmes.

All bidders must be treated in an equal and non-discriminatory manner, which means that domestic bidders cannot be favoured. If the object of the contract is required to have quality marks or technical specifications, the contracting authorities must accept the bid provided that the proposed products, services or works comply with a national standard transposing a European standard; a European technical approval; an official technical specification; an international standard; or a technical reference. Further, these specifications must address the performance or functional requirements set in the contract notice.

**VIII INFORMATION FLOW**

In accordance with the principle of equal and non-discriminatory treatment, all bidders must be provided with the same information throughout the procurement process.

Decisions concerning the positions of candidates and bidders, and the results of the procurement procedure, including the grounds for the award decision, must be provided in writing by the contracting authority. A decision shall include information about factors that have substantially affected the decision, at minimum the reasons for exclusion of a bidder or tender and the grounds on which accepted tenders have been compared. The decision must include written instructions on how to initiate a correction procedure with the contracting authority itself and on appeal to the Market Court (‘petition instructions’). The award decision and the grounds thereof, as well as the petition instructions, shall be submitted in writing to the parties concerned (i.e., the bidders).

Disclosure obligations and access to information is governed by the Act on the Openness of Government Activities (the Openness Act). Pursuant to the Openness Act, participation requests, tenders and other documents related to the procurement process become public.
after the procurement agreement has been concluded. However, documents shall be given to other bidders before they are in the public domain if said documents may influence their rights, interests or obligations in the matter.

Information compiled in public procurement processes relating to a business or professional secret of another bidder is exempted from the publicity principle and shall not be disclosed. However, the total price used in comparison must be provided to other bidders upon request.

The award decision does not in itself constitute a procurement contract, which must be concluded separately in writing. As regards procurements that exceed the EU thresholds, the procurement contract may be concluded no earlier than 14 days after all candidates or bidders have been informed, or are deemed to have been informed of the decision and the petition instructions (‘standstill period’).

IX CHALLENGING AWARDS

i Procedures

Concerned parties can initiate a correction procedure with the contracting authority and refer a procurement matter to the Market Court. Generally, only bidders that have participated in the tender procedure have been regarded as concerned parties. However, as regards direct awards, parties operating on the same market also have the right to initiate proceedings. Further, in cases where the contracting authority uses discriminatory criteria in the contract notice, parties that have failed to submit a tender due to, for example, a flaw in the contract notice may also be allowed to challenge decisions.

There are two parallel remedies for the bidders: they may initiate a correction procedure with the contracting authority itself and appeal the contracting authority’s decision to the Market Court. A party that has submitted an appeal to the Market Court must inform the contracting authority thereof by the date on which the appeal is submitted. In practice, unsuccessful bidders tend to initiate a correction procedure and appeal the award decision to the Market Court simultaneously, as the deadline for both is 14 days after the party has received information about the decision in writing. However, if the award decision or the petition instructions have been substantially deficient, the deadline for filing the petition is six months of the date of the decision. In the case of a direct award, the deadline for filing the appeal is six months of the date that the contract is signed; however, if the contracting authority has published a voluntary \textit{ex ante} transparency notice, the appeal shall be filed within 14 days of the transparency notice being published.

The contracting authority may also initiate the correction procedure on its own initiative within 90 days of its decision and re-award the contract. The contracting authority must immediately inform parties if a correction procedure has been initiated.

In addition to formal remedy procedures for concerned parties, any person or company can submit a request for the FCCA to investigate a public procurement case. Thus, the right to make such requests is not limited to concerned parties.

Following an increase in the fees for court proceedings on 1 January 2016, the processing fee is now:

\begin{enumerate}
  \item \(\varepsilon2,000\) for disputes concerning procurements of a value less than \(\varepsilon1\) million;
  \item \(\varepsilon4,000\) for disputes in which the value of the procurement is at least \(\varepsilon1\) million; and
  \item \(\varepsilon6,000\) if the value of the procurement is at least \(\varepsilon10\) million.
\end{enumerate}
In the period immediately following this increase, appeals lodged with the Market Court decreased rather significantly; however, the year 2017 saw a slight increase in the number of lodged appeals. In addition to the processing fees, appellants can expect to pay for their own legal fees and, in cases where an appeal is unsuccessful, part of the counterparty’s legal fees. The legal fees are, of course, dependent on the complexity of the case.

Litigation in the Market Court takes eight months on average in public procurement appeals. In 2017, the Market Court resolved approximately 500 public procurement matters. Appeals against the rulings issued by the Market Court can be lodged with the Supreme Administrative Court, provided that the Supreme Administrative Court grants leave to appeal. A ruling issued by the Market Court can be appealed without leave to appeal if the ruling includes imposing a fine on the contracting entity. Proceedings in the Supreme Administrative Court generally take at least 15 months, and in some cases up to 24 months.

ii Grounds for challenge

The contracting authority’s decision can be challenged on a number of different grounds. The most common grounds for challenge are the following:

a a bidder’s exclusion or lack thereof;
b the successful bidder was not the one who submitted the most advantageous tender;
c a procedural fault in the authority’s procedure;
d the comparison of tenders was inadequate because of the vagueness of or deviation from the selection criteria;
e a public contract has not been subject to public procurement; and
f the procurement procedure has not fulfilled the principle of equal and non-discriminatory treatment.

iii Remedies

For procurements not exceeding the EU thresholds, the Market Court may overturn the contracting authority’s decision completely or in part, forbid the contracting authority from pursuing its incorrect procedure and oblige the contracting authority to correct its incorrect procedure. These three remedies are primary and used in situations where the procurement contract has not been concluded. The contracting authority’s obligation to correct its incorrect procedure can involve, inter alia, re-evaluating the bidders’ suitability, correcting the comparison of tenders or organising a new procurement procedure.

If the procurement contract has already been concluded, the Market Court may order the contracting authority to compensate a bidder that could have been successful had the procurement procedure been handled in accordance with the applicable law. The compensation may not, without special grounds, exceed 10 per cent of the total value of the procurement contract. In practice, the compensation is often considerably lower.

As regards procurements exceeding EU thresholds, of social and other specific services, and concessions exceeding the relevant national thresholds, the Market Court may also set aside or shorten an already concluded procurement contract and order the contracting authority to pay a penalty fine to the state. Contracts exceeding EU thresholds, concerning social and other specific services, and concessions exceeding the relevant national thresholds are also subject to a standstill obligation, which means that the contract may not be concluded if the matter has been referred to the Market Court (‘automatic suspension’).
Despite an appeal to the Supreme Administrative Court, a ruling issued by the Market Court concerning primary remedies shall be complied with unless otherwise instructed by the Supreme Administrative Court. Rulings concerning other remedies shall be complied with when the ruling has become final.

In addition to formal remedies granted by the courts, the FCCA can provide administrative guidance to the procurement unit, prohibit illegal direct award contracts (if the contract has not yet been signed) or submit a proposal to the Market Court to impose sanctions (such as inefficiencies, penalties, a reduction of the contract term or cancellation of the procurement decision). The FCCA can only submit a proposal to impose sanctions in the case of direct award contracts exceeding EU threshold, procurement of social services and other specific services exceeding national thresholds.

Further, the FCCA can report any illegal or harmful practices discovered during supervision to the attention of the Ministry of Economic Affairs and Employment.

Damages can be sought through separate legal proceedings in civil courts. Such proceedings are, however, very rare in Finland.

X OUTLOOK

In 2018, case law based on the new procurement legislation will continue to evolve. Case law will hopefully answer open questions regarding this new legislation, and give tenderers and contracting authorities reassurance on proper procedures under the new legislative regime.

Strict new in-house provisions will also have an effect on the market. Many in-house entities must reassess their position under the new legislation. In certain fields, the new in-house legislation will have considerable effects on current structures. This especially applies to the waste sector, in which the need for possible legislative changes is being assessed.

In order to make the transition smoother, a transition period has been adopted regarding the new in-house rules. In most sectors, the strict thresholds for in-house entities’ sales to other entities than the controlling entities will not have to be applied as a whole until the beginning of 2019. In social services and other specific services, this transition period will continue until January 2022.

The new provisions on horizontal cooperation will also probably have similar effects on the market, and these provisions include a transitional period lasting until 2019 and 2022, respectively.

There is also comprehensive reform ongoing in Finland concerning healthcare and social services, as well as regional government. This is one of the biggest administrative and operational overhauls in Finland, and this major reform will also have a significant effect on public procurement practices in health and social care. The aim is to complete the reform by January 2020, with certain transitional periods.
Chapter 10

FRANCE

Vincent Brenot and Emmanuelle Mignon

I INTRODUCTION

The Public Procurement Ordinance\(^2\) and the Concession Ordinance,\(^3\) which came into force on 1 April 2016, reshaped the legislation applicable to public procurement contracts and concession contracts. These regulations transpose the European Directives and take into account the case law of the Court of Justice of the European Union (CJEU) and of the Council of State (the administrative supreme court in France).

Articles 39 and 40 of Law No. 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernisation of economic life (Sapin II) ratify the Public Procurement Ordinance (with slight modifications) and the Concession Ordinance. This law also empowers the government to codify the two above-mentioned ordinances in a new Public Procurement Code, which, according to the government, should be published by the end of 2018, but will more likely be published in 2019.


France retains certain specificities, especially in terms of litigation, as the division of the legal system between civil and administrative courts is not common to all other countries. However, the fundamental principles governing public procurement rules – transparency of procedures, non-discrimination of bidders, equal treatment of offers and the saving of public resources – are in line with the European Directives.

II YEAR IN REVIEW

The key legislation in 2017 governing government procurement is as follows:

- Decree No. 2017-516 of 10 April 2017, containing various provisions relating to public procurement;
- Ordinance No. 2017-562 of 19 April 2017, relating to public property;
- Administrative Order of 14 April 2017, relating to essential data in public procurement;

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1 Vincent Brenot and Emmanuelle Mignon are partners at August Debouzy. The authors would like to express their gratitude to Hélène Billery, counsel at August Debouzy, and Barbara Teissier du Cros, student at the Paris Bar School, for their valuable contribution to the drafting of this chapter.

2 Ordinance No. 2015-899 of 23 July 2015, relating to public procurement contracts.

3 Ordinance No. 2016-65 of 29 January 2016, relating to concession contracts.

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Administrative Order of 14 April 2017, relating to the minimum functionality and requirements of buyers’ profiles; and

Administrative Notice of 31 December 2017, relating to tenders’ thresholds and the lists of central government authorities.

Among key case law concerning the 2017 French procurement rules, it is worth mentioning the following:

a. the Council of State decision of 30 June 2017, allowing third parties and ‘favoured’ third parties (see Section IX) to request termination of the contract;4

b. the Council of State decision of 8 November 2017,5 which held that the delegating authority could modify the essential stages of the tendering procedure in order to preserve equality between the candidates, considering the very specific circumstances of this case, in which a candidate had accidentally gained access to information relating to the other candidate; and

c. the Council of State decision of 4 December 2017,6 which provides that a provision setting for the use of an interpreter to explain workers’ social rights and the safety rules they must comply with on a construction site is not prohibited.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The bodies subject to government procurement regulation are the same whether they enter into a procurement contract or a concession contract. There are two kinds of bodies:

a. contracting authorities, which include:
   • bodies governed by public law (the state, local authorities, and national and local bodies governed by public law);
   • bodies governed by private law that have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and under certain conditions (they are financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law; or they are subject to management supervision by those authorities or bodies; or they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law); and
   • bodies governed by private law created by public contracting authorities to fulfil certain needs they have in common; and

b. contracting entities,7 which include:
   • contracting authorities that pursue a network operator activity;
   • public undertakings that pursue a network operator activity. Public undertaking means any undertaking over which one or several contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein or the rules that govern it; and

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4 Council of State, 30 June 2017, Syndicat mixte de promotion de l’activité transmanche, No. 398445
5 Council of State, 8 November 2017, Société Transdev, No. 412859.
6 Council of State, 4 December 2017, Ministre de l’intérieur v. Région Pays de la Loire, No. 413366.
7 Article 11 of the Public Procurement Ordinance and Article 10 of the Concession Ordinance.
• when they are not contracting authorities or public undertakings, entities governed by private law that operate in network operator activities on the basis of special or exclusive rights granted by a public decision.

ii Regulated contracts

Procurement contracts

Public procurement contracts are contracts for pecuniary interest concluded between one or more contracting authorities or entities and one or more economic operators, and having as their object the performance of works, the supply of products or the provision of services. Public–private partnership contracts are also subject to these rules, and are now considered to be procurement contracts. Public procurement contracts must be clearly distinguished from contracts between two local authorities involving a transfer of legal competences.

Concession contracts

Concession contracts are contracts concluded in writing by means of which one or more contracting authorities or contracting entities entrust the performance of works or the provision and the management of services to one or more economic operators, the consideration for which consists either solely in the right to operate the works or the services that are the subject of the contract, or that right together with payment. The concessionaire shall be deemed to assume the operating risks (i.e., it is not guaranteed, under normal operating conditions, that the investments made or the costs incurred in operating the works or the services that are the subject matter of the concession will be recouped). The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

Temporary occupation permits in the public domain were previously not submitted to any publication or competition rules. Following the decision of the CJEU, which condemned the automatic renewal of a temporary occupation permit for the operation of tourist or leisure-orientated business activities on state-owned maritime property without an impartial and transparent selection procedure for potential candidates, France adopted advertising and competition rules for certain public domain occupancy contracts granted by the state, local governments and their public undertakings through Ordinance No. 2017-562 of 19 April 2017, relating to public property.

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8 Article 4 of the Public Procurement Ordinance.
9 Article 4 of the Public Procurement Ordinance.
11 Article 5 of the Concession Ordinance.
12 Council of State, 3 December 2010, Ville de Paris c Association Paris Jean Bouin, No. 338272.
13 CJEU, 14 July 2016, Promoimpresa SRL, No. C-77/16.
Defence contracts

Defence and security contracts are subject to specific provisions in the public procurement regulations. However, certain defence and security contracts (for instance, sensitive contracts relating to weapons, war materials and intelligence operations) are not caught by procurement rules.

Financial thresholds

Contracting authorities and entities may award a public procurement contract without prior publication or competition whenever the value is below €25,000.

The thresholds for the formalised procedures for public procurement contracts are as follows:

- contracting authorities:
  - supplies and services: (1) for central public authorities listed below (except for supplies for central public authorities in the defence sector): €144,000; (2) for other contracting authorities: €221,000; and (3) for supplies for central public authorities in the defence sector, except for goods mentioned in Annex 4 of Appendix I on European Union offers for the World Trade Organization Government Procurement Agreement: €221,000; and
  - works: €5.548 million;

- contracting entities:
  - supplies and services: €443,000; and
  - works: €5.548 million;

- public procurement contracts for defence and security:
  - supplies and services: €443,000; and
  - works: €5.548 million.

The central public authorities are:

- the state;
- public establishments of the state that do not have any commercial or industrial character, apart from the health establishments;
- independent administrative authorities that have legal capacity;
- Caisse des Dépôts et Consignations;
- the National Order of the Legion of Honour;
- the Union of Public Purchasing Groups (UGAP); and
- the Fondation Singer-Polignac.

The threshold for the common procedural rules for concession contracts bound by Article 9(1) of the Concession Decree is €5.548 million.

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14 Article 6 of the Public Procurement Ordinance.
15 Article 16 of the Public Procurement Ordinance.
16 All thresholds are indicated excluding taxes.
17 Article 42 of the Public Procurement Ordinance, Notice of 31 December 2017, relating to thresholds.
18 A public group in the service of France’s general interest and economic development.
Exceptions

Both Ordinances set out a list of contracts that are excluded from their scope. Some exceptions concern contracting authorities and contracting entities (real estate, rail transport, financial services, etc.). Others specifically concern contracting authorities (exploitation of electronic communications, postal services, etc.) or contracting entities (contracts concluded by contracting entities in an EU Member State, or in a geographic area identified by a Member State, when the European Commission has acknowledged that, in such state or area, the activity is pursued in a competitive marketplace where access is not restricted).

Specific exclusions deal with public–public partnerships (in-house contracts, cooperation between state entities, and contracts between contracting entities and affiliated enterprises).

Contract variation and contract transfer

Variations are allowed under the conditions set forth by the Decrees.

Both Decrees set out a list of allowed variations.

An original contract can provide that variations will be allowed. A contract can also be modified if variations become necessary, but only when a contractor substitution is impossible and would cause a major drawback. A contract can also be modified in the event of unforeseen circumstances. Unsubstantial variations are also possible, so long as they do not change the global shape of the contract or its main financial balance. Considered to be unsubstantial variations are costs increases that do not exceed 10 per cent of the original contract amount for supplies and services, 15 per cent for works and 10 per cent for concession contracts.

Both Decrees allow transfers under certain conditions: in accordance with a sunset clause or an option set out in the initial contract, or following a restructuring operation if such transfer does not cause any substantial modification of the initial contract. Apart from these two options, transfers are not allowed by the Decrees.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Central purchasing allows contracting authorities and entities to call on a buyer who works as a centralised purchaser and can purchase supplies or services, or conclude a procurement contract for works, supplies or services to the benefit of such contracting authorities or entities.

Central purchasing is caught by the procurement rules.

Contracting authorities and entities who call on central purchasing agencies are deemed to have satisfied the procurement rules for publication and competition. However, they remain liable for the award of contracts and their performance when they undertake them.

Contracting authorities and entities can also call on a central purchasing agency for procurement contracts related to defence and security.
Contracting authorities and entities can create a consortium to conclude joint procurement contracts. The constituting act of the consortium defines the appropriate rules. It can allow one or several of its members to lead the procurement procedure or the contract performance on behalf of all members.

ii Joint ventures

A public contract awarded by a contracting authority to a legal entity governed by private or public law shall fall outside the scope of both Ordinances where all of the following conditions are fulfilled (in-house contracts):

\[ (a) \text{ the contracting authority exercises over the legal entity a control that is similar to the control that it exercises over its own departments;}
\]
\[ (b) \text{ more than 80 per cent of the activities of the controlled legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal entities controlled by that contracting authority; and}
\]
\[ (c) \text{ there is no direct private capital participation in the controlled legal entity, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person.}
\]

A contract concluded exclusively between contracting authorities shall fall outside the scope of the procurement regulations if the contract establishes or implements cooperation between the contracting authorities to ensure that the public services they have to perform are provided with a view to achieving objectives they have in common. The implementation of that cooperation should be governed solely by considerations relating to the public interest, and the contracting authorities perform on the open market less than 20 per cent of the activities concerned by the cooperation.

In all other cases, a contracting authority can supply another contracting authority if the contract is submitted to a prior tendering procedure. However, if, aside from its public service mission, a contracting authority wishes to take over an economic activity, it must act within the limits of its competence and also demonstrate a public interest than can be justified by the lack of private initiative. The contracting authority or entity must not take advantage of its specific status.

Public–private partnerships must comply with the rules set out for procurement contracts, and are also bound by specific rules under the Public Procurement Ordinance.

Before resorting to a public–private partnership contract, the contracting authority or entity must conduct a prior evaluation that justifies the need for such contract. In case of termination or cancellation of the public–private partnership pronounced by the judge, the contractor can be compensated of the expenses incurred for the performance of the contract provided such expenses have been ‘useful’ to the contracting authority, including financing costs.

23 Article 28 of the Public Procurement Ordinance.
24 Article 17 of the Public Procurement Ordinance and Article 16 of the Concession Ordinance.
25 Article 18 of the Public Procurement Ordinance.
28 Article 39 of Sapin II amending Article 89 of the Public Procurement Ordinance.

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Where the private partner handles in whole or in part the project design, the project manager in charge of the design and monitoring of the works must be mentioned in the public–private partnership contract.²⁹

A private co-contractor should not be caught by the procurement rules when buying. However, its subcontractors must first be approved by the contracting authority or entity.³⁰

V THE BIDDING PROCESS

i Notice

With regard to public procurement contracts awarded following a formalised procedure, a call for tender is published by the contracting authority or entity in the Official Journal of the European Union or the Official Gazette for public procurement contracts, or both. It may also, optionally, be published in another publication, depending on the nature of the contracting authority or entity. Below the thresholds of the formalised procedure, publication in the Official Gazette for public procurement contracts or in a legal newspaper when the amount of the contract is superior or equal to €90,000 is mandatory for certain contracting authorities or entities. When the amount of the contract is below €90,000 for certain contracting authorities or entities, and below the thresholds of the formalised procedure for the other contracting authorities or entities, publication is made according to the characteristics of the contract.

With regard to concessions, the contracting authority or entity must release a concession notification. For concessions exceeding €5,548 million (excluding tax), the contracting authority advertises in the Official Journal of the European Union, the Official Gazette for public procurement contracts or in a legal newspaper and in a specialised newspaper in accordance with the economic area of the contract. Below this threshold, the contracting authority only advertises in the Official Gazette for public procurement contracts or in a legal newspaper.

ii Procedures

The Public Procurement Ordinance sets out various tendering procedures when the contract value exceeds the thresholds:³¹

a an open or restricted procedure when the contracting authority or entity chooses the economic operator that scores the highest, without any prior negotiation and based on objective criteria;

b competitive procedure with negotiation when the contracting authority negotiates the contract terms with economic operators;

c negotiated procedure with prior competition when the contracting entity negotiates the contract terms with economic operators; and

d competitive dialogue when the contracting authority or entity enters into a dialogue with candidates admitted to the procedure to find an appropriate solution to its needs and the tender specifications.

²⁹ Article 39 of the Sapin II law amending Article 69 of the Public Procurement Ordinance.
³⁰ Article 62 of the Public Procurement Ordinance.
³¹ Article 42 of the Public Procurement Ordinance.
The buyer can award the contract following an adapted procedure if the contract value is below the thresholds. The buyer can award the contract with no prior publication or competition if the amount of the contract is below €25,000.

The tendering procedures also apply to public–private partnerships. However, as mentioned above, before concluding a public–private partnership contract, the contracting authority or entity must conduct a prior assessment showing that such contract allows a better balance sheet regarding the project’s characteristics, the public service requirements, the general interest that will be achieved or the challenges encountered in similar projects. The new administrative department in charge of funding public infrastructures and projects also advises the public project holders. This department controls every prior assessment for projects implemented by the state or local authorities. The elected members of a local authority that has signed a public–private partnership contract with an economic operator must be properly informed of the exact costs incurred for the performance of works.

Regarding concession contracts, the contracting authority or entity can choose its tendering procedure as long as it guarantees open access to that procedure, equality between the candidates and the transparency of the procedure.

The contracting authority or entity can limit the number of candidates admitted to the tendering procedure by using non-discriminatory criteria related to the purpose of the contract and the aptitude of the candidates.

The contracting authority or entity can award the contract following a negotiated procedure with one or more bidders.

Public procurement contracts, and in strictly construed cases, concession contracts, can be awarded with no prior publication or competition when they can only be awarded to one specific economic operator, when there were no bidders or when all bids were inappropriate.

### iii Amending bids

The contracting authority or entity is allowed to amend the rules governing a procedure as long as competition is not affected, and the changes are necessary for the procedure or for the future performance of the contract. Equality between all candidates must be ensured, and candidates must be allowed an additional period of time to amend their bid if necessary.

Once the bids are filed, it is difficult to amend the rules governing the tendering procedure, and only minor adaptations are allowed.

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32 Article 66 of the Public Procurement Ordinance.
33 Council of State, 11 May 2016, Rouveyre, No. 383768.
35 Administrative Court of Appeal of Paris, 4 March 2004, Garde des Sceaux, Ministre de la Justice, No. 02PA03885.
VI ELIGIBILITY

i Qualification to bid

Parties will be disqualified from bidding on the following grounds applicable to procurement and concession contracts: 36

a they are economic operators that are under final condemnation for certain offences mentioned by the Ordinances;
b they are economic operators that have not filed their tax or social report, or that have not paid their taxes or social contributions;
c they are economic operators that are under judicial liquidation, that are subject to personal bankruptcy or a prohibition to administer, or that are admitted to a legal redress procedure;
d they are economic operators that have been convicted for certain employment law breaches; or
e they are economic operators that are under administrative or judicial contract exclusion.

Some grounds for disqualification are only applicable to defence and security contracts against the following parties: 37

a economic operators that are under final condemnation for certain offences mentioned in the French Criminal Code, the French Defence Code or the French Homeland Security Code;
b economic operators whose civil liability has been committed within the past five years by a final court order condemning their ignorance of their commitments in terms of security; or
c economic operators that are found to be not reliable enough to avoid security breaches for the state.

Parties may also be disqualified from bidding on the following grounds: 38

a they are economic operators that have had to pay damages for severe violation of their contractual obligations within the past three years;
b they are economic operators that had an undue influence on the decision-making procedure of the contracting authority or entity;
c they are economic operators whose participation in the procurement procedure elaboration led them to have access to certain information that may have affected competition; or
d they are economic operators under suspicion of participation in a cartel.

A Council of State decision of 31 October 2017 stated that neither the Public Procurement Ordinance nor any other instrument provide that a conviction for bankruptcy constitutes grounds for exclusion from a bidding process. 39

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36 Article 45 of the Public Procurement Ordinance and Article 39 of the Concession Ordinance.
37 Article 46 of the Public Procurement Ordinance and Article 40 of the Concession Ordinance.
38 Article 48 of the Public Procurement Ordinance and Article 42 of the Concession Ordinance.
39 Council of State, 31 October 2017, Metropole Aix-Marseille-Provence, No. 410496.
Economic operators must supply, along with their application, a sworn statement that they do not fall into the scope of some of these disqualifications. This sworn statement is a sufficient proof of the eligibility of the candidates to public procurement contracts. The contracting authority or entity no longer needs to ask the judicial authority to provide an extract of the judicial record of the candidate.\(^{40}\)

In some of the above situations, economic operators may demonstrate that they are once again trustworthy. Moreover, the contracting authority or entity can exceptionally allow an economic operator in one of the above situations to participate in the procurement procedure for overriding reasons relating to a major general interest.\(^{41}\)

### ii Conflicts of interest

Economic operators that can cause a conflict of interest can be excluded from the tendering procedure when there is no other possible way to address such conflict.

A conflict of interest is defined by the Ordinances as:

\[
a \text{situation where an economic operator that participates in the tendering procedure or can influence the procedure has a financial or economic interest or any other personal interest that could jeopardise its impartiality or independence in the tendering procedure.}^{42}\n\]

### iii Foreign suppliers

Foreign suppliers outside the EU can bid as long as they comply with the French procurement rules.

Regarding public procurement contracts, the contracting authority or entity may exclude an operator registered in a country whose public procurement contracts are not open to foreign operators.

Regarding concession contracts, in the field of defence and security, these contracts are earmarked for EU operators if they are not part of an international trade agreement. However, the contracting authority or entity may decide to open the procedure to foreign operators. In such a case, it indicates in the contract notice if the procedure is open to foreign operators and the accessibility criteria that the foreign economic operators should fulfil.\(^{43}\)

### VII AWARD

#### i Evaluating tenders

The Public Procurement Decree indicates that the contracting authority or entity can rely on the price for supplies and services contracts alone; or take into account various non-discriminatory criteria concerning the contract purpose, its qualitative aspects, and environmental and social criteria. These criteria are presented in the notice, the invitation to bid or the procurement documents. The purchasers must deploy all means to identify and reject the abnormally low tenders.\(^{44}\)

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\(^{40}\) Article 39 of the Sapin II law amending Article 45 of the Public Procurement Ordinance.

\(^{41}\) Article 47 of the Public Procurement Ordinance and Article 41 of the Concession Ordinance.

\(^{42}\) Article 48 of the Public Procurement Ordinance and Article 42 of the Concession Ordinance.

\(^{43}\) Article 20 of the Concession Decree.

\(^{44}\) Article 39 of the Sapin II law amending Article 53 of the Public Procurement Ordinance.
The Concession Decree indicates that, when evaluating a bid, the contracting authority or entity must take various non-discriminatory criteria into account, such as the price, environmental and social criteria, and innovation.

Whenever the concession contract value exceeds €5,548 million (excluding tax), the contracting authority or entity must fix the criteria in decreasing order, and this order is disclosed to bidders in the procurement documents.\(^\text{45}\) Exceptionally, the order can be modified by the contracting authority to take an innovating bid into account. However, such criteria must be non-discriminatory.\(^\text{46}\)

In all cases, the contract is awarded to the bid offering the best value for money.\(^\text{47}\)

The Public Procurement Ordinance requires contracting authorities and entities to disclose the awarded bid and the main data regarding the contract.\(^\text{48}\) The Concession Ordinance requires contracting authorities and entities to disclose the awarded bid.\(^\text{49}\)

### ii National interest and public policy considerations

European legislation forbids discrimination based on candidates’ nationality inside the EU. Contracting authorities and entities can use criteria based on environmental or social considerations.

Both Ordinances allow contracting authorities and entities to reject a bid regarding a defence and security contract when the tooling, supplies, IT equipment, staff, knowledge and supply sources are located outside of the EU, and when the candidate does not provide sufficient assurances to ensure the satisfactory performance of the contract.\(^\text{50}\)

### VIII INFORMATION FLOW

During the tendering procedure, the information provided to candidates must comply with certain fundamental principles:

a. the communication of the content of a draft contract must be accurate;\(^\text{51}\)
b. the information must be delivered in a straightforward manner without any ambiguity;\(^\text{52}\)
c. the information must be comprehensive: legal documents provide that the criteria must be ranked, but case law has added the requirement that sub-criteria shall also be ranked if they influence selection of candidates and bids;\(^\text{53}\) and

d. the criteria must be understandable.\(^\text{54}\)

As of 1 October 2018, the tendering procedure will be dematerialised and candidates will have access to the essential data relating to the contracts on the buyers’ profiles.\(^\text{55}\)

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\(^{45}\) Article 27 of the Concession Decree.

\(^{46}\) Article 27 of the Concession Decree.

\(^{47}\) Article 52 of the Public Procurement Ordinance and Article 47 of the Concession Ordinance.

\(^{48}\) Article 56 of the Public Procurement Ordinance.

\(^{49}\) Article 48 of the Concession Ordinance.

\(^{50}\) Article 51 of the Public Procurement Ordinance and Article 45 of the Concession Ordinance.


\(^{52}\) Council of State, 19 October 2001, Région Réunion, No. 234298.

\(^{53}\) Council of State, 18 June 2010, Commune de Saint-Pal-de-Mons, No. 337377.

\(^{54}\) CJEU, 29 July 2001, SIAC Construction, No. C-19/00.

\(^{55}\) Administrative Orders, dated 14 April 2017: relating to the essential data in public procurement; and relating to the minimum functionality and requirements of buyers’ profiles.
Candidates must be treated equally by a contracting authority or entity regarding information disclosure.

Confidentiality prevents a contracting authority or entity from communicating confidential information, such as secret information regarding industrial and commercial matters, or information that could harm fair competition between candidates.

However, the contracting authority or entity can ask candidates to disclose certain confidential information that has been specifically named.\textsuperscript{56}

Unsuccessful bidders must be notified by the contracting authority or entity.\textsuperscript{57}

When concession contracts exceed €5,548 million (excluding tax), the contracting authority must notify unsuccessful bidders and justify the rejection. A standstill period of 16 days (11 in the case of an electronic notification) is mandatory before the contracting authority is allowed to sign the contract.\textsuperscript{58}

When a procurement contract exceeds the thresholds (formalised procedure), a similar standstill period also applies.

\textbf{IX CHALLENGING AWARDS}

\begin{enumerate}
\item \textbf{Procedures}

Pre-contractual emergency proceedings are under the jurisdiction of the president of the administrative court or the president of the civil court, depending on the nature of the contract (i.e., administrative or civil). In any case, pre-contractual emergency proceedings involve only economic operators that have an interest in concluding the contract. This means that economic operators whose social purpose is linked to the contract's object are deemed admissible to conclude such contract and therefore lodge a complaint, irrespective of whether they took part in the tendering procedure.\textsuperscript{59}

Such emergency proceedings must be brought before the court prior to the contract being signed, and based on an infringement of the procurement rules related to publication and competition. Judgments are issued within 20 days.

Contract emergency proceedings are also under the jurisdiction of the president of the administrative court or the president of the civil court. The economic operators that can be involved are the same as the ones targeted in the pre-contractual emergency proceedings. However, an economic operator can only bring such action if it has unlawfully been deprived of the possibility to file pre-contractual emergency proceedings. In this case, the following situations are targeted: the claimant was not able to bring pre-contractual emergency proceedings, or it did bring such proceedings but the contracting authority or entity nevertheless signed the contract. Judgments are issued within one month.

In 2014, the Council of State created a court procedure to challenge the validity of contracts that allows interested third parties and unsuccessful candidates to challenge the contract's validity.\textsuperscript{60} ‘Favoured third parties’, such as prefects and members of the deliberating bodies of local authorities, do not have to prove an interest to act: their grade is sufficient to give them interest to act.

\end{enumerate}

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\item \textsuperscript{56} Article 44 of the Public Procurement Ordinance and Article 38 of the Concession Ordinance.
\item \textsuperscript{57} Article 51 of the Public Procurement Ordinance and Article 48 of the Concession Ordinance.
\item \textsuperscript{58} Article 29 of the Concession Decree.
\item \textsuperscript{59} Council of State, 8 August 2008, \textit{Région Bourgogne, No. 307143}.
\item \textsuperscript{60} Council of State, 4 April 2014, \textit{Département de Tarn-et-Garonne, No. 358994}.
\end{enumerate}
\end{footnotesize}
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On the contrary, other third parties and unsuccessful candidates need to show that their interests are prejudiced by the contract or the procurement procedure in a direct and clear way. Such legal actions have to be taken before the administrative court within a two-month period after the signature or publication of the award notice of the contract. Judgments are generally issued within 24 months.

ii Grounds for challenge

Regarding pre-contractual emergency proceedings, only grounds relating to the publication and the competition of the procurement procedure are allowed. The grounds must have prejudiced the claimant. The judge needs to verify whether the grounds invoked by the claimant have prejudiced him or her and favoured a competitor, depending on the stage of the procurement procedure they are related to.

Regarding contract emergency proceedings, only grounds stated in Article L 551-18 of the French administrative procedures code can be applied: breach of the publication principles; breach of the competition rules; breach of the standstill obligations; and breach of the introduction of pre-contractual emergency proceedings.

Concerning a legal action challenging the contract’s validity, a distinction has to be made depending on the claimant: ‘favoured third parties’ can rely on any ground, but other third parties and unsuccessful candidates can only rely on grounds that have a direct impact on their prejudice.

iii Remedies

Pre-contractual emergency proceedings judges can grant injunctions for the contracting authority or entity to start over all or part of the procurement procedure, or let the claimant know on what specific ground they have rejected its bid; the judge can also postpone a contract signature until the claimant has been informed on the rejection ground, and he or she can finally cancel the procurement procedure and revoke illegal provisions in the tender documents.

The contract emergency proceedings judge can cancel the contract, terminate it, reduce its duration, or impose a financial penalty upon the contracting authority or entity.

In a legal action challenging the contract’s validity, the judge is not bound by the concluding remarks of the claimant. The judge can only terminate or cancel the contract if there is a particularly serious breach in the contract that cannot be legalised. Otherwise, he or she can modify some provisions, rule in favour of the continuation of the contract or award damages.

X OUTLOOK

As mentioned above, in accordance with Sapin II, the government is expected to publish its Public Procurement Code by the end of 2018, including all provisions applicable to public procurement, which should ease the understanding and the application of the rules.

62 Council of State, 3 October 2008, Syndicat mixte intercontinental de réalisation et de gestion pour l'élimination des ordures ménagères du secteur est de la Sarthe (SMIRGEOMES), No. 305420.
65 Article L 551-20 of the French Code of Administrative Procedure.
German procurement law is based on both European and national law.

The award of contracts with an estimated value equal to or exceeding the thresholds established by European law is subject to the rules stipulated by the European directives. These directives were enacted into the German legal system in 1999 in the Act Against Restraints of Competition (GWB). The GWB reaffirms the procurement principles deriving from the EU directives such as competition, equal treatment and transparency. In addition, the new GWB emphasises the principle of proportionality. In accordance with the European directives, the contracting entity is defined as well as the public contract. The GWB also lists the exemptions from the applicability of procurement rules, including the exemption applicable to cooperation within the public sector. Following amendments in 2016, the GWB now contains basic stipulations with regard to specifications for tenders, qualification of bidders and the award of contracts. Finally, the GWB governs the review procedures.

Based on the GWB, a number of acts of delegated legislation came into effect that were significantly amended during the modernisation of procurement law in 2016. German procurement law consists of a complex set of regulations composed of not only statutes, but also ordinances and even rules established by non-governmental bodies. Further, German law limits the applicability of these rules strictly to contracts exceeding the thresholds; for contracts below the European thresholds, procurement rules are based on budgetary law and differ between the various federal states.

Besides the GWB, the most relevant regulation is the Ordinance on the Award of Public Contracts (VgV), which has been modified significantly to implement the New Directives into German law. The former version of the VgV contained only a few details on the award procedures, but basically declared applicable the procurement rules established by non-governmental committees. With regard to the award of public works contracts with an estimated value equal to or exceeding the European threshold, this is still the case. The award of those contracts is subject to the second section of the Regulation on Contract Awards for Public Works Contracts – Part A (VOB/A). With regard to contracts that are not public works contracts, the second section of the Regulation on Contract Awards for Public Supplies and Services Contracts – Part A (VOL/A) used to apply. Owing to the modernisation process, the procurement rules for the award of those public contracts are now set out in the VgV.

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1 Olaf Otting is a partner, Udo H Olgemöller is a counsel and Christoph Zinger is an associate at Allen & Overy LLP.
The second section of the VOL/A as well as the specific regulations for the award of service contracts that are performed by architects and other providers of independent professional services (VOF) no longer exist.

The award of contracts in the water, energy and transport sectors is regulated by the Ordinance on the Award of Public Contracts by Entities operating in the Water, Energy and Transport Sectors (SektVO). At the same level, the Ordinance on the Award of Public Contracts by Contracting Authorities or Entities in the Field of Defence and Security (VSVgV) stipulates specific rules transforming the Defence Directive. However, for public works contracts, the VSVgV refers to the third section of VOB/A.

The award of contracts with an estimated value below the European thresholds is governed by national budget law. The procurement rules for the award of contracts below the European thresholds were adapted in 2017. The legal framework for the award of contracts that are not public works contracts is now set out in the Regulation on the Award of Public Supply and Service Contracts below the EU Thresholds (UVgO), which was enacted on the federal level in September 2017. Some of the 16 federal states have also adapted these rules, e.g., Bavaria and Hamburg. The UVgO is inspired by the regulations of the VgV and replaces the first section of VOL/A. The award of public works contracts is still governed by the first section of VOB/A. Generally, the UVgO and VOB/A require the competitive award of contracts and procedures. Since the budget law applies to public authorities only, companies and utilities are not regulated. A contract notice in the Official Journal of the European Union (OJEU) is not mandatory. The effective review procedures governed by the GWB do not apply.

During the past few years, an increasing number of federal states have enacted additional procurement laws seeking to ensure compliance with social and environmental standards (and a minimum wage in particular), and in some cases the federal states have also established additional rules on procedures that apply to the award of contracts both below and above the thresholds.

In accordance with the New Directives, public service concessions are subject to German procurement law. They must be awarded in compliance with the regulations in the Ordinance on the award of Public Concessions. Where exemptions apply (e.g., in the field of water supply), the fundamental rules of the Treaty on the Functioning of the European Union (TFEU) have to be observed. Public service concessions in the field of public transport are to be awarded pursuant to Regulation (EC) No. 1370/2007. The German Public Transport Code (PBefG) establishes rules with regard to the award of public service contracts and public service concessions on public passenger transport services.

II YEAR IN REVIEW

Besides the recent amendments to the German legal framework on public procurement below the European thresholds, the German parliament passed a bill on the introduction of a public register aimed at the protection of competition on public contracts and concessions (WettRegG). This register shall be established on the federal level and list companies that have infringed certain commercial and social criminal laws or that have committed related administrative offences. The register will make it easier for contracting authorities to assess whether a bidder is eligible or not. As a next step, the practical and technical conditions will be created for the register to become operational. The register is expected to become operational in 2019 or 2020.
There have been some noteworthy rulings by the German review bodies and courts, including the German Federal High Court (BGH). In previous years, discussions on the design of award criteria had been dominated by decisions of the Higher Regional Court of Düsseldorf. The court had taken a restrictive approach and demanded a very precise description on the assessment process. In May 2017, the German Federal High Court opposed such opinion and ruled that the criterion of the quality may be evaluated by a school grade system without the obligation to publish further specifying details.\(^3\) The procurement review bodies and courts delivered first decisions in the field of electronic tendering. The procurement of military equipment is continually increasing in importance, which is also reflected in corresponding review procedures against the award of high-volume contracts in the field of defence and security.

Beyond the direct scope of procurement law, German courts reaffirmed on several occasions that procedures subject to German energy law aiming at awarding the right to use municipal roads, as well as ways to establish and operate transmission and supply networks for electricity and gas must be conducted in a manner very similar to the principles established under public procurement regulations.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

In accordance with the New Directives, central, regional and local authorities or their associations must comply with the procurement rules. These rules also apply to bodies ‘governed by public law’ in terms of the New Directives. However, according to the definition of such bodies in the New Directives, these bodies may also be separate legal entities set up under German company law, like a company with limited liability (GmbH), if these companies are directly or indirectly controlled by a public authority, financed by public funds and established for special purposes of general interest that they pursue in a non-commercial manner. Public procurement rules also apply where the contracting authority is (indirectly) financed by public authorities.

Municipal housing companies may qualify as contracting authorities,\(^4\) but a chamber of industry and commerce has not been considered to be a contracting authority even though it has been established by the state.\(^5\) The Utilities Directive does not apply to postal services in Germany. Natural or legal persons under private law may be contracting authorities if they receive public funds, for example for civil engineering projects or for building hospitals. Religious bodies and entities controlled by the church do not qualify as contracting authorities.

As a consequence of the New Directives, a private company that is granted a public works concession is no longer subject to the procurement rules.

Below the European thresholds, procurement rules pertain to entities that must comply with the public budget law.

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\(^3\) BGH, 4 April 2017, case X ZB 3/17.


\(^5\) VK Sachsen, 12 November 2015, case 1/SVK/033-15.
ii Regulated contracts

The award of public works contracts is subject to the procurement law, as is the award of public supply and service contracts. The Higher Regional Court of Düsseldorf referred a preliminary ruling to the Court of Justice of the European Union (CJEU) on the question of which preconditions danger prevention services (such as ambulance services) are excluded from public tendering. Procurement law also applies to public works concessions and public service concessions, with special rules laid down in Regulation (EC) No. 1370/2007 regarding concessions in the field of public transport. The award of public service concessions and contracts with an estimated value below the European thresholds may be subject to the procurement principles deriving directly from the TFEU. Utilities do not have to award contracts serving purposes other than sectoral activities. According to recent case law, planning services for the construction of a new administration building are usually serving such purpose. The specific regulations in the field of defence and security cover the award of contracts that have been excluded from these rules before on the basis of an excessive interpretation of Article 346 TFEU. In the healthcare sector, contracts between public health insurance funds and the pharmaceutical industry on discounts granted to the funds play an economically important role and have resulted in a number of complex procurement procedures. The open-house model does not constitute a public contract. The open-house model is a contract concluded between a public health insurance company and a producer of pharmaceuticals, and this contract is open to every producer who is interested in delivering the same products on the basis of the same conditions.

Amendments to an existing contract may require the re-tendering of that contract. This is typically, but not exclusively, given where the volume of the contract shall be increased. The German practice and review bodies are guided by the new Article 132 GWB, which transposes Article 72 of Directive 2014/24/EC and the CJEU’s case law.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Contracting authorities and entities may conclude framework agreements in terms of the European directives. According to German case law, bidders may challenge, in particular, a decision to put out to tender framework agreements with a duration exceeding the regular duration of four years. According to the new legislation, framework agreements may be concluded for all types of works and services. This had been doubted by some review bodies under the previous legislation: the GWB did not mention framework agreements.

Generally, contracting authorities and entities are entitled to accumulate their needs and purchase the required works, services and supplies jointly. However, even in such cases of joint procurement, it is mandatory to consider the principle of dividing contracts into lots in order to enforce the interests of small and medium-sized companies. The new legislation now also provides for the possibility of joint procurement procedures by entities based in different Member States of the EU.

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6 Higher Regional Court of Düsseldorf, 12 June 2017, case Verg 34/16; CJEU case C-465/17.
7 Higher Regional Court of Munich, 13 March 2017, case Verg 15/16.
8 CJEU case C-410/14.
9 CJEU case C-454/06.
10 VK Bund, 27 July 2016, case VK 2-63/16.
ii Joint ventures
Public–private partnerships must comply with procurement law. Where public contracts are to be awarded in such structures, contracting authorities must choose their partner by way of a regular procurement procedure. The joint venture itself must comply with the procurement law if it is to be qualified as a contracting authority or entity.

With regard to public–public partnerships, the CJEU’s in-house concept has been the prevailing point of interest for years. The rules on in-house contracts, first ruled on in the Teckal case, are set out in Article 108 GWB, which implements the provisions provided by the New Directives 1:1. Neither contracts awarded between subsidiaries (or sub-subsidiaries) controlled by the same authority nor ‘bottom-up contract awards’, where the controlled entity awards a contract to the parent company, are subject to German procurement law. In addition, cooperation among public authorities falls outside the scope of the procurement law under specific preconditions. However, this may not be interpreted as a general exemption from the procurement rules in the public sector. In any case, an entity that is awarded a contract may perform only up to 20 per cent of similar activities on the open market, and any cooperation must be governed by a public common interest.

V THE BIDDING PROCESS

i Notice
Notices on contracts having an estimated value equal to or above the European thresholds are to be published in the OJEU. Additionally, pursuant to national or state regulation, the award of contracts may have to be notified on further websites (e.g., www.bund.de). The award of contracts below the thresholds is to be notified in the local or specialised press, on the above-mentioned websites, or both. Generally, contracting authorities must ensure that contracts with a cross-border interest are published in a way that attracts cross-border attention.

ii Procedures
The course of procurement procedures to be followed by contracting authorities is regulated precisely in the procurement regulations VgV and VOB/A. They define open procedures, restricted procedures, negotiated procedures and competitive dialogue. Electronic purchasing systems, particularly electronic auctions and electronic catalogues, are introduced by Articles 25 and 27 VgV but are not yet very common. The very strict priority of open procedures has been removed from the GWB, and German procurement law now stipulates the freedom to choose between open and restricted procedures in accordance with the New Directives. The requirements for the negotiated procedure are the same as for the competitive dialogue. The general exemption for specific services has been replaced by a new flexible regime for social and similar services. The new regime applies to the procurement of social and other specific services listed in Annex XIV of Directive 2014/24/EU where the contract value is above a higher threshold of €750,000. The Directive leaves the procedural provisions up to

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11 Higher Regional Court of Düsseldorf, 2 November 2016, case Verg 23/16, or CJEU case C-553/15.
12 CJEU case C-107/98.
13 CJEU case C-51/15, Piepenbrock.
14 CJEU case C-318/15.
the Member States. German law refrains from inventing a new procedure, but Article 130 GWB offers the freedom to choose between the common procedure, the open, restricted and negotiated procedures and the competitive dialogue.

Procurement procedures carried out by utilities are regulated by the SektVO, which follows a more flexible approach and allows, in particular, the utility free discretion to choose between open, restricted and negotiated procedures and, newly, competitive dialogue. Specific rules for contracts in the field of defence and security are laid down in the VSVgV and the third section of VOB/A; contracts may be awarded in restricted and negotiated procedures and competitive dialogues, but not in open procedures. Article 5(3) of Regulation (EC) No. 1370/2007 stipulates flexible guidelines with regard to contracts falling under the scope of that provision, specified by the rules laid down in the PBefG and the European Commission's Communication on interpretative guidelines concerning Regulation (EC) No. 1370/2007 on public passenger transport services by rail and by road.15

iii Amending bids

In open and restricted procedures, bidders are not entitled to amend their bids when the time limit for receipt of tenders has expired. Queries of contracting authorities seeking to clarify the tenders are allowed but may not lead to amendments of the bids. Negotiated procedures are more flexible. The entire content of the contract is subject to negotiations as long as its identity is not changed, which means that the essential characteristics of the contract cannot be amended without a new notice of the newly defined contract. However, after reception of the final and binding offer, renegotiations with only one of the bidders are not allowed. If the contracting authority intends to do so, the negotiations must be reopened with all bidders due to the principle of fair and equal treatment. Where, in a negotiated procedure, subsequent stages take place to reduce the number of tenders, each decision on an amendment of the content of the contract must avoid the discrimination of bidders that have been excluded from the procedure previously. This may require either a limitation of the scope of negotiations to amendments that have no potential influence on the bidder's ranking, or the readmittance of rejected bidders.

VI ELIGIBILITY

i Qualification to bid

The criteria to qualify to bid are equivalent to European directive standards. Bidders must first demonstrate that exclusion grounds do not apply. German law differentiates between mandatory grounds (Article 123 GWB) and grounds that may justify an exclusion depending on the discretion of the authority (Article 124 GWB). In accordance with Article 122 GWB, bidders must prove their suitability to pursue the professional activity, their economic and financial standing as well as their technical and professional ability. The minimum yearly turnover that tenderers are required to have shall not exceed two times the estimated contract value. Bidders may rely on the qualification of third parties, regardless of the legal nature of the link the bidder has with them. However, recent German case law emphasises that the bidder must disclose the fact that he or she wants to rely on the capacities of other entities. Otherwise, the bidder should be excluded from participation in the procurement

15 OJEU 2014 C 92/1.
procedure. Aiming to promote small and medium-sized companies, German procurement law emphasises that groupings of candidates and tenderers must be treated equally to individual competitors. Nonetheless, in cases where companies join forces by establishing a grouping, they must respect the restrictions stipulated by the antitrust regulations. If a bid is incomplete, it does not have to be excluded from the procedures in each case. Candidates and bidders may complete or explain minor defects, but in some cases it is at the contracting authorities’ discretion whether to let parties make use of this opportunity. They must make use of their discretion in a non-discriminatory way. Companies that compete regularly for public contracts may apply for a listing on pre-qualification registers. A reference to a pre-qualification register may replace the submission of evidence in each case. Further, bidders can now prove their qualification by providing the European Single Procurement Document (ESPD) as preliminary evidence. The contracting authority may ask tenderers at any moment during the procedure to submit all or part of the supporting documents. According to German law, the ESPD is not mandatory in procurement procedures, but may be used by bidders in every case (and, if so, must be accepted as preliminary evidence). Alternatively, German law provides for the possibility to make use of self-declaration instead of producing evidence of eligibility.

Infringing bidders may demonstrate that they have taken measures to regain their reliability by means set out in Article 125 GWB. Companies that have infringed the law – in most cases, competition or antitrust rules – may clarify the facts and circumstances by actively collaborating with the investigating authorities, and by taking concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. Article 125(1) GWB stipulates the necessity to prove that the company has compensated any damage caused by the criminal offence or misconduct. In March 2017, the procurement review chamber Südbayern asked the CJEU for a preliminary ruling regarding the question whether and, if so, to what extent undertakings have to disclose details about their former participation in a cartel to the contracting authority in the context of a self-cleaning procedure.16

Recent case law has repeatedly confirmed that companies have large discretion on the decision to enter into an ad hoc cooperation aimed at submitting a common bid.17

ii Conflicts of interest
German procurement law stipulates specific rules for persons excluded from acting on behalf of the contracting authority: Article 6 VgV lists cases where grounds exist to justify fears of prejudice due to a conflict of interest (such as acting for one of the bidders). Article 42 VSVGvV provides the same rules in the field of defence and security, and Article 6 SektVO for utilities. Apart from that, in accordance with the CJEU’s Fabricom case,18 candidates and bidders who have advised or otherwise supported the contracting authority or entity before the commencement of the award procedure must be excluded if their advantages cannot be compensated otherwise.

16 CJEU case C-124/17.
18 CJEU case C-21/03, C-34/03.
Foreign suppliers

Contracting authorities and entities can accept bids from foreign suppliers provided they comply with the qualification criteria. A local branch or subsidiary is not necessary except where markets have not yet been completely liberated on the European level, such as the railway sector (see Article 14 of the German Railway Code). Where service contracts are put out to tender, contracting authorities and entities often prefer tenders offering availability on short notice. Thus, it may be advantageous to promise to establish an office or a branch on-site in the event of being awarded a contract. In any case, such award criterion must be notified transparently to the bidders.

AWARD

Evaluating tenders

Basically, tenders are evaluated in a four-step procedure. First, tenders must comply with the formal requirements. Time limits must be observed as well as all further formal requirements. Tenderers are not allowed to deviate from any conditions established by the contracting authority or entity; these conditions can only be amended in negotiated procedures or as far as they are challenged by objections and review procedures. Second, the qualification of the bidder is to be verified. Third, tenders offering an abnormally low or high price may be excluded. Fourth, the remaining tenders are to be evaluated against the award criteria cited in the notice or in the tender documents in accordance with the notified weighting.

Article 127 GWB now explicitly states that a contract must be awarded to the bid with the most advantageous relationship between price and quality. However, the lowest price may still be the only criterion. Alternatively, various criteria of relevance to the subject matter of the contract (quality, price, etc.) may be defined, allowing the contract to be awarded to the most economically advantageous tender (best value for money). Contrary to previous German case law, the new Article 35(2) VgV allows for variations in the bids even if the price is the only criterion. Another current debate regards the compliance of German regulations on prices and fees (e.g., for architects) with European law.

Principally, criteria for the selection of candidates cannot be reused as award criteria; German case law even anticipated the Lianakis CJEU decision of 24 January 2008.19 In March 2015, the CJEU ruled in Ambisig that where a contract is intellectual in nature, it is the abilities and experience of the team proposed that is decisive for the evaluation of the professional quality of the team, and that a contracting authority is entitled to take quality into account as an award criterion.20 The CJEU distinguished Lianakis from the present case on the basis that the Lianakis case concerned the staff and experience of the tenderer in general, whereas this case concerned the staff and experience of the persons making up the particular team proposed to perform the contract. In line with Ambisig and the New Directives, the VgV now allows consideration of the organisation, and the qualifications and the experience of the team, where this seems to be appropriate for selecting the most economically advantageous tender. This applies to all types of contracts, not only to service contracts.

19 CJEU case C-532/06, Lianakis; cf. BGH, 8 September 1998, case X ZR 109/06.
20 CJEU case C-601/13, Ambisig.
A bidder is entitled to present two or even more offers if its offers differ from each other in technical or qualitative terms and not only in terms of price. Affiliates of the same company may tender for the same public contract where Chinese walls ensure that such affiliates do not know of the content of the competing entity's bid.

**ii National interest and public policy considerations**

The protection of national interests justified the refraining from competitive award procedures in the field of defence and security for a long time. This field has been cut back considerably as a result of the Defence Directive and its enactment into German procurement law. However, contracts that are declared secret in accordance with the German legal and administrative provisions are not subject to procurement law, and the same applies to contracts falling within the scope of Article 346 TFEU. Specific rules on the security of information set forth in the VSVgV enact the equivalent provisions of the Defence Directive. First experiences have been gained in a complex negotiated procedure for the procurement of German navy vessels.

Compliance with measures that aim at ensuring data privacy (no-spy requirements) may be demanded by contracting entities if this is required by the matter of the contract in question.21

In consequence of the principles of non-discrimination and equal treatment, contracting authorities and entities are not entitled to favour local or domestic suppliers.22 In practice, cross-border tenders are rare. This may be due, *inter alia*, to language barriers, since most procurement procedures are carried out in German. Nevertheless, at least regarding contracts having an estimated value equal to or above the European thresholds, contracting authorities and entities are not allowed to require that products comply with national standards or quality marks; only compliance with European standards can be required.

Environmental considerations have become more important in recent years. Green procurement can be pursued, for example, by defining mandatory features of products or by setting award criteria favouring eco-sensitive products. For example, carbon dioxide emissions must be an award criterion if public supply contracts on cars are put out to tender. Moreover, in accordance with Article 31(2) VgV, contracting authorities may lay down special conditions relating to the performance of a contract such as eco-friendly specifications of breakdown vehicles where contracting authorities tender out relevant service contracts. The conditions governing the performance of a contract may, in particular, concern environmental considerations. Where contracting authorities award contracts with specific environmental, social or other characteristics, they may require compliance with the standards of specific labels as proof that the bidders meet the requirements. Recent statistics indicate that, despite an upward trend, only 2.4 per cent of public contracts in Germany include green criteria.

Article 31(2) VgV covers social considerations as well. Based on this provision, the federal states have enacted an increasing number of procurement laws that require that tenderers guarantee to pay minimum wages defined in these procurement laws. An example is the procurement law of the federal state of North Rhine-Westphalia, which came into effect on 1 May 2012. This requires, *inter alia*, evidence of tenderers proving that they promote women or require a statement that products used in the bidder's supply chain comply with international labour rules (ILO Standards). It was quite controversial whether these requirements are in compliance with European law. The CJEU’s case law sets limits to such

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21 Higher Regional Court of Düsseldorf, 21 October 2015, case 28/14.
22 Reconfirmed, e.g., by Higher Regional Court of Koblenz, 20 April 2016, case Verg 1/16.
regulations in a case where subcontractors from other EU Member States were concerned, whereas the CJEU ruling of 14 September 2015 generally confirmed that the provisions for minimum wages are in line with European law. However, due to recent modernisation efforts, it is intended to streamline and simplify the procurement law of the federal state of North Rhine-Westphalia by abolishing the aforementioned requirements excluding the provisions for minimum wages.

VIII INFORMATION FLOW

Since contracting authorities and entities are obliged to carry out a fair and transparent procedure, they must inform candidates and bidders on the intended course of the procedure. If a request for participation shall be rejected, the candidate is to be notified. Most notably, all bidders must be notified of the outcome of the procedure. It is a legal obligation to inform the unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of their tenders and the earliest date of the conclusion of the contract (Article 134 GWB). A violation of that obligation and the following standstill period of at least 10 days may lead to the ineffectiveness of the award of a contract (Article 135 GWB). Specific obligations to ensure confidentiality of information apply in the field of defence and security.

IX CHALLENGING AWARDS

i Procedures

Candidates and bidders are only able to challenge procurement procedures if they can invoke the violation of regulations on the award of public contracts that are to protect their rights. The undertaking must demonstrate its interest in the contract, a non-compliance with the relevant rules and that the violation prejudices its expectations to be awarded the contract. Before initiating a review procedure, the bidder must have notified the alleged violation to the contracting authority or entity by way of an objection. Article 160(3) GWB stipulates elaborated requirements on these objections, first of all severe time limits. Non-compliance with these requirements leads to the inadmissibility of a subsequent application to the review bodies. In particular, candidates and bidders are obliged to object to potential violations of the procurement rules within 10 days of their becoming aware of that violation. This deadline was newly introduced, as the former rule that bidders had to object ‘without undue delay’ was probably not in line with European law. A company that challenges an allegedly unlawful direct award of a contract has to evidence its ability to bid for that contract.

First instance review bodies are the procurement review chambers. They are part of the administration, and not of the judicial branch. Their decisions are subject to an immediate complaint. At the second instance, the higher regional courts of the federal states are competent. The German Federal High Court is not established as a regular third instance. This Court is involved solely if a higher regional court wishes to deviate from a decision of another higher regional court. If necessary, either the higher regional court or the Federal High Court is obliged to request the CJEU’s preliminary ruling pursuant to Article 267 TFEU.

23 CJEU case C-549/13.
24 CJEU case C-115/14.
25 CJEU case C-406/08.
Below the European thresholds as well as beyond the scope of European directives, said review procedure established by the GWB does not apply. The civil or administrative courts must be invoked where undertakings intend to avoid alleged violations of their rights. However, with increasing regularity the courts require that undertakings must notify alleged violations in compliance with the severe requirements set out by Article 160(3) GWB. Even though the procurement law regime does not provide for an information and standstill obligation for the award of concessions below the thresholds, the Higher Regional Court of Düsseldorf took the view that a public service concession might be ineffective due to the failure to inform unsuccessful bidders about the intended award decision.27 It remains to be seen whether such legal position will be established by the courts.

ii  Grounds for challenge

Procurement procedures can be challenged by candidates and bidders who allege violations of the procurement law, given that the violated provisions seek to protect the applicant’s rights. Principally, all provisions of the German procurement law grant the right to undertakings to demand compliance with the law. For example, bidders can invoke violations of the provisions restricting the economic activities of municipalities set by the municipal codes of the federal states. Companies may also challenge a decision to award a contract directly in violation of the duty to put that contract out to tender. A topic of controversial discussions for years had been the question of whether bidders can demand the exclusion of a competitor if their tender appears to be abnormally low. In 2017, the German Federal High Court clarified that unsuccessful bidders are entitled to demand compliance with the obligation to examine unreasonably low tenders.28 The wide range of provisions allowing review procedures to be initiated led to about 870 review procedures in 2016, with a success rate of around 16 per cent.

iii  Remedies

Where review bodies decide that the applicant’s rights were violated, they are entitled to take suitable measures to remedy the violation of rights and to prevent any impairment of the interest affected (Article 168 GWB). In most cases of successful proceedings, parts of procurement procedures must be repeated taking into account the review body’s legal opinion (e.g., correction of the evaluation of the tenders). Contracts that have been awarded cannot be set aside except in two cases: either the contract was awarded after the beginning of the review procedure, or the contract was awarded directly without any legal justification. According to current case law, undertakings can even prevent the award of contracts below the European thresholds or beyond the scope of the European directives, but details are still controversial. However, undertakings may claim damages either regarding the costs accrued by them during their participation in an unlawful procurement procedure or – in exceptional cases – regarding their losses due to an unlawful award to a competitor.

27  Higher Regional Court of Düsseldorf, 13 December 2017, case Verg 27 U 25/17.
28  BGH, 31 January 2017, case X ZB 10/16.
X  OUTLOOK

A major topic on the agenda of the contracting authorities remains the upcoming obligation
to organise the tender procedure entirely by electronic means. The electronic submission
of tender notices and the obligation to make the tender documents available electronically –
which have both been mandatory since 18 April 2016 – have neither required greater
investments nor caused material hurdles in the daily operations. In light of the upcoming end
to the prolonged implementation period in October 2018, it is a much bigger challenge to
carry out the entire procedure, including the correspondence with the bidders via databases
or electronic market spaces. Therefore, further case law is expected on this subject.

Germany entered the year 2018 without a federal government. According to the draft
coalition agreement between the Christian Democratic Union and the Social Democratic
Party, the potential impact of the prospective new government on the public procurement
legal framework might be significant as it indicates a potential revision of the legal framework
on the award of public works contracts. Another proposed goal is to foster swift and
effective procurement procedures in the field of defence and security, inter alia, by issuing
interpretation guidelines on the application of Article 346 TFEU.

The likely impact of Brexit on existing public procurement contracts with contracting
authorities in Germany or with German undertakings is not yet predictable. The public
procurement legislation will be heavily influenced by the nature of any future trade
agreements between the UK and the EU. As a guideline, the European Parliament issued
a paper that examines the implications of the UK’s departure from the EU for the EU–UK
legal relationship in the field of public procurement.
Chapter 12

ITALY

Filippo Pacciani and Ada Esposito

I  INTRODUCTION

The main public procurement legislation applicable in Italy is laid down by the Public Contracts Code (the PCC), as amended by Legislative Decree No. 56/2017 (the Corrective Decree) and Law Decree No. 50/2017. The PCC came into force on 19 April 2016, implementing both the 2014 Public Contracts Directive and the 2014 Concession Contracts Directive, as well as the 2014 Utilities Contracts Directive, and replacing the previous Public Contracts Code.

The relevant legal framework is completed by a number of secondary sources, which include ministerial decrees and guidelines issued by the National Anti-Corruption Authority (ANAC), aimed at providing detailed rules on specific matters.

The European Union (on behalf of its Member States, including Italy) is party to the World Trade Organization’s Agreement on Government Procurement (GPA), which has been approved at the EU level by Council Decision 94/800/EC.

The national bodies responsible for setting up the public procurement policy are Parliament (legislative power), the government (executive power) and the ANAC, whose power has been consistently widened by the PCC.

The main principles underpinning public procurement policy in Italy are closely aligned to those that inspire the 2014 Procurement Directives: transparency and equal treatment of economic operators, effectiveness, impartiality, proportionality, environmental protection and energy efficiency.

II  YEAR IN REVIEW

In the past year, pivotal developments in public procurement legislation have been made: the PCC came into force implementing the 2014 Procurement Directives and a number of ANAC guidelines and ministerial decrees have been adopted.

ANAC guidelines already in force provide specific regulations about:

a architectural and engineering services tenders;
Italy

b the ‘most economically advantageous’ tender criterion;\(^5\)
c the role of the tender procedure manager;\(^6\)
d below threshold contract tenders;\(^7\)
e selection criteria of members of the tender committee;\(^8\)
f exclusion of candidates due to material professional misconducts;\(^9\)
g in-house providing;\(^10\) and
h negotiated procedures without prior publication of the contract notice in case of non-fungible public supply and service contracts.\(^11\)

Moreover, the following decrees have been adopted:
a Decree of the President of the Council of the Ministers, dated 10 August 2016, published in the Italian Official Gazette No. 203 of 31 August 2016 concerning the composition of the Control Centre;
b Decree of the Ministry of Justice, dated 17 June 2016, published in the Italian Official Gazette No. 174 of 27 July 2016 concerning the approval of the schedules of the consideration based on quality for the design performances;
c Decree No. 248, dated 10 November 2016, published in the Italian Official Gazette No. 3 of 4 January 2017 relating to specialist work categories;
d Decree No. 263, dated 2 December 2016, published in the Italian Official Gazette No. 36 of 13 February 2017 regarding the requirements for the operators in architectural and engineering services;
e Decree of the Ministry of Infrastructure and Transport, dated 2 December 2016, published in the Italian Official Gazette No. 20 of 25 January 2017 concerning the publication of the calls for tenders in the information technology sector;

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7 ANAC Guidelines No. 4, adopted by Resolution No. 1097 of 26 October 2016, then updated, following the Corrective Decree, by Resolution No. 206 of 1 March 2018 (awaiting publication in the Official Gazette).
8 ANAC Guidelines No. 5, adopted by Resolution No. 1190 of 16 November 2016, then updated following the Corrective Decree by Resolution No. 4 of 10 January 2018, published in the Italian Official Gazette, General Series No. 28 of 3 February 2018.
Decree of the Ministry of Interior, dated 21 March 2017, published in the Italian Official Gazette No. 81 of 6 April 2017 concerning the monitoring of relevant infrastructures and criminal infiltrations;

Decree No. 122, dated 7 June 2017, published in the Italian Official Gazette No. 186 of 10 August 2017 concerning meal ticket services;

Decree No. 154, dated 22 August 2017, published in the Italian Official Gazette No. 252 of 27 October 2017 concerning the public works regarding cultural heritage;

Decree No. 192, dated 2 November 2017, published in the Italian Official Gazette No. 296 of 20 December 2017, concerning foreign tenders procedures;

Decree of Ministry of Infrastructure and Transport, dated 7 December 2017, published in the Italian Official Gazette No. 12 of 16 January 2018, concerning the use of funds for major infrastructure projects;

Decree No. 14, dated 16 January 2018, published in the Italian Official Gazette No. 57 of 9 March 2018 regarding the planning of works, services and supplies of the Public Administration; and

Decree No. 560, dated 16 January 2018, regarding the BIM platform for tenders and concessions of works.

Additional ANAC guidelines, as well as a number of ministerial decrees, have not yet been issued.

Case law developments have spanned a wide range of issues, such as enforcement of the bid bond in favour of the contracting authority, should the bidder fail to sign the contract;\textsuperscript{12} contract award annulment;\textsuperscript{13} bidders’ ability to rectify documentation filed with the contracting authority;\textsuperscript{14} and qualification requirements based on social security contributions.\textsuperscript{15}

III SCOPE OF PROCUREMENT REGULATION

Regulated authorities

The PCC is applicable to public entities encompassing the central government, any regional or local authority, and any association formed by such entities.

Additionally, the PCC’s scope also includes the following entities:

bodies governed by public law, that is, bodies in compliance with the following characteristics: they are established for the specific purpose of meeting needs in the general interest (not having an industrial or commercial character); they have legal personality; and they are financed, for the most part, by central government, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board and at least half of the members are appointed by the central government, regional or local authorities, or by other bodies governed by public law;

\textsuperscript{12} Council of State, Section III, Decision No. 3765/2016.
\textsuperscript{13} Council of State, Section III, Decision No. 5026/2016.
\textsuperscript{14} Council of State, Section V, Decision No. 3667/2016.
\textsuperscript{15} Council of State, Plenary Meeting No. 5/2016 and No. 10/2016.
b. public undertakings over which a public entity exercises a dominant influence by virtue of its ownership thereof, its financial participation therein or the rules governing it;

c. private entities acting on the basis of ‘special or exclusive’ rights, granted by a competent authority, in any of the utilities sectors provided for by Articles 115 to 121 of the PCC;

d. works and services concessionaries; and

e. private entities that hold building permits when such entities directly undertake the obligation to execute town planning works in lieu of payment of the relevant contribution.

ii. Regulated contracts

The PCC applies to public works, supplies and services contracts, in the ordinary sectors and in the utilities sectors. The utilities sectors include: gas and heat; electricity; water; transport services; ports and airports; postal services; and extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

Public contracts in the defence and security sectors are awarded pursuant to the PCC and specific rules set forth by Legislative Decree No. 208/2011, implementing Directive No. 2009/81/EU.

The PCC also provides for an organic regulation of public–private partnership (PPP) contracts, including concession contracts.

PPPs are defined as contracts for pecuniary interest, concluded in writing, by means of which one or more contracting authorities entrust one or more economic operators with a set of activities including the execution, transformation, maintenance and operation of a work or service, the consideration for which consists in the availability or in the right to exploit the works or services or in the performance of a service connected to such works by undertaking the risk. The PPP contracts include, inter alia, work and service concessions, the project financing procedures, the availability contract and financial leasing.

Moreover, the definition of PPP expressly recalls the application of the Eurostat decisions under the public accounting aspects. As a general rule, the private sector partner has to be competitively tendered.

Concession contracts are defined as agreements for pecuniary interest concluded in writing by means of which one or more contracting entities entrust one or more economic operators with the execution of works or the provision and the management of services the consideration for which consists either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment.

The award of a concession, as well as any other PPP contract, shall involve the allocation to the concessionaire of an operating risk in exploiting the works or services, encompassing demand or supply risk or both. The concessionaire or private partner in a PPP contract shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the contract. The part of the risk transferred to the concessionaire or private partner in a PPP contract shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire or private partner in a PPP contract shall not be merely nominal or negligible.

As far as PPP and concession contracts are concerned, the PCC also provides for a set of specific rules with regard to bidding process, duration of the contract, public contribution, early termination, and revision of the financial and economic plan.
The PPP regime has been strengthened further by the Corrective Decree. Among the main changes introduced by this, it is worth highlighting:

- the obligation of the contractor to prove the availability of financing and, accordingly, provision of a duration to be initially set depending on the amortisation period of the investment;
- the obligation of the contracting authority to provide for the termination of the PPP contract in the tender if the facilities agreement is not entered into within a fair term, namely within 18 months of the execution of the contract;
- an increase from 30 to 49 per cent of the public contribution payable to the contractor to ensure the economic and financial balancing of the PPP contract; and
- recognition of hedging costs among the indemnities due to the contractor in any case of early termination of the PPP contract due to default of the contracting authorities or revocation for public reasons and the provision of specific indemnities due to the contractor in case of withdrawal caused by the lack of an agreement on the re-balancing of the financial plan.

Moreover, the Corrective Decree has strengthened the power and role of the ANAC in the PPP and concessions sector. Particularly, the ANAC is entitled to adopt guidelines on the monitoring of PPP contracts conducted by the contracting authorities to ensure the correct allocation of the operational risk on the PPP contractor over the duration of the contracts. These guidelines are currently under discussion and expected imminently.

Article 211, Paragraphs 1 bis, 1 ter and 1 quater of the PCC (as recently introduced by 52 ter of Law Decree No. 50/2017 converted, with amendments, by Law No. 96 of 24 June 2017) enabled the ANAC to appeal any call for tender, acts and measures relating to significant contracts (e.g., PPP contracts) before the administrative courts if it considers that they violate the rules on public contracts relating to works, services and supplies.

Specific financial thresholds for determining individual contract coverage are set forth by the PCC. The PCC applies to both above-threshold and below-threshold contracts, although such contracts are treated differently in terms of the procurement procedures to be applied. Examples include works contracts equal to or higher than €40,000 and lower than €150,000; and supply and services contracts whose amount is equal to or higher than €40,000 and lower than the thresholds set forth by the PCC, which are awarded through negotiated procedures subject to prior consultation of 10 economic operators, where available, selected on the basis of a market survey, or from special lists and in compliance with a criterion of rotation. Moreover, regarding below-threshold contracts, the Corrective Decree extended the scope of the principles applicable to such contracts, providing for the application of the provisions concerning the conflict of interest and environmental sustainability criteria, as well as the faculty of the contracting authorities to insert social clauses in the calls for tender.

As far as above-threshold contracts are concerned, contracting authorities may award public contracts by a negotiated procedure without prior publication under specific conditions laid down by the PCC, such as:

- failed procurement;
- works, supplies or services that can be supplied only by a particular economic operator;
- extreme urgency;

16 Article 36 of the PCC.
supply contracts where the products involved are manufactured purely for the purpose of research, study or development;

additional deliveries by the former supplier, intended as a partial replacement or extension of existing supplies where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in technical difficulties in operation and maintenance;

supplies quoted and purchased on a commodity market;

purchase of supplies or services on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, or the liquidator in an insolvency procedure; and

new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract.17

As a general rule, variations to contracts are subject to authorisation of the contracting entity and must not alter the nature of the agreement. In particular, public contracts may be modified or transferred to a different supplier (as a consequence of a merger, demerger or transfer of a going concern) without competitively tendering the varied or transferred contract under specific conditions set forth by the PCC.

Certain contracts are excluded from the scope of the PCC due to their object. Examples include: concession contracts in water supply sector; certain financial or legal services; certain public transportation services, etc. Although the award of such contracts is not subject to the procedural rules laid down by the PCC, general principles governing public procurement (such as transparency, equal treatment, etc.) apply.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

A framework agreement means a contract that is awarded in accordance with the procedures laid down by the PCC and concluded between one or more contracting authorities and one or more economic operators, aimed at establishing the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.18

The term of a framework agreement shall not exceed four years in the ordinary sectors and eight years in the special sectors, apart from exceptional cases duly justified, in particular by the subject of the framework agreement.

Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement. For the award of those contracts, contracting authorities may consult the economic operator that is party to the framework agreement in writing, requesting it to supplement its tender if necessary.

Where a framework agreement is concluded with more than one economic operator, contracts based on that agreement shall be awarded either with or without reopening

17 Article 63 of the PCC.
18 Article 54 of the PCC.
competition among the economic operators parties to the framework agreement, depending on the conditions provided for by the PCC and on the basis of a reasoned decision of the contracting authority.

Contracting authorities may use a dynamic purchasing system for commonly used purchases. Such procedure entails a completely electronic process, which follows the rules of a restricted procedure and is open throughout the period of its validity to any economic operator that satisfies the selection criteria.

Contracting authorities can launch autonomous tender procedures only under the condition that they are qualified to do so by the ANAC, in accordance with specific rules set forth by a governmental decree, which is still under discussion and expected to be adopted in the coming months.

Non-qualified contracting authorities shall necessarily purchase works, supplies or services from or through a central purchasing body (which can be used by qualified contracting authorities as well).

The role of central purchasing bodies has been strongly enhanced by recent legislation in the context of a national spending review programme. The main operating functions of central purchasing bodies are: to award supplies and services contracts as well as certain types of works contracts; to enter into framework agreements that can be used by qualified awarding authorities to award public tenders; and to manage dynamic purchasing systems and electronic markets.

The main central purchasing body is Consip SpA, a joint-stock company entirely held by the Ministry of Finance. Moreover, each region has its own central purchasing body, operating at a local level.

ii Joint ventures

As a general principle, contracting authorities should always award public contracts pursuant to public procurement procedures, regardless of whether the counterparty is a private or public entity.

However, the PCC has introduced specific rules for in-house providing, pursuant to which the award of a public contract shall fall outside the scope of public procurement rules where all of the following conditions are met: (1) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (2) more than 80 per cent of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority; and (3) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person.

Pursuant to Article 192 of the PCC, a special register of the contracting authorities operating through in-house awards is held by the ANAC.

Further, in the utilities sectors, the PCC does not apply to contracts awarded by: a joint venture (JV) set up by public entities or public undertakings to an entity that is affiliated with a member of the JV; or a JV’s member to the JV itself.

19 Article 55 of the PCC.
20 Article 38 of the PCC.
V  THE BIDDING PROCESS

i  Notice

As a general rule, contracting authorities comply with the general principle of transparency, according to which all their acts concerning public tenders must be formally published.21

Specific rules are laid down by the PCC with regard to publication of: contract notices, both at the EU level and at the national level, as well as on the buyer profile; prior information notices; and contract award notices on the results of the procurement procedure.

ii  Procedures

Contracting authorities may use the following tender procedures:

a  open procedures, where any interested economic operator may submit a tender in response to a call for competition;22

b  restricted procedures, where any economic operator may submit a request to participate in response to a call for competition, and only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender;23

c  competitive procedures with negotiation, where any economic operator may submit a request to participate in response to a call for competition. However, only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender, which shall be the basis for the subsequent negotiations. Afterwards, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them. The contracting authority then assesses the final tenders on the basis of the award criteria and awards the contract;24

d  negotiated procedure without prior publication, which can be used by awarding authorities under specific circumstances set forth by the PCC;25

e  competitive dialogues. In accordance with such procedural scheme, contracting authorities shall set out their needs and requirements in the contract notice and may also define them in a descriptive document. Any economic operator may submit a request to participate in response to a contract notice, but only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue. Contracting authorities then open a dialogue with the selected participants aimed at identifying and defining the means best suited to satisfying their needs. Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue;26 and

f  innovation partnership, introduced by the PCC implementing the 2014 Public Contracts Directive.27

21 Article 29 of the PCC.
22 Article 60 of the PCC.
23 Article 61 of the PCC.
24 Article 62 of the PCC.
25 Article 63 of the PCC.
26 Article 64 of the PCC.
27 Article 65 of the PCC.
Awarding authorities may also use electronic procurement or electronic auctions.

### iii Amending bids

As a general principle, no material changes regarding either the conditions of the tendered contracts or the requirements for eligibility to bid are allowed.

When the evaluation criteria is the most economically advantageous tender, contracting authorities may authorise or require tenderers to submit variants, indicating such faculty in the contract notice. However, variants shall be linked to the subject matter of the contract, and only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

### VI ELIGIBILITY

#### i Qualification to bid

In order to participate in tender procedures, bidders must comply with the following three main sets of requirements pertaining to:

- **a** general moral requisites, aimed at excluding from tenders entities falling into the following categories:
  - those who have been convicted of certain types of crimes by means of a final judgment;
  - those undergoing bankruptcy proceedings (or entry into a proceeding for the declaration of bankruptcy);
  - those who have failed to pay social security contributions or taxes;
  - those who have been found guilty of material professional misconduct; and
  - those who have made some misrepresentations, etc.;

- **b** economic and financial capacity; and

- **c** technical and professional capacity.

The requirements described under (b) and (c) must be related and proportionate to the subject matter of the contract.

Economic operators may be excluded from the tender only in the event the above-mentioned requirements are not met by the bidders, or should the bid not be compliant with mandatory requirements set forth by the procurement documents.

The Corrective Decree introduced changes concerning the general moral requirements provided by Article 80 of the PCC, such as:

- **a** extending the criminal offences causing the exclusion from the tenders, providing for the crime of corporate misrepresentation and submission, in the tender, of false statement;
- **b** widening the individuals obliged to personally declare the absence of the exclusion’s causes from the tender, including the instititori and general attorneys; and
- **c** clarifying the period of exclusion from the tender in case of application of an exclusion cause other than the criminal offences listed by Article 80.

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28 Article 80 of the PCC.
ii Conflicts of interest

The PCC provides for a wide concept of conflicts of interest, which covers any situation where staff members of the contracting authority who are involved in the conduct of the procurement procedure have, directly or indirectly, a financial, economic or other personal interest that might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.29

Personnel of contracting authorities that have a conflict of interest must give specific notice thereof to the contracting authority and must abstain from the procurement procedure.

iii Foreign suppliers

Pursuant to Article 45 of the PCC, Italian contracting entities shall allow economic operators established in EU Member States to participate in national procurement procedures.

Insofar as they are covered by the GPA and by the other international agreements by which the EU is bound, contracting authorities shall accord to the economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators established in Italy.30

VII AWARD

i Evaluating tenders

As a general rule, contracting authorities award public contracts following the most economically advantageous tender criterion, which takes into account both the price and other quality criteria, using a cost-effectiveness approach. Quality criteria may include: organisation, qualification and experience of staff assigned to performing the contract; after-sales service and technical assistance; and environmental or social aspects.

The contracting authority shall specify, in the procurement documents, the relative weighting it gives to each of the criteria chosen to determine the most economically advantageous tender. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

As to the most economically advantageous tender criterion, one of the most innovative changes introduced by the Corrective Decree is the fact that the weight given to the economic component of the bid, compared to the technical quality component, for the purposes of the score, may not exceed 30 per cent. Moreover, the contracting authorities are prevented from assigning points in relation to additional works offered by the competitors that were not included in the executive design put to tender.

According to the amendments introduced by the Corrective Decree, the lowest-price criterion can be used in the following cases only:31

a for works up to €2 million awarded on the basis of executive designs;

29 Article 42 of the PCC.
30 Article 49 of the PCC.
31 Article 95, Paragraph 4 of the PCC.
for services and supplies with standard features or whose terms are defined by the market, including those with no relevant technological or innovative content; and

services and supplies below the EU threshold, with repetitive features and without relevant technological or innovative content.

Moreover, when using the lowest-price criterion, the contracting authority must give evidence of the grounds of such choice in the tender documentation.

ii National interest and public policy considerations

Specific regulations are laid down with regard to strategic infrastructures of national interest, aimed at: ensuring correct planning and priority in their execution; providing them with financial support through specific national funds; and providing the awarded contract with greater stability.

As far as public policy considerations are concerned, public contracts must be awarded in accordance with the principles of environmental protection and energy efficiency, and may also consider social criteria.

Unless justified by the subject matter of the contract, technical specifications laying down the characteristics required for a work, service or supply shall not refer to a specific make or source, or a particular process that characterises the products or services provided by a specific economic operator, or to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted only on an exceptional basis.

Where a contracting authority uses the option of referring to technical specifications, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

VIII INFORMATION FLOW

On request from the tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

a any unsuccessful tenderer of the reasons for the rejection of its tender;
b any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and
c any tenderer that has made an admissible tender of the progress of negotiations and dialogue with tenderers.

Contracting authorities withhold information regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the

32 Articles 4 and 30 of the PCC.
33 Article 68 of the PCC.
34 Article 76, Paragraphs 1 and 2 of the PCC.
public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.  

Further, contracting authorities shall as quickly as possible, and in any event within five days from receipt of a written request, inform:

- the awardee and other recipients identified by the PCC of the contract award, as well as the signing date of the contract;
- excluded bidders of their disqualification; and
- any candidate of the decision not to award a contract or not to conclude a framework agreement.

Once the contract is awarded, each bidder having a qualified interest can ask to have access to the bidding documents of the awardee as well as other undisclosed procurement documents. However, contracting authorities shall not grant access to information with regard to:

- information concerning technical or trade secrets of the bidder, unless access to such information is necessary for filing a legal action;
- legal opinions obtained for the solution of potential or ongoing disputes concerning public contracts; and
- technical solutions or software used by the contracting authority for electronic auctions, where covered by industrial property rights.

As far as the standstill period is concerned, the PCC provides that the contract cannot be signed before 35 days from the last notice of the contract award by the contracting authority. Should the contract award be challenged and interim measures (such as suspension of the effects) be requested, the contract cannot be signed before the issuance of the precautionary decision by the administrative court.

IX CHALLENGING AWARDS

Litigation costs in the field of public procurement may depend on various circumstances. In particular, bringing a legal action before the administrative courts involves the payment of a tax ranging from €2,000 to €9,000.

Time frames may also vary depending on a number of factors, such as the complexity of the case and the workload of the court seized of the case. However, specific rules are set forth by the Administrative Trial Code (ATC) to accelerate the duration of judicial proceedings in the field of public procurement.

35 Article 76, Paragraph 4 of the PCC.
36 Article 76, Paragraph 5 of the PCC.
37 Article 53 of the PCC.
38 However, exceptions to the standstill rule are set forth by Article 32 of the PCC.
39 Article 32, Paragraph 11 of the PCC.
40 Legislative Decree No. 104/2010.
Procedures

In the Italian legal framework, enforcement of public procurement rules is granted not only through judicial review, but also by means of alternative dispute resolution (ADR), encompassing the following procedures:

- friendly settlement agreements, which can be used by contracting authorities in the event the amount of the exceptions raised and quantified by the contractor is equal to or higher than 5 per cent and up to 15 per cent of the contract value;
- civil settlements;
- the arbitration panel of the ANAC; and
- pre-litigation advice to be issued by the ANAC with regard to disputes arising during the tender procedures.

The Corrective Decree introduced some changes to the ADRs, in particular:

- the removal of the technical advisory board, which could be entrusted by the parties with the task of submitting a non-binding solution to disputes; and
- in the case of friendly settlement agreements, the enterprise refusing the proposal of friendly settlement will only be entitled to challenge it before a court within the peremptory term of 60 days.

Finally, some amendments have been introduced in relation to the provisional regime, providing that the arbitration procedures shall be applied to contracts whose call for tender or invitations to the tender have been published before the entrance into force of the PCC.

As far as judicial reviews are concerned, a distinction must be drawn between actions regarding the awarding procedure, which are subject to the jurisdiction of administrative courts, and actions concerning the performance of the contract once it has been awarded, which are subject to the jurisdiction of civil courts.

Judicial claims are regulated by the ATC. As a general principle, any interested party is entitled to challenge measures adopted by the contracting authority within 30 days from the communication (or acknowledgment) of the measure itself. Should the contract notice not be published, the 30-day period starts from the day following the publication of the contract awarding notice. If no such notice is issued, challenge must be filed within six months from the day following the contract signing.

The appeal may be filed with the competent regional court of first instance, whose decisions may be challenged before the administrative court of second instance (the Council of State).

In 2016, the PCC introduced a new regulation with regard to challenges against measures issued by the contracting authority pertaining to admission to or exclusion of candidates from procurement procedures. Such claims must be filed within 30 days from their publication on the buyer profile, otherwise claimants are prevented from challenging any subsequent deed issued in the procurement procedure.

Grounds for challenge

Appeals before administrative courts may be grounded on the breach of the procurement rules set forth by the law and the procurement documents as well as on the infringement of the general principles governing the exercise of administrative power (such as lack of competence, lack of a preliminary investigation and failure to state sufficient reasons, illogical and contradictory motivation).
iii Remedies

Generally, claimants are entitled, *inter alia*, to challenge administrative measures issued by contracting authorities (such as calls for tender, admission or exclusion of a candidate) and ask for interim measures aimed at suspending the effectiveness of the challenged measure. Administrative courts may also award damages, including the loss of chances.

Should the court set aside the contract award, the former is bound to declare the contract ineffective, in whole or in part, only in cases of material violations set forth by the ATC.\(^{41}\)

However, in spite of such serious violations, the contract remains effective if overriding reasons relating to a general interest require that its effects are maintained. On the other hand, the administrative court identifies the following alternative sanctions to be applied alternatively or cumulatively:

a a fine to be paid to the contracting authority, whose amount range from 0.5 to 5 per cent of the value of the contract;\(^ {42}\) and

b a shortening of the contract duration, where possible, ranging from 10 to 50 per cent of the remaining duration at the date of the court decision.

Apart from the above-mentioned cases, the court that overturns the contract award determines whether or not to declare the contract ineffective.

Further procedural provisions are set forth with regard to disputes concerning strategic infrastructures. Apart from cases in which the court is bound to set aside the contract, the suspension or annulment of the contract award does not imply the ineffectiveness of the contract already signed, and the applicant is only entitled to claim for damages.

X OUTLOOK

Forthcoming developments in the field of public procurement will be brought by a special governmental decree aimed at amending the PCC, to be issued within one year after the entry into force of the latter and currently under discussion.

The next year will also see further implementation of the PCC through ministerial decrees and ANAC guidelines. Moreover, cases applying the previous regime will continue to make their way through the courts, alongside cases based on the new legal framework.

All this considered, it remains to be seen how the policies related to public procurement will affect the business environment, from the standpoint of both contracting authorities and economic operators.

\(^{41}\) Article 121 of the ATC.

\(^{42}\) Pursuant to Article 123, Paragraph 1(a) of the ATC, the contract value is intended as the award price.
I INTRODUCTION

The legal framework governing how the Mexican government and state-owned enterprises acquire goods, services, contract public works or otherwise partner with the private sector has its foundations in the Mexican Constitution, which clearly defines the fundamental principles of government procurement: legality, loyalty, efficiency, equal treatment, fairness, transparency and honesty. Amendments and additions to the public procurement legal framework in the past decade took place in light of such principles, to make procurement practices and processes more efficient, combat corruption and bid rigging, and to introduce new mechanisms facilitating the implementation of projects in conjunction with the private sector. Notwithstanding such important improvements to our legal regime, its application and enforcement is yet to be seen, as corruption scandals in procurement processes often arise and, in many cases, the structuring of procurement processes is not as time-efficient as the law suggests.

Mexico is a federation and is therefore subject to three levels of interaction and regulation: federal, state and municipal. Procurement laws are issued at all three governmental levels. Certain public services and utilities are mandated by the Mexican Constitution to be satisfied solely by municipal governments, such as waste collection, public lighting and the supply of potable water; however, municipalities can render such services and utilities through decentralised entities in association with state and federal governments or the private sector. Further, depending upon the source of a project’s financing, although it may be a state or municipal project, if federal funds are used, federal procurement laws (in addition to other applicable local laws) will apply to the project.

This chapter shall focus on federal procurement laws since most of the volume and large procurement processes are based upon federal law. Moreover, the main principles of the federal procurement laws can be seen throughout local legislation as federal laws generally act as a model for local statutes.

There are three main bodies of law that regulate procurement at a federal level:

- the Public Procurement Law, which regulates procurement of leases and acquisition of goods and services;
- the Public Works Law, regulating specific lump sum and unit price construction contracts; and
- the Public–Private Partnership Law (the PPP Law), regulating long-term service contracts and partnerships.
All of these laws are complemented by regulations based upon the principles set out in such laws and guidelines for more specific matters (i.e., guidelines on cost-benefit analyses and those applicable to certain force majeure events, methods for the evaluation of bids, among others).

Certain state-owned entities (such as the Federal Electricity Commission (CFE) or Petróleos Mexicanos (Pemex)) have developed their own specific procurement regime, different from the one set forth in the laws mentioned above; however, such regime must also abide by the fundamental principles of public procurement set out in the Mexican Constitution. In addition, the recently enacted laws comprising the National Anticorruption System contain specific provisions applying to public procurement (regardless of the specific statute regulating the process) to impose fines and administrative and criminal sanctions for corruption offences. As certain projects may require governmental concessions or permits to exploit public assets or render a public service, other laws will be applicable in such cases, and in specific cases a special procurement process may also apply (e.g., hydrocarbons industry, energy, roads and airports).

The main governmental bodies that interpret and regulate procurement laws are the Ministry of Finance and the Ministry of the Comptroller; both entities publish guidelines on matters related to procurement. All such guidelines, as well as any amendments to any procurement laws or regulations, must be published in the Federal Official Gazette for transparency and publicity purposes. Certain industries such as gas, oil, energy, roads and airports have their own governmental bodies that regulate their specific industry. Further, most governmental bodies also have internal guidelines issued by their internal comptroller body and procurement committees that issue guidelines on how to procure for their specific needs. The Ministry of the Comptroller has tried to standardise these internal guidelines across different federal governmental bodies.

The procurement legal framework mandates that public procurement procedures guarantee the best available terms and conditions for the public body; however, the current framework focuses more on transparency and anti-corruption issues and less on assuring an actual competitive and efficient results. In addition, Mexico is a party to various multilateral and bilateral treaties granting benefits in connection with public procurement, such as treating entities or individuals of such treaty countries as from a ‘most favoured’ or ‘preferred’ nation, including the North America Free Trade Agreement (NAFTA). Mexico is not a party to the Government Procurement Agreement of the World Trade Organization.

II YEAR IN REVIEW

The laws implementing the National Anticorruption System, which was created in 2015, came into force in 2017. These laws have a direct impact on public procurement, setting forth procedures applicable to public officials in procurement as well as administrative and criminal sanctions on public officials, private individuals or entities for administrative offences, such as bribery and collusion in public procurement. However, there has not yet been any significant progress in the implementation of the system. Congress has not appointed the specialised independent prosecutor to combat corruption, the judges in charge of imposing administrative sanctions have not been appointed and an important number of local governments have not taken the necessary measures to adopt the anti-corruption system at a state level. There are still no precedents concerning enforcement actions or guidance for the authorities to comply with anti-corruption laws.
There is also the challenging task of finalising the Digital National Platform: an information technology system that will connect all bodies of government for the sharing of data, including data regarding procurement process, financial disclosure of government officials, information about sanctions, offences and corruption, and a key component of the National Anticorruption System.

During 2017, the Senate issued an initiative to amend the Public Works Law with the objective of further promoting transparency, including by means of improvements to CompraNet, the Mexican electronic procurement system, involving competition authorities in major works projects and adapting the law to the anti-corruption system in procurement procedures. Congress is currently discussing the initiative. In addition, the regulations to the PPP Law were amended to include budgeting and publication requirements in relation to the approval of public–private partnership (PPP) projects and rules for contracting agents that may carry out competitive procurement procedures on behalf of public entities.

Another relevant statutory development affecting public procurement is the Financial Discipline Law enacted in 2016 and amended in 2018. The law has forced states and municipalities to comply with certain requirements when incurring debt. Now, any financing obtained by local governments must comply with certain budgetary and legal requirements (e.g., approval of local legislatures and registration of the indebtedness incurred at a sole public registry for the Ministry of Finance to keep track of sub-national debt). A key component of the Financial Discipline Law is that states and municipalities have to carry out competitive procedures by requesting bids to at least five different financial institutions before procuring any financing or by a public tender in case such financing equals or exceeds 240 million pesos regarding states, or exceeds 60 million pesos regarding municipalities.

Public procurement was active in 2017, mainly regarding social infrastructure projects (toll roads and hospitals), the New International Airport of Mexico City (NAICM) and water projects, such as the development of desalination plants in Sonora and Baja California (the latter being the largest in Latin America).

The NAICM project, launched by Mexico’s President Enrique Peña Nieto in the year 2014, continued to develop in 2017. This project is in response to a 20-year-old need to expand the capacity of Mexico City’s current international airport. Currently one of the three largest airport infrastructure projects worldwide and the largest infrastructure project in the country, its construction costs are estimated at US$13 billion.

The Airport Group of Mexico City, a majority state-owned company, received a mandate from the Mexican government to design, build and open the NAICM.

Given the magnitude of the project, instead of one or a few PPPs or concessions, GACM decided to tender the NAICM construction works into a series of procurement packages under the Public Works Law, organised by critical path in order to meet an ambitious timeline, with a mix of design-bid-build and bid-design-build models.

As of 2017, the development of the NAICM has resulted in more than 321 procurement procedures, amounting to 136.134 billion pesos, including contracts for core works of the airport, such as the construction of the terminal building, the runways and the control tower.

With regard to the energy sector, interest in development and acquisition of power projects increased during 2017 and there have been successful auctions for long-term contracts in the clean energy sector. Various projects awarded in the first and second long-term auctions

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are now being financed or developed, while a third long-term auction, which took place in 2017, will enable the development of 15 new electricity plants (mainly solar), which will represent an estimated investment of US$2.396 billion.\(^4\)

In addition, auctions for exploration and exploitation of oil continued to develop. The National Hydrocarbons Commission auctioned 29 contracts for deep-water oil exploration and production, and announced an additional auction for more than 30 contracts for oil exploration and production in shallow waters.\(^5\) In the midstream sector, pipelines continued to develop as well. Another important development was the opening of new gasoline stations by private companies (instead of being PEMEX franchises) and new storage facilities, which are still at initial stages.

The Federal Electricity Commission (CFE) issued its procurement rules and procedures in 2017 to adapt to its relatively new regulatory reality, in which the activities of the generation and sale of energy are liberalised. The CFE adopted specific provisions related to procurement procedures such as criteria for applying exceptions to open auctions, certification of officers responsible for procurement and evaluation of bids.

Petróleos Mexicanos (PEMEX) continued to adapt to the energy reform by centralising its procurement function and implementing an electronic system for procurement (SISCEP), which is a platform for more comprehensive e-procurement that improves simplification and transparency.

Both PEMEX and the CFE have also procured projects by means of generic model contracts (such as power purchase agreements or oil exploration and exploitation) used to standardise the commercial and contractual relationships with their counterparts.

### III SCOPE OF PROCUREMENT REGULATION

**i) Regulated authorities**

The procurement rules described in this chapter apply to practically all Mexican federal governmental agencies, bodies and entities with a majority of equity held by one of these entities. PEMEX and CFE would be exceptions to this rule. Also, certain types of projects may be subject to special laws, as would be the case for concessions in the transportation industry.

**ii) Regulated contracts**

All contracts entered into by government agencies, except as noted above, are regulated by the provisions of the Public Works Law, the Public Procurement Law, the PPP Law and the regulations thereunder. As a general rule, procurement contracts must be tendered in an open bid. Conducting a restricted invitation or directly awarding a contract is an option only afforded to the government under special circumstances, where a public tender would not be possible or recommended because of, *inter alia*:

- the existence of licences, intellectual property and patents;
- national security matters, or where a public tender may affect or compromise public health, the economy, public safety, the environment or may otherwise create social unrest;
- in cases of urgency because of force majeure or otherwise;

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\(^5\) https://rondasmexico.gob.mx/.

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where the goods or services to be contracted cannot be obtained through an open tender process or when the corresponding tender process was unsuccessful;

e where the goods or services are offered to the government as payment in kind, or the relevant contract derives from or is ancillary to a master agreement that has already been awarded; or

f if the amount of the contract is less than the threshold amount included for such purposes in the annual federal spending budget.

Under laws applicable to oil and gas-related activities, there are also certain exceptions to a public bid such as in the case of retaining advisers, oil spills and engineering services.

Regardless of the form tendered, the terms of any procurement agreement will need to abide by applicable procurement laws and, when applicable, the special rules governing the requesting entity.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Mexico does not have standardised forms of agreements across the board (and sometimes not even within the same governmental body). It is easy to find, within the same agency, contracts of a very similar nature signed only a day apart but with substantially different provisions or structures. Some of the previously mentioned guidelines and specific efforts of government agencies have resulted in framework agreements for commodity-type services or supplies of goods.

Central purchasing is not compulsory in Mexico, but it is a practice that is starting to be observed given the efficiencies that can be obtained; such is the case for the Mexican Social Security Institute. Some states have also started to centralise purchases, but again there are no regulations on the matter and certainly no obligation to procure in this way.

ii Joint ventures

Public companies and independent governmental bodies

The Mexican legal system provides for the existence of independent governmental bodies, public companies with major government interests, as well as the formation of public trusts. Such entities are considered to form part of the Mexican public administration and (unless expressly exempted) are therefore subject to all applicable procurement rules. All activities are regulated principally in the same fashion as any governmental agency. Joint ventures in which the government has a minority stake would not necessarily be subject to or regulated under general public procurement rules. Both Pemex and CFE, as state productive companies, have been expressly excluded from the Federal Law of Parastatal Entities and will have their own set of procurement rules as mentioned above.

PPPs

For many years, to encourage private capital participation in public infrastructure and utilities, the main forms of contracting have been through long-term services agreements with a construction component, financed public works contracts and concessions. Over the years these forms of contracting, having evolved and improved, led to the enactment of
the PPP Law in 2012 and to the enactment of PPP laws in the majority of the states in Mexico. These laws were especially created to provide the necessary flexibility in procurement to develop long-term joint ventures between governmental agencies and private parties.

V THE BIDDING PROCESS

The Mexican Constitution prescribes that all government acquisitions and leases of any kinds of goods, retained services or construction of public works be carried out and awarded – as a general rule – through a public bidding process, to guarantee the best available conditions for the government in terms of price, quality, financing and opportunity. Accordingly, all procurement laws dictate that all government procurement – as a general rule – should be conducted through an open tender procedure.

i Notice

The use of an electronic procurement system called CompraNet, managed by the Ministry of the Comptroller, is a mandatory mechanism to make public and freely available information on government procurement.

All federal government public invitations to tender must be made public through CompraNet and in the Federal Official Gazette, and may also be divulged by other means of publicity, such as the official website of the contracting agency or governmental body, or newspapers with national distribution, as determined in each case. As a general rule, amendments, changes or clarifications to the bid documents (including those stemming from clarification meetings), award notices or any other relevant information for the tender process are made public through CompraNet to guarantee that all participants have access to the same information, and the transparency of the process.

In addition, any bidder in a tender process to be conducted under the Public Procurement Law may now participate through CompraNet without the need to physically attend the different events of the process, unless otherwise specifically requested in the tender documents.6

ii Procedures

As previously indicated, the government procurement process in Mexico is usually conducted through a public tender; however, procurement contracts, under certain circumstances described above, may also be awarded through a restricted invitation to tender, delivered to at least three participants or even directly awarded to a supplier or service provider.

Also, an important development under the PPP Law is the government’s ability7 to retain consulting or advisory services through a restricted invitation to tender process, or to directly award contracts to service providers to perform all necessary works and services to develop and implement a specific project to be tendered by the government, provided that the total costs of such services do not exceed a specified threshold.

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6 A tender process under the Public Procurement Law may require that the submitting of bids and other events of the tender process be conducted only in person, in person and through CompraNet, or only through CompraNet.

7 Notwithstanding that the government is afforded this flexibility under the PPP Law, the relevant advisory, consulting or service agreements will be awarded under the Public Procurement Law but specifically for the development and implementation of PPP projects to be tendered in accordance with the PPP Law.
The Public Procurement Law also provides that, in connection with the purchase or supply of certain goods, certain environmental or sustainability requirements be met, and in some circumstances a certification by the Ministry of the Environment and Natural Resources may be required.

Procurement contracts to be awarded under the Public Procurement Law or the Public Works Law can be tendered as:

a. a national public tender, where only Mexican entities or individuals may participate in the bidding process and the goods to be provided or the materials to be used for the works or project being contracted should have a national content of at least 50 per cent;

b. an international public tender, under the coverage of international treaties, where it would be mandatory under the relevant international treaty to limit the participation to Mexican and foreign bidders only from those countries with which Mexico has signed a free trade agreement with a chapter on government procurement; or

c. an open international public tender, only when an unsuccessful national tender process has been held; or if required for the procurement to be financed with a foreign loan granted to, or guaranteed by, the federal government.

The PPP Law does not classify tender processes for PPP projects as national and international, but rather specifically sets forth that any entity may participate in PPP projects provided that the industry-specific regulations allow for the participation of the private sector in the services to be provided (for such purposes a licence, permit or concession may be required).

iii Amending bids

As long as any changes or amendments would not have the purpose of restricting the participation of other bidders, the contracting governmental body or agency may change the bidding documents throughout the tender process, including as a result of a clarification meeting, provided that any such amendments would have to be made with sufficient anticipation for all participants to revise their proposals accordingly before the submission date. As previously indicated, any such amendments should be disclosed through CompraNet – among other means – to guarantee that all participants would have access to such information. Such amendments should not entail the substitution of the goods or services originally tendered, or add others significantly different in quality or nature to those originally tendered.

The tender documents, including the form of contracts and exhibits thereto, as may be amended in clarification meetings and the bid proposal, are binding among the parties. The actual contract to be executed should not modify or amend the terms and conditions contained therein.

Mexican public procurement laws do not promote or facilitate discussions on the tender documents on an individual basis but are rather limited to responses and information provided in the clarification meetings. The only exceptions to this rule are:

a. those cases where a contract is directly awarded, as was the case with each PPP contract that was awarded in 2011 under the PPP Federal Prison Programme (in such awards the federal government had several individual meetings with each participant to negotiate and modify the relevant form of PPP contract);
in connection with unsolicited proposals under the PPP Law; or
clarifications requested during a tender under the PPP Law.

After a procurement contract has been awarded, the contracting governmental body or agency may amend the contract as long as the amount, quantity or volume of the goods or services originally contracted has not increased by more than 20 per cent and the prices of the relevant goods, leases or services are not changed. If, however, after a contract has been awarded, new general economic circumstances arise that result in new conditions outside the control of the parties, which imply an increase or reduction in the prices of services or goods, such an increase or reduction should be considered and adjusted in the contract in accordance with the guidelines that the Ministry of the Comptroller may issue for such purposes. A similar limitation applies under the Public Works Law, as contracts may be amended provided that the price is not increased or the term of the agreement is not extended by more than 25 per cent.

In contrast, the PPP Law expressly recognises the need to review and amend long-term contracts to implement modifications to:
- improve the conditions or quality of the services or infrastructure being provided;
- protect the environment and natural resources;
- adjust the scope of the contract because of new circumstances; or
- enhance the financial feasibility of the project when new and unforeseen circumstances arise.

VI ELIGIBILITY

Other than those specific cases where the private sector or foreign participation is limited or proscribed, as previously explained, the eligibility criteria for government procurement is relatively standardised throughout Mexican government procurement legislation.

i Qualification to bid

In addition to those specific cases where proposals should not be admitted because of a conflict of interest or otherwise, as described in Section VI.ii, proposals may be dismissed or disqualified if a participant has used inside or privileged information; if participants have colluded to raise prices or to obtain any other advantage; or if a participant does not meet the requirements under the bid documents provided that any such breach would affect the financial or technical feasibility of the relevant tender.9

As a particular feature of PPP projects, the PPP Law affords the tendering government agency the ability to pre-qualify proposals in accordance with the specific terms and conditions of the bid basis. Such pre-qualification should be limited to ascertaining which proposals comply with the minimum requirement to be considered as economically and technically feasible.

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9 All procurement laws and – as a general rule – all bid documents clearly specify that lack of compliance with specific requirements under the bid documents should not constitute a cause to disqualify or reject a proposal unless lack of compliance adversely affects the technical or economic financial viability of the proposal. The foregoing has been consistently confirmed in court precedents.
ii Conflicts of interest

All government procurement regulations prohibit governmental bodies or agencies from receiving proposals or awarding contracts to participants that:

a have a family, business or labour relationship, or where a government officer who participates in the bidding process could otherwise benefit from the relevant contract;

b have a conflict of interest with the contracting governmental agency or other participants in the same tender process;

c have been convicted by a final and non-appealable judgment in the previous three years in connection with government procurement contracts;

d have had a governmental agency rescind a contract for breach or wrongful misdoing;

e are insolvent or subject to an insolvency proceeding; or

f have been vetoed by the Ministry of the Comptroller.

The new General Law of Administrative Liabilities has a much more ample definition of ‘conflict of interest’, identifying as such ‘the possible influence of an impartial and objective performance from public officials due to personal, family or business interests’. Although this definition has not been transferred to procurement laws, verification and confirmation of the absence of conflict of interests in procurement processes should be further scrutinised. To that effect, the General Law of Administrative Liabilities now obliges public officials to submit declarations of assets, conflicts of interests and evidence of good standing with the Mexican tax authorities.

iii Foreign suppliers

Unless otherwise specifically prohibited with regard to a particular industry, foreign suppliers may participate in government procurement tenders. However, as previously explained, certain tenders may be limited to national participants. Even in such cases, foreign suppliers may also participate through associations or joint ventures, provided that the Mexican company remains the majority and controlling holder, or as a subcontractor or supplier, only if the 50 per cent national content threshold is observed.

Foreign participants may or may not be required under the tender documents to incorporate a Mexican subsidiary in the event that they are awarded a procurement contract, but in all cases they would be required to submit to Mexican law and Mexican courts. In those cases where the supplier or services provider is required to hold a certain permit, licence or concession, the specific regulations governing such permits, licences or concessions generally require that any such governmental authorisation be granted solely to a Mexican entity.

VII AWARD

i Evaluating tenders

Bidders are commonly asked to submit their proposals in two separate packages (or envelopes): one containing the technical proposal and a separate one containing the pricing.

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10 For short-term contracts or those limited to the supply of goods, foreign participants are not always required to incorporate a Mexican special purpose vehicle to enter into the relevant procurement agreement.
Both packages could be opened at the same time or in successive events with the technical proposals being opened first then, in a subsequent evaluation, the pricing under each of the proposals that qualify for the second stage would be revealed.

Government procurement laws provide flexibility to the tendering authorities to establish in the tendering documents the specific rules to be considered for the evaluation of the proposal; these rules should be outlined in the tendering documents for the information and benefit of all participants. Depending on the type of procurement contract, the winning bid could be determined on the basis of price or on the overall qualification of each proposal.

Among the most common mechanisms for evaluating proposals, the pricing component is weighted as follows:

a. lowest price wins (commonly used for supply of goods or services) provided that the goods or services offered are consistent with the tender documents;\(^\text{11}\)
b. the technical proposals are evaluated separately and, among those that reach a certain minimum score, the contract is awarded to the proposal with the lowest price; or
c. in a score-based tender, where many aspects of the proposals are individually evaluated (including pricing as one of the many criteria to be considered) and the bid with the highest score is awarded the project.

The award should spell out:

a. the reasons for disqualifying certain bids;
b. which bids were considered technically feasible;
c. the reasons for not considering as valid the pricing under certain proposals;
d. the reasons for awarding the contract to a specific bidder; and
e. information in connection with the execution of the relevant procurement agreement.

ii National interest and public policy considerations

Generally procurement laws promote the participation of Mexican companies and the acquisition of Mexican goods in government procurement processes. As a practical matter, national companies and goods can be favoured in a procurement process as follows:

a. with regard to industries where foreign participation is proscribed or limited;
b. in a national tender process where only Mexican suppliers may participate or goods and services should comply with a certain Mexican component;
c. with regard to certain goods that require certifications issued by Mexican authorities;
d. in open international public tenders, the tendering authority should favour, in equal circumstances, those proposals that would generate employment in Mexico or that would use more products produced in Mexico (that comply with the national component threshold required in a national tender process). Such proposals should receive up to a 15 per cent advantage in their price with respect to other proposals with imported goods or services; and
e. in those cases where the evaluation rules consider a score-based tender, additional scores could be granted to those proposals from small or medium-sized companies that use innovation technologies as evidenced by certification from the Mexican Institute of Industrial Property.

\(^{11}\) A contract may not be awarded to the bidder with the lowest price if in the opinion of the tendering authority (based on an independent analysis) the prices offered by such a bidder are not market prices.
VIII INFORMATION FLOW

All relevant information regarding federal government procurement is made freely and publicly available by the federal government through CompraNet, and includes:

a. the annual spending programme\(^\text{12}\) of, and projects to be conducted by, the relevant governmental contracting agency or body;

b. authorised suppliers’ lists;

c. calls for public bids and closed invitations, as well as amendments thereto;

d. calls for clarification meetings and the outcome thereof; and

e. contract award notices, including those directly awarded outside a bidding process.

Government procurement regulations prescribe that the tender process and all relevant information in connection therewith should be disclosed and made equally available to all participants. However, certain information may be reserved and not disclosed if it is deemed to be restricted or confidential in accordance with the Federal Law of Transparency and Access to Public Government Information or any other applicable laws and regulations (e.g., the procurement of goods or services related to national security; documents or information used in or considered to be part of an ongoing tender process;\(^\text{13}\) and information submitted by participants as confidential).

IX CHALLENGING AWARDS

All challenges in connection with a government procurement tender process should be submitted to the Ministry of the Comptroller. Such challenges should only be made in connection with:

a. the invitation for the tender process and for the clarification meetings;

b. restricted invitations to at least three participants (only such participants may contest the invitation);

c. submission and opening of bid proposals;

d. the award;

e. the cancellation of the tender process; or

f. acts and omissions from the tendering government agency that hinder the execution of the relevant procurement agreement.

i Procedures

An award may only be challenged by a participant that actually submitted a proposal and should be filed in writing with the Ministry of the Comptroller or through CompraNet within the next six business days following the date on which the meeting making the award public was held or when the participant was actually notified of the award in the event that such a meeting was not held.

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\(^{12}\) Such programmes can be updated on a monthly basis, or as required.

\(^{13}\) Governmental authorities usually reserve the proposals submitted by bidders for several years after the relevant tender process has been concluded.
ii  Grounds for challenge
The challenging participant may request that the tender process be suspended and the execution of the procurement contract with the winning bidder be postponed. In the event that the Ministry of the Comptroller approves the requested suspension of the process, such a suspension would only be granted if the challenging participant actually guarantees the indemnification of any damages that the suspension may cause, as requested by the Ministry of the Comptroller. Such a guarantee would have to be of an amount greater than 10 per cent and less than 30 per cent of the amount of its bid; however, the winning bidder may offer a counter-guarantee of the same amount for the process not to be suspended.

iii  Remedies
The final resolution issued by the Ministry of the Comptroller may dismiss the challenge, declare the tender process null and void, or declare the nullity of the specific act being challenged (such as the award), in which case the challenged act would need to be restored. Such a resolution may be contested or appealed at the federal courts.

X  OUTLOOK
The shape of the Mexican economy in the year 2018 will be dictated by the presidential and congressional elections, as well as by the fate of NAFTA. At present, it seems that corruption, including in procurement procedures, will be a critical issue in the presidential election. Further, Chapter 10 of NAFTA concerning government procurement is expected to change with the renegotiation, although no details have yet emerged. It is also expected that an anti-corruption chapter will be included to adopt certain measures such as increasing transparency in laws, encouraging due process in legal cases and promoting integrity among public officials.

The Ministry of Finance has contemplated 22 PPP projects in the government’s expenditure plan for 2018 that will represent a total investment of up to 34.5 billion pesos. Such projects will consist in the development of nine hospitals and clinics, and the maintenance or construction of up to 11 toll roads.

In addition, the shared public telecommunications network that will bring 4G-LTE services to more than 90 per cent of the country continues to develop and is expected to reach its commercial operation this year. Further, several major constructions related to the new Mexico City airport are expected to conclude this year, such as the terminal building, the control tower and two airstrips.

Finally, more auctions are expected in the power and oil sectors. For example, an additional auction was announced at the beginning of this year for oil exploration or production contracts concerning 37 land areas.
INTRODUCTION

Portugal is a signatory to the World Trade Organization (WTO) Agreement on Government Procurement (GPA), which provides for reciprocal market access commitments in procurement between the European Commission (EC) and World Trade Organization members that are signatories to the GPA.


These Directives were implemented into the Portuguese legal system through Decree-Law No. 111-B/2017 of 31 August 2017, which approved an amendment to the Public Contracts Code (PCC), first approved by Decree-Law No. 18/2008 of 29 January 2008, and subsequently amended. This large amendment to the PCC was the main mark of public procurement in Portugal in 2017, and implied a general revision to procurement procedures and public contracts.

In Portugal, 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 the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The coordination of procedures for the award of contracts in the fields of defence and security is ruled by Directive 2009/81/EC (the Defence Directive). Through Decree-Law No. 104/2011 of 6 October 2011, Portugal implemented the Defence Directive into its legal system, which allows more flexibility in procurement procedures in these sectors. This Decree-Law also stipulates that, in line with Article 296 of the EC Treaty, certain contracts regarding both the defence and security sectors are excluded from its scope of application.

YEAR IN REVIEW

In 2017, a major change to the Portuguese legal system was implemented through the 11th amendment to the PCC, approved by Decree-Law No. 111-B/2017 of 31 August, and the 12th and 13th amendments, which are ratifications to the 11th amendment. This amendment provoked a profound revision to the previous legal regime as it has revoked 35, added 54 and

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1 Paulo Pinheiro, Rodrigo Esteves de Oliveira and Catarina Pinto Correia are partners and Ana Marta Castro is a managing associate at Vieira de Almeida (VdA).
changed 155 Articles, modifying significant aspects of public procurement procedures and contracts. This amendment, in addition to the implementation of Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU, also intended to simplify the PCC, add transparency measures and reduce bureaucracy in the decision-making processes. Moreover, the new PCC intends to increase the access to small and medium-sized enterprises to the public contracts market, as it creates more flexible rules. The following are also relevant:

a  Law No. 31/2017, dated 31 May 2017, which approves the rules and principles related to the organisation of the public tender procedures for the attribution, by contract, of concessions aimed at the exclusive operation of the low-voltage power distribution municipal networks;

b  Decree-Law No. 93/2017, dated 1 August 2017, which creates the electronic notifications public service associated with the unique digital address;

c  Decree No. 371/2017, dated 14 December 2017, which establishes the model contract notices applicable to the pre-contractual procedures under the PCC; and

d  Decree No. 372/2017, dated 14 December 2017, which establishes the rules and terms concerning submission of the contractor’s qualification documents on public contracts’ pre-contractual procedure.

2017 witnessed no rulings likely to change the case law paradigm, only case law related to the regular interpretation of the Portuguese rules. In addition, 2017 saw significant efforts to improve administrative justice, namely by the appointment of 30 new judges to the Administrative Court of Lisbon, where most of the country’s administrative litigation is held.

III  SCOPE OF PROCUREMENT REGULATION

i  Regulated authorities

The PCC identifies the entities subject to government procurement rules as follows:

a  the traditional public sector, including the central, regional and local authorities (Article 2/1), including:
   •  the Portuguese state;
   •  autonomous regions;
   •  municipalities;
   •  public institutes;
   •  independent administrative authorities;
   •  the Bank of Portugal;
   •  public foundations;
   •  public associations; and
   •  associations either financed by the entities above or subject to their management control; or where the majority of the members of the administrative, managerial or supervisory board are, directly or indirectly, appointed by the entities above;

b  bodies of a public or private nature, governed by public law, as included in both the Utilities Directive and the Public Sector Directive (Article 2/2); and

c  utilities in the transport, energy, water and postal sectors (Article 7):
   •  public undertakings (i.e., those subject to the dominant influence, either directly or indirectly, of the entities referred to in (a) and (b), including by means of holding the majority of the share capital or the majority of the voting rights,
or holding the management control; or the right to appoint the majority of the members of the administrative, managerial or supervisory board;

- entities holding special or exclusive rights that have not been granted within the scope of an internationally advertised pre-contractual procedure; that aim to limit the exercise of activities included in the special sectors; and that substantially affect the ability of other entities to carry out such activities; and

- companies that are incorporated exclusively by utilities referred to in Clause 7/1 (point (c)) or financed by the same; subject to their management control, or whose administrative, managerial or supervisory board members are appointed by the said entities; and dedicated to the common pursuit of activities in the water, energy, transport or postal sectors.

Some procurement rules may also apply to contracts executed by public works concessionaires or by entities holding special or exclusive rights for the undertaking of public service activities, under certain circumstances expressly defined in Articles 276 and 277 of the PCC.

ii Regulated contracts

The nature of contracts subject to public procurement rules is determined by the nature of the awarding entity that concludes the contract.

For purposes of contracts executed by entities belonging to the traditional public sector, public procurement rules apply to any contracts, regardless of their name or nature, the scope of which is subject to competition in the market. This is a vague concept that is not determined or defined by the law. It has been interpreted in a very broad manner. The PCC determines that it includes, inter alia:

a public works contracts;
b public works concessions;
c public service concessions;
d acquisition or lease of goods;
e acquisition of services; and
f company contracts.

As to contracts being executed between public sector entities or by bodies governed by public law (Article 2/2), public procurement rules apply only to the contracts referred to in points (a) to (e).

Some specific contracts are expressly excluded from the scope of public procurement rules, such as those contracts that are excluded from the scope of the 2014 Directives and contracts for the acquisition of real estate (Article 4).

Certain rules are established concerning the procurement procedures adopted for the award of utilities contracts. The PCC adopts more flexible rules, such as the possibility to freely choose from a broader range of types of procedure, including an open procedure, restricted procedure with pre-qualification or negotiation procedure, as specified in Section V.i.

As to defence procurement contracts, Decree-Law No. 104/2011, dated 6 October 2011, established more flexible rules concerning, for example, the adoption of special procedures, such as:

a a negotiation procedure without publication of a notice;
b rules concerning qualitative selection including quality or environment management;
c confidential proceedings;
As a general rule, the above-mentioned contracts are subject to the applicable procurement rules regardless of the contract value. However, contracts under the special utilities sectors are only subject to the rules if the relevant contract values equal or exceed the thresholds set forth in the Utilities Directive.

The awarding entities may award contracts by means of a direct award procedure (not advertised and non-competitive) regardless of the contract value, if some material criteria are met. These material criteria concern:

- **a** for all kinds of contracts:
  - failed procurement (under certain conditions);
  - extreme urgency arising from unforeseeable events not imputable to the awarding entity;
  - contracts for the provision of telecommunication services; and
  - existence of an exclusive co-contractor because the object of the contract is the creation or the acquisition of artwork or an artistic show, there is no competition for technical reasons or it is necessary to protect exclusive rights;

- **b** for public works contracts:
  - new repeated works similar to works previously awarded, subject to the conditions set forth in the law;
  - works contracts under a determined threshold, for research and development (R&D), non-profit study or experimental purposes only; and
  - performance of a work under a framework agreement;

- **c** for contracts for the acquisition or lease of goods:
  - goods intended to replace or broaden previous supplies awarded to the same entity, provided different goods would cause incompatibility, or disproportionate technical difficulties of use or maintenance;
  - goods under a determined threshold, produced for R&D, non-profit study or experimental purposes only;
  - goods quoted and acquired in the Raw Materials and Commodities Exchange;
  - special advantageous acquisitions;
  - goods acquired under a framework agreement; and
  - the acquisition of water or energy by a utility acting in the water or energy special sectors;

- **d** regarding services contracts:
  - new repeated services similar to services previously awarded, subject to the conditions set forth in the law;
  - some services of an intellectual nature;
  - services related to a real estate acquisition or lease;
  - arbitration, mediation or conciliation services;
  - certain R&D services;
  - services acquired under a conception tender executed with one entity;
  - services acquired under a framework agreement; and
  - services acquired under especially advantageous conditions.
Regarding variations of contracts, a contract may be amended without the need to submit the amended contract to a competitive tender whenever the amendment does not:

- affect the main scope of the contract;
- prevent, restrict or distort competition;
- imply that the order of the evaluated bids in the tender procedure for the award of the initial contract would have been altered, by objectively verifiable means, had the tender specifications contemplated this amendment; and
- produce an increase over either 10 or 25 per cent of the initial contract price, depending on the grounds of the variation.

Whenever the amendments breach the above-mentioned legal limits, the awarding authority must competitively tender the amended contract.

On the other hand, changing the contracting parties will not require the launching of a competitive tender if such an alteration is provided for in the existing contract, or when it is authorised during the performance of the contract by the contracting authority and the new entity complies with all capacity, technical and financial qualification criteria required under the original tender. Also, it is possible for the change of contracting parties to occur in a situation of breach of the contract by the co-contractor, and in such case a third party, chosen by the contracting authority considering the sequential order of the pre-contractual procedure, will become a party to the contract.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The public procurement regime set forth in the PCC deals with all special procedures (such as framework agreements and central purchasing, but also concept tenders, dynamic purchasing or qualification systems) and special rules set forth for the utilities sectors. Framework agreements may be executed with one entity only or with several entities, if the tender specifications have all been set forth in the tender documents, or with several entities if the tender specifications have not all been set forth in the tender documents.

The award of a framework agreement is subject to the adoption of competitive procedures, considering the global amount of contracts to be executed under the agreement. A framework agreement binds the private contractor to the contracts executed under the agreement. However, the contracting authority may execute contracts outside the scope of the framework agreement. Further, the term of a framework agreement must not exceed four years and the termination of the framework agreement will not have any effect on the already initiated procedures or on the contracts executed under the framework agreement.

The contracting authorities covered by bounded procurement systems in a framework agreement are not bounded to such bond if they are able to demonstrate that, for a given acquisition, or lease of goods or services, the utilisation of the framework agreement would lead to the payment of a price, by unit of measure, of at least 10 per cent.

Central purchasing may be created by contracting authorities other than utilities acting in the special sectors (i.e., only entities included in the traditional public sector and bodies governed by public law).
Central purchasing may be created for the purpose, among others, of awarding bids, leasing or acquiring goods or services, or executing framework agreements and centralising the procurement of several entities. Central purchasing must comply with the rules applicable to each contracting authority. Procurement through central purchasing is purely optional.

The PCC also sets forth the special proceedings instruments, which include:

- concept tenders;
- dynamic acquisition systems intended to execute contracts for the acquisition or lease of goods or services of current use and public works contracts with a reduced complexity, by means of a totally electronic system;
- qualification systems, which may only be adopted in the context of executing contracts designed for activities in the special utilities sectors;
- specific rules for the alienation of movable property; and
- specific rules for the acquisition of social services, or health and administrative services in the social, educational and medical areas.

ii Joint ventures

The public procurement rules do not apply to in-house relations between contracting authorities and publicly owned undertakings. The PCC has laid down the requirements for exclusion (in relation to in-house entities) in accordance with European Court of Justice case law: it requires the existence of control exercised by the contracting authority over the contracted party similar to the control exercised by the contracting authority over its own departments, the carrying out of the essential part of the contracted party’s activity (over 80 per cent) to the benefit of the contracting authority and the absence of private capital participation in the contracted party.

Accordingly, if a public–public joint venture complies with the above criteria, it may be contracted by its parent companies without being subject to the public procurement rules.

Also excluded from the scope of public procurement rules is the award by a contracting authority of a public service contract to an undertaking that stands as a contracting authority itself, given the existence of an exclusive right.

The PCC and Decree-Law No. 111/2012, dated 23 May 2012, provide a special legal framework for public–private partnerships. The private sector partner has to be competitively tendered and duly advertised. Only reasons related to public interest (as well as those mentioned in Section III.ii) may justify the adoption of a direct award procedure.

Special rules are set forth for special utilities sectors. Joint venture companies may be deemed contracting entities provided they are incorporated exclusively by utilities referred to in Clause 7/1 of the PCC or comply with the requirements set forth in Section III.i.

V THE BIDDING PROCESS

i Notice

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 according to the Public Sector Directive, for publication in the Official Journal of the European Union (OJEU).

Regarding agreements concerning utilities, the same must submit a periodic indicative notice in accordance with the Utilities Directive.
Moreover, all competitive tenders must be launched through publication of a tender notice, which may be at the national level (i.e., published in the Portuguese Official Gazette) or the European level if the contract’s value exceeds EC thresholds.

Decree No. 371/2017, of 14 December, establishes the model contract notices applicable to the pre-contractual procedures under the PCC, and the completion and submission of the contract notices set forth in this Decree are made electronically for publication in both the National Gazette and the OJEU. The completion of the contract notices to be published in the National Gazette must also be completed and submitted. When there is a need to rectify an already published notice, it is mandatory to publish a rectification notice, which must indicate the number and date of the rectified notice. All the notices submitted in the electronic platform set forth in this Decree are made available (free of charge) to all potential interested parties.

ii Procedures

The PCC provides for the following procurement procedures:

a. direct award: one bidder will be invited to submit bids;

b. prior consultation: at least three entities will be invited to submit bids;

c. open procedure: any interested entity is free to submit bids after the publication of a tender notice;

d. restricted procedure with pre-qualification (similar to (c) but comprising two stages: submitting technical and financial qualification documents, and selecting candidates; and submitting bids);

e. negotiated procedure: including the same two phases as the procedure in (d) and a third phase for the negotiation of bids;

f. 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

g. partnership for innovation: whenever a contracting authority intends the performance 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 with its 11th amendment.

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 two procedures: the negotiation procedure or competitive dialogue. The only special procedure applicable to the utilities sector is the qualification system.

Regarding the defence and security sector, Decree-Law No. 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.

Further to the European directives stating 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.
iii Amending bids

The general rule that applies to all cases is that tender documents and bids must not be altered during the whole procedure. Exceptions are, however, expressly foreseen.

The tender documents may be rectified by the contracting authority until two-thirds of the time limit for the submission of bids has elapsed. Interested parties are given until a third of the time frame has elapsed to identify errors and omissions in the tender specifications, which will subsequently be subject to approval by the contracting authority. Any rectification of errors and omissions after this deadline will be the cause for extension of the deadline for presentation of bids. Moreover, any rectification regarding errors and omissions must not imply amendments to any of the tender documents’ essential aspects. Whenever such amendments occur, the deadline for presentation of bids should be extended.

Further, after the award decision and before the signing of the contract, the contracting authority may propose changes to the contract content, provided such changes are imposed in the public interest and it is objectively demonstrated that the bid ranking would remain unchanged should the proposed adjustments be reflected in the bids. Nonetheless, such proposed changes cannot violate any of the tender documents’ imperative settings nor reflect the adoption of another bidder’s bid. Likewise, there are certain situations in which bids may be subject to amendments. Such is the case whenever bid negotiation occurs or, in the case of direct award with one bid, whenever the bidder is requested to improve its bid.

VI ELIGIBILITY

i Qualification to bid

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 capacity are assessed.

Parties will be excluded if they do not meet eligibility criteria for reasons that include:

- insolvent or similar;
- conviction for crimes affecting professional reputation;
- administrative sanctions for a serious professional breach;
- non-payment of tax obligations;
- non-payment of social security obligations;
- sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;
- conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set in the PCC;
- direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage;
- unlawful influence on the competent body for the decision to contract;
- conflict of interest; and
- significant faults on the execution of a previous public contract in the past three years.

In the situations referred to above in (b), (c), (f), (g) or (l), the PCC allows bidders to demonstrate that enough measures have been implemented in order to demonstrate a bidder’s honesty and probity for the execution 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 European directives.

ii Conflicts of interest

Contracting authorities are strictly prevented from awarding a public tender should a conflict of interest arise. All public entities must comply with general rules regarding conflicts of interest, as established in the Administrative Procedure Code. In general, such rules address situations where a member of the administrative authority has a special interest in the decision-making process, and comprise the following situations: cases of special interest in a given decision or tender as a result of some kind of involvement with a given bidder; family ties; and a business interest in a matter similar to the one under assessment.

For the reasons referred to above, bidders who have participated, directly or indirectly, in the preparation of tender documents may participate in the tender that will be launched, provided that the contracting authority takes appropriate measures to ensure that competition is not distorted by the participation of such bidder.

iii Foreign suppliers

Both foreign and national suppliers can bid on the same level playing field. Moreover, the free movement principle determines that foreign EU suppliers cannot be obliged to set up a local branch or subsidiary, or have local tax residence.

VII AWARD

i Evaluating tenders

There is a general provision in the PCC 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 criteria and their corresponding weight, as well as the evaluation methodology, the scoring system for every single criterion and factors concerning the contract’s execution, must be clearly specified.

According to the PCC, contracting authorities can award public contracts based on two criteria: the lowest price, as the only aspect of the contract to perform; and the most economically advantageous tender.

With the 11th amendment to the PCC it became mandatory for the rules of the procedure to establish a tie-breaker criterion for the choice of the best submitted offer. This can be related to the evaluation factors established or with 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 offers were submitted.

According to the first criterion, only the price of the proposals is evaluated. Regarding the latter, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, namely quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, aftersales service and technical assistance, delivery date and delivery period or period of completion.
Once the proposals are submitted, the jury begins their evaluation and issues a preliminary evaluation report, which shall include a description of their analysis, an assessment of the legality of the proposals submitted, namely in relation to their absolute compliance with the tender specifications, and the concrete application of the approved evaluation criteria.

All bidders that submit a proposal 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 the modification of the preliminary report if they do not agree with its content.

Upon analysis of the requests presented by the bidders, the jury has the opportunity to review its previous decision. In cases where changes are introduced that modify the proposals’ ranking, or if the jury decides to reject a proposal previously admitted and evaluated, a new preliminary evaluation report is issued and the bidders will be granted a new opportunity to review it. However, if the jury decides to maintain its previous decision, or if only minor changes are introduced to the content of the preliminary report, the jury issues a final evaluation report with its final decision regarding the analysis and evaluation of the proposals submitted, and does not submit it again for prior hearing.

Once the final evaluation report is concluded, the jury transmits it along with all the documentation issued during the procedure to the competent department of the contracting authority, which, in most cases, confirms and approves the content of the jury’s final evaluation report.

Nevertheless, although such situations are rare, the contracting authority may also conclude that the final evaluation report lacks information; for instance, if the report is insufficiently grounded. In such cases, it can either address these insufficiencies itself, or return the report to the jury to be rectified.

Another possibility is to deem the procedure well instructed but its conclusions illegal, in which case the contracting authority can alter them accordingly.

Finally, the contracting authority will award the contract to the successful bidder that has presented the best bid in light of the adopted criteria. The act of award shall be written and duly grounded (the specific factual and legal grounds on which the act is based must be clearly stated) and, if the call for bids has been advertised in the OJEU, the act of award will also have to be advertised in this publication.

At this point, the selected bidder is requested to present to the contracting authority all the necessary documents that duly confirm that his or her personal situation does not prevent him or her from entering into a public contract.

ii National interest and public policy considerations
Procurement procedures may comprise criteria aiming to address certain social and environmental considerations, provided they are linked to the subject matter of the public contract, are clearly stated in the procedure documents, do not confer unrestricted freedom of choice on the contracting authority and comply with the fundamental principles of the EU (such as the principle of non-discrimination).

Such requirements must be fulfilled in the award phase and some are observed during performance of the contract. These can include fostering employment, fulfilment of health and safety requirements at work, social inclusion and human rights protection.

Contracting authorities cannot specify the provenance of goods and services, and thus must accept products that are of ‘equivalent quality’. In fact, according to the principle of
equal treatment, no bidder may be discriminated against on the basis of nationality (or on the location of headquarters), and procurement procedures exclusively aimed at national bidders are strictly prohibited.

Accordingly, any criterion aimed at directly or indirectly favouring products or services of national origin, national bidders or the national market (e.g., favouring bidders headquartered in Portugal) will be deemed illegal. The principle of non-discrimination plays a key role both in Portuguese and EU public procurement law.

As previously indicated, procurement legislation specific to the defence sector has been introduced by Decree-Law No. 104/2011, which is compliant with the standard Portuguese public procurement regime regarding the evaluation procedure and the national interest, as well as public policy considerations.

According to this Decree-Law, contracting authorities in the defence sector must also award contracts based on the two above-mentioned criteria. Further, the Decree-Law in question specifically refers to the duty to comply with the basic public procurement principles, namely the principle of non-discrimination, extending to the defence sector the general prohibition on favouring national interests.

Nevertheless, the Decree-Law does not apply to some specific contracts in the defence sector, namely the ones that are declared to be secret or that call for the protection of critical interests of the state. For this reason, the secrecy associated with the entering into force of these contracts may also lead to the conclusion that it would be preferable to buy national products to maintain national security.

VIII INFORMATION FLOW

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.

In addition, any relevant decisions by the jury or contracting authority shall be notified to all interested parties, including unsuccessful bidders.

Special attention in the PCC is given to the importance of the notification regarding the decision to award the contract. Besides the duty to notify this final decision to all bidders that submit a proposal, the PCC also stipulates a general standstill period of 10 days between the time of notification of the award decision in writing to all tenderers and the conclusion of the contract, so that unsuccessful bidders are allowed to challenge the decision before the contract has been signed.

Further to the compulsory measure implemented by the PCC obliging all public contracting authorities to use electronic platforms when launching public procurement procedures, transparency regarding this type of procedure has become absolute. The bidders have the opportunity to view and analyse competitors' requests to participate as well as their bids on the day after the deadline for its submission, and before the preliminary evaluation report of the jury is issued.

This obligation to disclose the content of the requests to participate or of the bids will be effective in most cases. Nonetheless, in certain situations, namely when candidates or tenderers request those documents to be treated as confidential, non-disclosure may be allowed.
The request for the confidentiality of documents must be fully grounded. The candidate or tenderer concerned must demonstrate the need to protect the secrecy of the commercial, industrial, military or other type of information contained. However, if after analysing the classified documents the contracting authorities consider there are no grounds for classification, they may decide to disclose the documents.

Another situation where the PCC safeguards confidentiality is the competitive dialogue, where the proposed solutions may not be revealed by contracting authorities to other participants without prior agreement, to prevent bidders from being deterred from participating for fear that the entity might reveal confidential information and, in particular, details of its proposed solution that might be used by other tenderers.

Confidentiality rules are stricter in procedures concerning the defence sector, especially where classified and strategic information is at stake. Indeed, in such situations, contracting authorities should impose special requirements on bidders and on the jury to guarantee the confidentiality of certain information conveyed throughout the procedure.

In addition, when considered contrary to public interest or even contrary to the legitimate commercial interests of the tenderers, it may be thought preferable not to publicise certain information on the contract notice or the contract notice itself, provided such a decision is duly grounded.

IX CHALLENGING AWARDS

i Procedures

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through review procedures that are regulated by the contracting authorities or through judicial review proceedings under the jurisdiction of administrative courts.

The review procedure concerning pre-contractual procedures is characterised by its pressing urgency, aimed at avoiding excessive delays in the procurement procedure, and it must be brought within five days. Further, whenever the review concerns the award, the qualification decision or the rejection of a complaint regarding any of these decisions, the contracting authority is obliged to invite other bidders to submit their views. Judicial review can be initiated before the contract is formally concluded, and also after its conclusion, and judicial proceedings regarding pre-contractual litigation must be filed within one month after the relevant decision has been issued and notified to the bidder. After the conclusion of the contract, any unsuccessful bidder can also seek remedies within six months of the conclusion of the contract or of its notice.

As a general rule, judicial proceedings on pre-contractual litigation regarding proceedings for the award of public works contracts and concessions, public service concessions, acquisition or rental of movable property and public service contracts follow a special proceeding laid down in Article 100 et seq. of the Procedural Code of Administrative Courts. Because of the importance of obtaining a swift ruling, this kind of proceeding usually takes no less than six months to obtain the first-instance decision. Accordingly, with the recent revision of the Procedural Code of Administrative Courts, the judicial proceedings on pre-contractual litigation are now applicable to the public service concessions.

Further, the judicial proceedings on pre-contractual litigation filed to challenge the award decision of the contracting authority now have an automatic suspensive effect on the
decision or on the contract’s execution, although the court may decide to lift the suspensive effect of said decision for public interest reasons and after a balanced consideration of all interests involved.

Concerning judicial proceedings that are not filed for challenging an award decision, Portuguese law provides for administrative courts to grant interim measures.

ii Grounds for challenge
Decisions of contracting authorities as well as procedure documents can be challenged on grounds of illegality or of breach of the applicable procurement rules, namely the PCC.

Challenges can address substantive or procedural matters. Further, procedure documents can be challenged for, inter alia, violation of the principles of non-discrimination, transparency and competition, as well as for failure to fully comply with PCC rules.

Challenges concerning procurement procedures are frequently brought before the contracting authorities and courts by unsuccessful bidders. Chances of success will mainly depend on the grounds invoked by the challenge.

iii Remedies
Courts can award damages and even terminate a contract in some circumstances as long as the contract has not been fully performed. However, in such case, it is still possible to award damages (e.g., costs for filing the protest and the bid’s preparation costs).

Finally, courts can impose fines for breaches of the procurement procedure’s rules.

X OUTLOOK
EU procurement law already strongly influences Portuguese procurement law. The new Public Procurement Directives were published in the OJEU on 28 March 2014 and entered into force on 17 April 2014, and Portugal has now fully implemented the provisions of the 2014 Directives, with the 11th amendment to the PCC. As recent amendments to the PCC entered into force on 1 January 2018, it is foreseeable that new challenges may arise in the Portuguese legal system in the coming year.
INTRODUCTION

Broadly speaking, Russian government procurement (also referred to as public procurement) legislation provides for two different regulatory regimes depending on the contracting body: either public authorities or public entities. This chapter is focused on government procurement related to public authorities unless otherwise stipulated. The key law regulating procurement involving public authorities and some related entities (contracting authorities) is Federal Law No. 44-FZ ‘On the Contract System in State and Municipal Procurement of Goods, Works and Services’, dated 5 April 2013 (Law No. 44-FZ). There are also numerous subordinate legal acts adopted in accordance with federal procurement legislation.

With regard to state defence procurement, in addition to general rules established by Law No. 44-FZ, some peculiarities are set out in a separate law, Federal Law No. 275-FZ ‘On State Defence Procurement’, dated 29 December 2012. Generally, the procurement regime under Law No. 44-FZ applies to utilities procurement; however, there are also basic laws regulating certain utilities (water and heat supply systems, etc.) that should be considered.

The EU procurement directives and the World Trade Organization (WTO) Agreement on Government Procurement (GPA) do not apply in Russia. However, on 29 May 2013 the WTO Committee on Government Procurement granted Russia observer status, which may represent a first step towards Russia’s possible accession to the GPA as a full party in the near future.

The government and the Ministry of Economic Development are the key bodies responsible for setting government purchasing or procurement policy and guidelines. The control function in the area of compliance with procurement legislation is mainly exercised by the Federal Antimonopoly Service of Russia (FAS), which investigates different violations in this area, challenges procurement proceedings, brings suits, etc. Similar control powers are vested in the Federal Service for Defence Contracts with regard to government defence procurements. In practice, the FAS also actively participates in developing government procurement legislation.

On 5 April 2013, Federal Law No. 44-FZ ‘On the Contract System of Procurement of Goods, Works and Services for State and Municipal Needs’ was adopted, with the majority of the provisions becoming effective as of 1 January 2014. This Law replaced and modernised

Among other new provisions, the Law introduced:

- a system of planned procurement based on annual and three-year procurement plans;
- additional methods of selecting a supplier, including rules relating to requests for proposals, tenders with limited participation and two-stage tenders;
- monitoring, auditing and public oversight of procurement; and
- anti-dumping measures intended to ensure that procurement participants comply with their price undertakings and select suppliers on the basis of important criteria other than price.

This Law led to the adoption of many new subordinate legal acts, and has been updated numerous times since its enactment to keep up with economic policy developments and new practical challenges.

Law No. 44-FZ regulates relations aimed at meeting state and municipal needs for the purpose of enhancing the productivity and efficiency of the procurement of goods, works and services, promoting transparency and preventing corruption and other abuses in this area. Thus, the contract system under Law No. 44-FZ is based on the following principles:

- uniformity of the contract system;
- transparency;
- competition;
- professionalism of contracting authorities;
- promotion of innovation;
- responsibility for productivity in meeting state and municipal needs; and
- efficiency of procurement.

However, while certain principles are developed further in the provisions of the relevant procurement laws, some are more general in nature. Consequently, whether the action of a contracting authority will be in accordance with the legal principles may depend on how those are interpreted by the Russian courts and other competent bodies.

With regard to procurement involving public entities (as opposed to public authorities), the main law in this area is Federal Law No. 223-FZ ‘On the Purchase of Goods, Works and Services by Certain Types of Legal Entities’, dated 18 July 2011 (Law No. 223-FZ), which provides for a more liberalised procurement mechanism in comparison with Law No. 44-FZ. The following entities fall within the scope of this law:

- state corporations, state-owned companies and public companies;
- natural monopolies;
- companies engaged in regulated activities in the fields of electric power, gas, heat, water, etc.;
- autonomous institutions;
- legal entities where the Russian Federation holds a stake exceeding 50 per cent;
- subsidiaries where the entities listed above hold a stake exceeding 50 per cent;
- subsidiaries where the above-mentioned subsidiaries hold a stake exceeding 50 per cent;
- budget financed institutions in certain cases; and
- state and municipal unitary enterprises in certain cases (e.g., when their procurements are made based on the grants provided by Russian and foreign individuals and legal entities).
Law No. 223-FZ leaves determination of the appropriate procurement procedure to the discretion of the contracting entity (and in this respect is more flexible than Law No. 44-FZ). Thus, contracting entities should adopt their own procurement policies, including the procedure for preparing for and carrying out procurement, as well as conditions for its application, procedure for conclusion and execution of contracts, and other related provisions. Until a contracting entity approves its own procurement policy, it must follow the procedures established by Law No. 44-FZ.

From 31 December 2017, certain executive authorities or entities may adopt model procurement policies and determine the entities that must follow such model policies, while elaborating their own. See Section II ‘Year in Review’.

II YEAR IN REVIEW

There were a number of legislative changes in 2017 related to procurement involving public authorities. In particular, the list of sole-supplier procurement cases under Law No. 44-FZ was expanded. For some planned amendments to Law No. 44-FZ please see Section V. ii. Regarding procurement involving public entities, as of 31 December 2017, executive authorities performing the function of the founder of a budget-financed or autonomous institution, and executive authorities or entities exercising the powers of the owner of the property of a unitary enterprise, at either the federal, regional or municipal level, may adopt model procurement policies and determine the entities that must follow the model policies established by Law No. 44-FZ, while elaborating their own.

Model policies must establish a date by which all the relevant policies will need to be brought in line with the model policy, and contain provisions regarding the procurement procedure, method and conditions of its application, and the term for entering into the agreement as a result of the competitive procurement, which may not be changed in policies elaborated pursuant to the model one. In addition, subsidiaries listed under the above-mentioned items (f) and (g) regarding the types of public entities defined under Law No. 223-FZ (see Section I) may join the procurement policy established by their parent company.

Following a legislative change that introduced the concept of public companies, such companies were included in the scope of Law No. 223-FZ. Public companies are defined as unitary non-commercial organisations established by Russia, having powers and authority of public character and acting in the interest of the state and society.

State and municipal unitary enterprises, except for a limited number of cases, have been removed from the scope of Law No. 223-FZ. Starting from 1 January 2017, such enterprises must conduct procurement in accordance with the more stringent provisions of Law No. 44-FZ. Unitary enterprises may nonetheless engage in procurement under Law No. 223-FZ in a limited number of instances, provided that they have adopted their procurement policy and published it in the unified information system within the requisite deadline.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

A wide range of bodies are deemed contracting authorities pursuant to Law No. 44-FZ, including the following:

a state (federal or regional) and municipal authorities;
According to Law No. 44-FZ, any legal entity, regardless of its form of incorporation, ownership type, place of business or place of origin of its capital, and any individual, including those registered as a self-employed entrepreneur, may be a procurement participant. Since August 2015, an exception to this rule exists that prohibits offshore companies from participating in procurement. The list of offshore territories is established by the Ministry of Finance. For more information regarding procurement participants, see Section VI.iii.

ii Regulated contracts

Government procurement rules regulate contracts for the supply of goods, carrying out of works and provision of services (including the acquisition of immovable property or lease of property).

There are specific rules with regard to utilities and defence procurement contracts, as well as to contracts in relation to provision of goods to be used in emergency situations. Specific rules also apply to:

- goods supplied for federal needs in accordance with federal and interstate target programmes;
- energy service agreements;
- communication services for the needs of public authorities, national defence, national security and law enforcement;
- development of drugs and psychotropic substances;
- agricultural products supplied for state needs;
- gas supplied for federal (or municipal) needs;
- scientific research and experimental development;
- educational services;
- production and distribution of national films;
- regular automobile and city electric transport transportation;
- design and exploration works or construction and reconstruction of capital construction projects;
- procurement of goods the manufacturing process of which has been established, modernised or developed in Russia; and
- some other procurements.

Concession agreements, privatisation and the provision of services by international financial institutions are not within the scope of the government procurement law. Concession agreements are regulated by Federal Law No. 115-FZ ‘On Concession Agreements’ dated 21 July 2005.
One innovation of Law No. 44-FZ is a type of service contract called a ‘life-cycle contract’, which allows for the establishment by the government of a contract providing for the procurement of goods or works, covering different stages of the life cycle of the object (design, construction, subsequent maintenance, operation, etc.). Under the previous regulation it was impossible to enter into one contract covering different types of works, and it was necessary to conduct a separate tender for each different type of works.

The provisions of Law No. 44-FZ do not provide for a competitive dialogue procedure, and in this respect the procurement rules are quite strict. Thus, the current legislation generally does not provide for the possibility of amending a draft public contract that is an integral part of procurement documentation at the stage of submission of bids. Bidders may only submit requests for clarification of documentation requirements. However, in certain cases stipulated by Law No. 44-FZ, the parties may agree to amend certain provisions of the public contract at the execution stage.

The amendment of material conditions in contracts following their execution is prohibited, except for the following amendments, which do not require a new procurement procedure: a change of contracting authority; a change of supplier in cases of legal succession; or a change of the contract price by mutual agreement as provided by Law No. 44-FZ in certain cases. An existing contract may only be transferred to another supplier without a new procurement procedure in the case of legal succession.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Given that Law No. 44-FZ presumes the mandatory conclusion of public contracts without any amendments to contractual rights and obligations, framework agreements are not used in Russian procurements.

Contracting authorities are entitled to hold joint tenders or auctions in cases where they make purchases of the same goods, works and services. The authorities’ rights, duties and liabilities when holding joint tenders or auctions are to be defined by an agreement between the relevant parties. A contract with the winner of a joint tender or auction is required to be concluded by each contracting authority. The government establishes the procedure for holding joint tenders and auctions.

According to the procurement legislation, for the purpose of centralised purchasing, the function of determining suppliers may be transferred to existing or specially created bodies (namely, state and municipal bodies or treasury enterprises). Under centralised purchasing, delegation of the functions of justifying purchases and determining the terms of a contract is not permitted, in particular for the fixing of the initial (maximum) price of a contract and the signing of the contract. Contracts must be signed by the contracting authority that procures the goods, services or works.

ii Joint ventures

Depending on the nature of the project, a company established by state public bodies may act in accordance with special legislative acts regulating their activity or under Law No. 223-FZ.

Procurement procedures stipulated by Federal Law No. 44-FZ are not applicable to public–private partnerships (PPPs). At present, PPP projects may be implemented under Federal Law No. 224-FZ ‘On Public–Private Partnership, Municipal–Private Partnership in the Russian Federation and Amendments to Certain Regulatory Acts of the Russian
Federation’, dated 13 July 2015 (PPP Law); or Federal Law No. 115-FZ ‘On Concession Agreements’, dated 21 July 2005, which provides for a two-stage tender procedure for awarding concessions: pre-qualification and evaluation of bids. The PPP Law, which came into force on 1 January 2016, has introduced a unified legal regime for the implementation of long-term infrastructure projects based on PPP agreements at the federal level. Previously, PPP agreements were structured based on the general rules of the Civil Code and regional legislation. The adoption of the PPP Law is a positive legislative development that has resolved problems arising from the prior lack of clear and uniform regulation of PPP agreements. Currently, there are discussions and legislative plans to improve the provisions of the PPP Law for the purpose of increasing the number of projects implemented under it.

V THE BIDDING PROCESS

i Notice

Public procurements must be published within a unified information system that is located on a designated website. The content of the contract notice and terms for such notices will depend on the value of the contract, type of procurement procedure and other factors.

It is possible to place orders for goods, works or services without a procurement procedure or procurement publication in cases such as those set forth in Article 93 of Law No. 44-FZ (procurements from a sole supplier). Although in the area of procurements from a sole supplier there is generally no need for publication, there are some exceptions. For instance, there is a requirement to publish notices in relation to, inter alia:

a procurements of goods, works or services from the natural monopoly companies falling within the scope of Federal Law No. 147-FZ of 17 August 1995 ‘On Natural Monopolies’, as well as procurements of services of the central depository;
b services in the areas of water supply, heat supply and gas supply (except for services related to the sale of liquefied gas); and
c services in the area of storing and importing or exporting narcotic agents and psychotropic substances.

The contracting authorities are obliged to publish their procurement plans for a three-year period and scheduled plans for each financial year based on their procurement plans.

ii Procedures

Where procurement regulations apply, contracting authorities must use one of the procedures prescribed by the relevant procurement regime. Procurements can be done through competitive methods of determining suppliers or from a sole supplier. Such competitive methods include:

a tenders (namely, public tender, tender with limited participation, two-stage tender, closed tender, closed tender with limited participation and closed two-stage tender);
b auctions (namely, electronic auction and closed auction);
c requests for quotations; and
d requests for proposals.

The prevailing type of procurement procedure is an electronic auction. Procurement from a sole source means procurement from a particular supplier without a tender, which may be done in exceptional cases envisaged by Law No. 44-FZ. These exceptional cases (the list of which has been extended with new cases during 2015 and 2016) include, for instance, the conclusion of the following contracts:

1. the supply of Russian armaments and military equipment that have no Russian analogues and are made by the sole manufacturer, with the supplier of such armaments and military equipment;
2. rendering services in relation to water supply, water discharge, heat supply and gas supply (except for the services related to the sale of liquefied gas);
3. services in connecting to (cutting in) engineering networks at prices (tariffs) controlled in compliance with Russian legislation;
4. storing, importing or exporting narcotic agents and psychotropic substances;
5. the procurement of goods, works or services for an amount not exceeding 100,000 roubles, provided that the total annual volume of procurements, which the contracting authority may make pursuant to this provision, must not exceed 2 million roubles or 5 per cent of the aggregate annual volume of the authority's procurements and must not comprise more than 50 million roubles (it is noteworthy that the 100,000 roubles limitation does not apply to contracting authorities operating outside of Russia, such as diplomatic or trade missions, consular offices, etc.);
6. the delivery of items of cultural value (including museum collections, rare and valuable editions, manuscripts and archival documents) intended to replenish state museum funds, libraries, archive funds, film and photo funds, as well as similar funds; and
7. the procurement of goods of which the manufacturing process has been established, modernised or developed in Russia, in accordance with a special investment contract, which is a new type of contract introduced in 2015 for the purpose of promoting national industry. The investor under such a contract must be approved by the government provided that certain conditions are met (e.g., the investment should equal or exceed 3 billion roubles);
8. the procurement of legal services for protecting the interests of Russia in foreign and international courts and arbitral tribunals, and in the bodies of foreign states (introduced in 2017);
9. the procurement of works relating to the modernisation of federal state information systems that provide informational and legal support to the Russian parliament, and services that support such systems (introduced in 2017); and
10. some other exceptional cases provided by Law No. 44-FZ.

As of July 2018, amendments to Law No. 44-FZ will enter into force, allowing the contracting authorities to electronically conduct all competitive procedures specified in Section V.ii; and from 2019, these authorities will be obliged to conduct the competitive procedures electronically. Special amendments related to the electronic procedures will enter into force accordingly.

With effect from 1 July 2018, Law No. 223-FZ will also list competitive and non-competitive procurement methods, but as opposed to the provisions of Law No. 44-FZ, the list is not exhaustive. A procurement policy, established in accordance with Law No. 223-FZ, may set forth other competitive methods aside from tenders, auctions, requests
for quotations and requests for proposals, provided that such methods comply with the conditions established by Law No. 223-FZ. Non-competitive methods, in turn, include methods that do not comply with such conditions (e.g., procurements from a sole supplier).

iii  Amending bids

A bidder is entitled to modify or withdraw its application before the expiry of the period for filing applications, subject to the provisions of Law No. 44-FZ. In such cases, a tender participant or auction participant does not forfeit the right to the monetary assets provided to secure the application thereof. The modification of an application or a notice of its withdrawal is deemed valid before the expiry of the period for filing applications. In relation to requests for quotations, a bidder is entitled to change or withdraw its application for participation in the request only if the contracting authority has amended the notice making the request for quotations. Once the period for filing applications has expired, no changes to the bid may be made.

VI  ELIGIBILITY

i  Qualification to bid

There are two types of procurement procedures depending on whether they are one-stage or two-stage tenders. A separate pre-qualification stage is used in most tenders (tenders with limited participation, two-stage tenders, closed tenders with limited participation and closed two-stage tenders). The winner in the latter case is determined during the second stage of the tender from the bidders who passed the pre-qualification stage.

In any type of procurement procedure, the procurement commission must first verify whether a bidder meets mandatory unified requirements and any mandatory additional requirements established by the government.

Thus, a bidder may be excluded when the supplier is being determined, or the conclusion of a contract with the winning supplier may be cancelled at any time prior to concluding the contract if the contracting authority or procurement commission finds that the bidder does not satisfy mandatory unified and additional requirements, or has provided unreliable data in respect of satisfying the requirements.

Unified requirements include, in particular, the following:

\( a \)  satisfaction of the requirements established in compliance with the legislation of Russia for persons engaged in the supply of the goods, carrying out of the work and the provision of the services that are the object of the procurement;

\( b \)  a bidder shall not be in the process of liquidation, and there must be no decision of a court declaring a bidder bankrupt and initiating bankruptcy proceedings;

\( c \)  a bidder’s activities are not suspended in accordance with the Code of Administrative Offences of the Russian Federation as of the date of filing an application for participation in purchases;

\( d \)  a bidder shall have no arrears on taxes, fees, debts or other mandatory payments to budgets of the budget system of Russia;

\( e \)  a bidding individual or the general director, members of the board of directors or chief accountant of a bidding legal entity have not been subject to criminal liability for certain crimes related to economic activities;
f a bidder that is a legal entity has not been subject to administrative liability in accordance with the Code of Administrative Offences for illegal gratification of an official on behalf of a legal entity;
g a bidder possesses the necessary intellectual property rights in case, as a result of the procurement, the contracting authority shall acquire such rights;
b the absence of any conflict of interests, etc., between bidders and the contracting authority; and
i a bidder is not an offshore company.

The contracting authority may also establish a requirement for the exclusion of any bidder that is included in the register of unfair suppliers maintained by the FAS.

The government is entitled to establish additional mandatory requirements for participants in procurements of certain kinds of goods, works and services that are procured by way of tenders (except for public and closed tenders) or auctions, in particular for the availability of the following:
a financial resources for a contract’s execution;
b equipment and other material resources for a contract’s execution held under ownership or on other legal grounds;
c work experience connected with the subject of a contract and business reputation; and
d a required number of specialists and other employees with a definite qualification level for a contract’s execution.

The government is also entitled to establish additional mandatory requirements for participants in procurements of audit and related services and consulting services. Such additional requirements have been elaborated and are expected to be adopted.

In Russia, much attention is given to compliance with formal requirements. Thus, in practice, the bidder may be disqualified if the application does not comply with all formal requirements or if certain documents are missing even when the bidder substantially meets all requirements.

ii Conflicts of interest

Law No. 44-FZ prohibits participation in procurement commissions by persons that have a personal interest in the results of the procurement or that may be influenced by a bidder.

In particular, the following persons cannot act as members of a procurement commission:
a individuals who were involved as experts in respect of the procurement documentation;
b individuals personally interested in the results of the selection of suppliers;
c individuals who are influenced by the procurement participants (member or shareholder of a relevant organisation, member of governing bodies, creditor, etc.);
d individuals married to the head of a procurement participant; or
e individuals who are members of the procurement control authority.

In the event that any member of a procurement commission is found to fall within any of the categories set out above, that member must immediately be replaced by another person.

Commission members may only be replaced by the decision of the contracting authority that adopted the decision on the establishment of the commission.
Foreign suppliers

Generally, contracting authorities can accept bids from foreign suppliers provided that they comply with the qualification criteria. There is no requirement to set up a representative office or a subsidiary in the territory of Russia for the purpose of bidding. However, the participation of foreign suppliers may be restricted in a procurement if the procurement involves state secrecy. In addition, according to Law No. 44-FZ only Russian legal entities may participate in tenders for entering into a state contract envisaging mutual investment undertakings of a supplier or investor to establish, modernise or develop the manufacturing of goods in the territory of one of the Russia’s regions. This type of investment contract has been introduced with a view to support the national industry and manufacturing. Such a contract must provide for an investment amount of no less than 1 billion roubles and must be entered into for a period of no longer than 10 years. With regard to national interest issues, see Section VII.ii.

VII AWARD

Evaluating tenders

The procurement documentation (in the case of tenders and auctions) along with the information specified in a notice of holding a procurement must also contain the criteria for the evaluation of bids, the weighting of these criteria and the procedure for consideration and assessment of bids in compliance with Law No. 44-FZ.

The process of the assessment of bids in relation to all procurements, except for auctions, requests for quotations, sole-supplier procurements and certain requests for proposals, is based on value and non-value assessment criteria. Value criteria include price, costs for operation and repair or life-cycle value (if applicable), and non-value criteria include qualitative, functional and environmental characteristics of the procurement object and qualification of the bidders. The latter refers to, in particular, the existence of financial resources, equipment and other material resources held by them under ownership or on some other legal grounds; work experience connected with the subject of a contract and business reputation; and specialists and other employees holding a specific level of qualification. To determine the winner the use of at least two criteria is required, provided that price is one of these.

The legislation specifies the weightings for the assessment criteria. The sum of the respective weightings for the assessment criteria must total 100 per cent. Thus, the proportion of minimum value to maximum non-value criteria is generally 70:30 in relation to procurement of goods, and 60:40 in relation to procurement of works and services. However, there are certain exceptions. Thus, the proportion of 40:60 is established, for instance, for such goods, works and services as the performance of emergency rescue works, restoration of cultural heritage objects, and provision of medical, educational and legal services. In the case of creating and developing state (municipal) information systems and official websites, a 30:70 proportion applies, and in the case of scientific research works, 20:80.

National interest and public policy considerations

Under the procurement regulations, national interest can only be taken into consideration to a limited extent. Equal treatment and non-discrimination of suppliers is presumed. However, Russian suppliers may be granted certain advantages over foreign suppliers in certain cases in accordance with Article 14 of Federal Law No. 44-FZ.
Law No. 44-FZ establishes the following regimes for the admission of foreign goods, works and services to procurements:

a. national regime: applies when and where the international agreements of Russia so provide; within the framework of the WTO, the application of the national regime will depend on the accession of Russia to the GPA and the conditions of that accession;

b. prohibition or limitation of admission: established by the government to guarantee national defence and state security to protect the fundamentals of the constitutional system, internal market and the development of the Russian economy and to support Russian manufacturers. It is worth noting that some of the prohibitions or limitations currently in force do not apply to suppliers coming from Eurasian Economic Union Member States; and

c. admission conditions: established by the Ministry of Economic Development upon the government’s instruction.

In addition, it should be mentioned that, from 1 January 2016, legal entities under the jurisdiction of Turkey as well as legal entities controlled by Turkish citizens or by legal entities under the jurisdiction of Turkey are not entitled to be procurement participants under Law No. 44-FZ.

Environmental considerations have become more important in recent years, although there is still generally little knowledge of how such considerations can best be taken into account in public procurements. There is as yet no wide practicing of ‘green’ procurement in Russia. However, Law No. 44-FZ introduced new criteria for bid evaluation (ecological characteristics of the procurement object), which is a first step towards establishing a system of green public procurement.

VIII INFORMATION FLOW

In Russia, access to information about the contractual system in the area of procurement is required to be unimpeded and free of charge. The openness and transparency of this information is to be ensured, in particular, by way of its placement in the unified information system. The information required by Law No. 44-FZ to be placed in the unified information system must be full and reliable. Data constituting a state secret are not published in the unified information system. From 31 December 2017, entities falling within the scope of Law No. 223-FZ may introduce corporate information systems connected with the unified information system. These systems will exchange information and, in case of any discrepancies, the information in the unified information system will prevail.

Based on the principles of transparency and ensuring competitive procedures, the contracting authority must provide all procurement participants with the same information and inform them about the proceedings of a public procurement. The procurement participants are entitled to receive clarifications regarding the provisions of procurement documentation.

It is a legal obligation of the tender commission to inform any unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of the bid and the earliest date of the conclusion of the contract. However, there is no requirement to be specifically notified – the publication of the minutes of the tender commission regarding the procurement procedures is sufficient. Once the winner has been determined, the commission should publish the minutes of the bid evaluation no later than the day following the expiry of the period for consideration of applications by the commission.
Bidders are not granted access to the comprehensive procurement file (encompassing all procurement documents, submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation and the award process). However, they are granted access to the procurement documentation and minutes of decisions taken by the procurement commission, and can check the registers of concluded contracts.

Further, contracting authorities must ‘stand still’ for a certain period; for example, in the case of electronic auctions or tenders, a contract may not be concluded until 10 days after the date of the publication in the unified information system of a protocol with the results of an electronic auction. This period allows unsuccessful bidders time to bring claims to prevent the contract award if they consider the award decision to be unlawful.

There are confidentiality obligations in relation to personal data and other types of data (e.g., commercial secrecy) in cases stipulated by federal law. The data constituting a state secret must not be published in the unified information system. Specific obligations to ensure confidentiality of information apply in the field of defence and security.

IX CHALLENGING AWARDS

i Procedures

There are two key procedures for reviewing complaints:

a administrative review through the authorised state body dealing with such claims, the Federal Antimonopoly Service. In relation to the procurement procedure for state defence orders or other federal needs that deal with state secrets, the Federal Service on Defence Orders is the body for reviewing complaints; and

b court review through state arbitrazh courts.

Complaints regarding the actions (or inaction) of the contracting authority and procurement commissions can be filed no later than 10 days from the date of posting the minutes with the results of assessments of bids by the contracting authority on the official website.

Administrative review takes up to five business days. A copy of a decision taken as a result of an administrative review is published and sent to the interested parties within three business days after the decision is taken.

The deadline for court review of administrative decisions taken under administrative review is three months from the date of the decision.

Court appeals may be filed within three years from the date the applicant finds out or should have found out that his or her rights were violated (including for claims for the application of consequences of contract invalidity).

Court reviews must be performed within a ‘reasonable time’, which is determined based on the specific nature of each case. In practice, a first-level judicial review usually takes up to three months.

ii Grounds for challenge

Any procurement participant that believes a violation of the public procurement procedure has taken place may file an application for administrative review (complaint) or submit a claim to court. The application or claim should include certain information and needs
to be accompanied by documents evidencing the grounds for the claim. Authorised state bodies may also submit applications and claims in the event of violations of the procurement legislation on a general basis.

### Remedies

An application for review does not lead to an automatic suspension of the procurement procedure or the conclusion of the contract; however, the antimonopoly authorities are entitled to suspend the procurement process until the application for review is examined. In the event of court proceedings, the claimant can apply to a court for the adoption of injunctive measures, which include the suspension of the conclusion of the contract.

Upon review of the complaint, the FAS can either issue a binding order to the affected contracting entity (including obliging it to rectify the relevant violations) or cancel the results of the procurement procedure.

A concluded contract may be cancelled by a court decision if the court rules that the procurement procedure that led to the conclusion of the contract violated procurement law.

The current legislation provides for various penalties for the breach of the procurement legislation by contracting authorities (or their officers) depending on the procurement law breached and the character of the administrative offence. Procurement participants may bear criminal liability, liability in accordance with antimonopoly laws or liability for the non-performance of the relevant contracts provided that material harm has been inflicted on the interests of the state and society.

### Outlook

Law No. 44-FZ came into force on 1 January 2014 and represents a progressive step in improving regulation of government procurement. This Law also requires the adoption of a significant amount of new subordinate legislation and government regulations to put a new contractual system into successful operation. A number of new legal acts have been issued, and the work on adopting the appropriate regulations in Russia is ongoing. There are also certain initiatives to amend procurement legislation in light of the current economic situation in Russia.
I  INTRODUCTION

The law of government procurement in South Africa is informed primarily by Section 217 of the Constitution, which requires organs of state in the national, provincial and local spheres of government, and any other institution identified in national legislation, to contract for goods or services ‘in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’. The entire legislative framework regulating government procurement in South Africa is based upon these five foundational principles, which are echoed in various further pieces of legislation, most notably the Public Finance Management Act (PFMA) and the Local Government: Municipal Finance Management Act (MFMA).

A further hallmark of government procurement law under South Africa’s constitutional dispensation lies in the constitutional imperative of public procurement being employed as a means of addressing discriminatory policies and practices under the public procurement system of the previous dispensation. The Constitution specifically indicates that the above-mentioned five foundational principles of public procurement do not prevent organs of state or other institutions from implementing procurement policies that provide for ‘categories of preference in the allocation of contracts’ and ‘the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination’. In fact, the Constitution makes provision for the enactment of national legislation to prescribe a framework within which the policy of preferential procurement must be implemented.

The Preferential Procurement Policy Framework Act (PPPFA) prescribes the framework within which these preferential procurement policies may be implemented. In terms of the PPPFA, an organ of state must determine its preferential procurement policy and implement it within the framework established by that Act. This framework prescribes that preference points may be allocated for specific goals, such as contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Aside from limited exceptions (which are touched on below), all government procurement in South Africa takes place within this framework.

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1 Andrew Molver is a partner and Gavin Noeth is a senior consultant at Adams & Adams.
2 Section 217(1) of the Constitution of the Republic of South Africa of 1996.
3 Act 1 of 1999.
5 Section 217(2) of the Constitution of the Republic of South Africa of 1996.
6 Section 217(3) of the Constitution of the Republic of South Africa of 1996.
7 Act 5 of 2000.
A further key piece of legislation is the Broad-Based Black Economic Empowerment Act (B-BBEE Act), which empowers the Minister of Trade and Industry to issue codes of good practice on black economic empowerment that may include, *inter alia*, ‘qualification criteria for preferential purposes for procurement and other economic activities’. The B-BBEE Act requires every organ of state and public entity, as defined therein, to apply any relevant code of good practice issued in terms of the B-BBEE Act in developing and implementing a preferential procurement policy. It is these codes that determine the B-BBEE status of any procuring entity and, hence, that determine the preference points allocated to any bidder in terms of the preferential procurement framework.

Lastly, the Promotion of Administrative Justice Act (PAJA) provides for the judicial review of ‘administrative action’, which includes almost all government procurement decisions, and sets out both the codified grounds of review and established remedies. Those procurement decisions falling outside the ambit of the PAJA may be reviewed in terms of the constitutional principle of legality, which constitutes a component of the rule of law.

South Africa is not a member of the European Union, and the European Union directives therefore do not apply to government procurement within the South African context. South Africa is a founding member of the World Trade Organization, but is neither a party nor an observer to the Agreement on Government Procurement.

## II YEAR IN REVIEW

Recent policy developments have been aimed at placing greater reliance on public procurement as a tool for achieving expedited economic transformation and urgently addressing socio-economic imbalances deriving from South Africa’s pre-democratic past. In the past year, this was largely performed through the implementation of the recently issued Preferential Procurement Regulations of 2017, which introduced a number of significant changes. Most notably, the regulations give government the power to apply ‘pre-qualification criteria to advance certain designated groups’ in awarding state tenders. Regulation 4 permits an organ of state to advertise any invitation to tender on the condition that only a particular category of bidders may tender, categories including those having a ‘stipulated minimum B-BBEE status level’, exempted micro enterprises (EMEs) and qualifying small business enterprises (QSEs) and bidders agreeing to subcontract a minimum of 30 per cent to various categories of EMEs or QSEs. By permitting organs of state to apply a pre-qualification criterion that requires all tenderers to have a minimum B-BBEE status level, the regulations appear to circumvent the limitations imposed by the PPPFA as to what weighting is to be attached to a tenderer’s B-BBEE status in evaluating and awarding a tender.

Whereas, under the PPPFA, a maximum of 10 or 20 points out of 100 (depending on the value of the tender) can be allocated for B-BBEE status, the new regulations elevate the importance of B-BBEE status to the extent that it can entirely preclude certain bidders from tendering at all, irrespective of how functional and cost-effective such bidders might be. This contradicts the PPPFA’s clear intention to promote price as the most determinative factor in awarding government tenders, with the matter of ‘preference’ playing a substantially smaller role. A judicial challenge to have this regulation declared *ultra vires* and invalid remains imminent.

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10 Act 3 of 2000.
Other noteworthy changes introduced by the Preferential Procurement Regulations include the following:

a change in the threshold of the evaluation of a bid on the basis of price and preference, whereby tenders are assessed on the basis that, in contracts with a value of equal to or above 30,000 rand and up to 50 million rand (the previous threshold was up to 1 million rand), price shall count for 80 points and preference shall count for 20 points (out of a total of 100 points) and in contracts with a value of more than 50 million rand, price shall count for 90 points and preference shall count for 10 points (previously above 1 million rand); and

b organs of state are required to identify tenders, where it is feasible, in which the successful bidder must subcontract a minimum of 30 per cent of the contract value for contracts above 30 million rand to certain categories of qualifying entities.

The Department of Justice and Constitutional Development published a proposed Code of Good Administrative Conduct in terms of PAJA, which will apply to public procurement decisions. The Code is intended to provide guidance to administrators to ensure that the decisions they take are lawful, reasonable and procedurally fair. The Code does not impose additional legal obligations on administrators than those imposed by the Constitution and PAJA, but is there to assist administrators to comply with their legal duties and, in doing so, improve their services. The deadline for public comment on the Code was 17 February 2017 and publication of the final Code is now awaited.

The Department of Trade and Industry has initiated the Strategic Partnership Programme (SPP) to develop and support programmes or interventions aimed at enhancing the manufacturing and services supply capacity of suppliers with links to strategic partners’ supply chains, industries or sectors. The objective of the SPP is to encourage large private-sector enterprises in partnership with government to support, nurture and develop small to medium-sized enterprises (SMEs) within the partner’s supply chain or sector to be manufacturers of goods and suppliers of services in a sustainable manner and to support B-BBEE policy through encouraging businesses to strengthen the element of Enter and Supplier Development of the B-BEE Codes of Good Practice. The SPP will be available on a cost-sharing basis between government and the strategic partners for infrastructure and business development services necessary to mentor and grow enterprises. The grant will be capped at a maximum of 15 million rand per financial year over a three-year period based on the number of qualifying suppliers and is subject to the availability of finds.

In the matter of State Information Technology Agency SOC Limited v. Gijima Holdings (Pty) Limited, the Constitutional Court held that PAJA does not apply to organs of state seeking to review and set aside their own procurement decisions. The Court reached this conclusion by finding that Section 33 of the Constitution creates the right to just administrative action to be enjoyed by private persons only, and that the State is only the bearer of obligations (and not rights) under that section. The Court held that organs of state must therefore review their own decisions in terms of the principle of legality, being a component of the rule of law. Given this ruling, administrators are no longer bound by the

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12 [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at para 37.
13 Id at para 29.
14 Id at para 40–41.
180-day period when seeking to review their own decisions. The Court did not extend its findings to the scenario where an organ of state in a position akin to that of a private person (natural or juristic) seeks to review the decision of another organ of state, or the situation where an organ of state purports to act in the public interest in terms of Section 38 of the Constitution in seeking to review its own decision.\textsuperscript{15}

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Section 217(1) of the Constitution imposes the five foundational principles of public procurement on all organs of state in the national, provincial or local spheres of government, or any other institution identified in national legislation. Section 239 of the Constitution further defines an organ of state as any department of state or administration in the national, provincial or local spheres of government, or any other functionary or institution that exercises a power or performs a function in terms of the Constitution, a provincial constitution or any legislation.

Not all institutions that are subject to the procurement provisions of the Constitution are bound by the PFMA and the PPPFA. The PFMA only applies to those national and provincial public entities that are not only established in terms of legislation, but that are also fully or substantially funded by way of a levy imposed in terms of national legislation, and accountable to Parliament. Similarly, the PPPFA only applies to those institutions falling within the ambit of Section 239 of the Constitution that are also recognised by the Minister of Finance, through notice, to also be subject to the provisions of the PPPFA.

The PFMA regulates procurement by national and provincial public entities through Regulations 16 and 16A of the Treasury Regulations of 2005 (the Treasury Regulations) issued in terms of the PFMA. Regulation 16 of the Treasury Regulations, which deals with public–private partnerships (PPPs), applies to all national and provincial departments and the national and provincial public entities listed in Schedule 3 to the PFMA,\textsuperscript{16} while Regulation 16A, which deals with general supply chain management, only applies to the national public entities listed in Part A of Schedule 3 of the PFMA and provincial public entities listed in Part C of Schedule 3 of the PFMA (thereby excluding national government business enterprises from these regulations).\textsuperscript{17} Under Regulation 16A the accounting officer or accounting authority of an institution to which the regulations apply must develop and implement an effective and efficient supply chain management system for the procurement of goods and services as well as the disposal and letting of state assets, including the disposal of goods no longer required.\textsuperscript{18} Even though certain public entities are not bound by these regulations, they are still bound by Section 217 of the Constitution.

The MFMA regulates procurement by municipal entities through the Municipal Public Private Partnership Regulations of April 2005 and the Municipal Supply Chain Management Regulations of May 2005, both issued in terms of Section 168 of the MFMA.

\textsuperscript{15} Id at para 2.
\textsuperscript{16} Regulation 16.1 of the Treasury Regulations 2005.
\textsuperscript{17} Regulation 16A of the Treasury Regulations 2005.
\textsuperscript{18} Regulation 16A.3 of the Treasury Regulations 2005.
ii Regulated contracts

Generally, the five foundational principles of South African public procurement law would demand that the procuring authority advertises and holds a competitive bidding procedure. Where it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from a competitive bidding process are recorded and approved by the accounting officer or accounting authority.19 Within the local government context, an accounting officer may deviate from the supply chain management policy if there is an emergency,20 if the goods or services are produced or available from a single provider only,21 or if the acquisition is of special works of art or historical objects where specifications are difficult to compile,22 if the acquisition is of animals for zoos,23 and in any other case where it is impractical or impossible to follow the official procurement processes.24

The threshold value of contracts is also used to determine the appropriate type of procurement procedure. At the national or provincial government level, the following thresholds apply: for contracts up to 2,000 rand, contracting authorities may procure by means of petty cash (no quotation or competitive bidding); for contracts above 2,000 rand but not more than 10,000 rand, verbal or written quotations may be obtained; and for contracts above 10,000 rand but not more than 500,000 rand, written price quotations should be obtained. All contracts above 500,000 rand are subject to a competitive bidding process.25 At the municipal level, the same thresholds generally apply, except that written price quotations should be obtained for contracts above 10,000 rand and up to 200,000 rand, and above this value competitive bidding must be used.26

Because of the competitive process followed in public procurement, contracting parties may not conclude a contract that is materially different from that specified in the initial call for bids. Further, transferring an existing contract to another supplier or provider without a new procurement procedure is generally not allowed.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

In the national and provincial spheres of government accounting officers or accounting authorities of organs of state may opt to participate in transversal term contracts facilitated by the relevant treasury, in which event the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.27 The accounting officer or accounting authority may also, on behalf of the

20 Regulation 36(1)(a)(i) of the Municipal Supply Chain Management Regulations.
21 Regulation 36(1)(a)(ii) of the Municipal Supply Chain Management Regulations.
22 Regulation 36(1)(a)(iii) of the Municipal Supply Chain Management Regulations.
23 Regulation 36(1)(a)(iv) of the Municipal Supply Chain Management Regulations.
24 Regulation 36(1)(a)(v) of the Municipal Supply Chain Management Regulations.
26 Regulation 12(2)(a) of the Municipal Supply Chain Management Regulations.
department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of the organ of state and the relevant contractor.\(^{28}\)

A municipality may also procure goods or services under a contract secured by another organ of state. This is, however, subject to:

\(a\) the initial procurement having been done by tender process;

\(b\) there being no reason to believe this was not validly procured;

\(c\) there being demonstrable benefits or discounts as a consequence; and

\(d\) there being written approval from the other organ of state and the provider of the goods or services.\(^{29}\)

This practice has been subject to ‘misuse’ and the relevant Treasury Regulation is therefore being scrutinised as part of the above-mentioned broader review process targeting the entire legislative framework for supply chain management. Guidelines to assist accounting officers and accounting authorities with the roles, responsibilities and procedure for participation in transversal term contracts were issued in March 2017. Although these guidelines refer to Regulation 32, they do not shed light on the appropriate application of the regulation. They only provide guidance in instances where the regulation is utilised for transversal contracting through the National Treasury. To date, no changes have been made to the regulation. However, the High Court in *Blue Nightingale Trading 397 (Pty) Ltd T/A Siyenza Group v. Amathole District Municipality*\(^{30}\) provides the necessary guidance on the interpretation and application of Regulation 32(1) of the Municipal Supply Chain Management Regulations.

In appropriate circumstances, framework agreements are permitted provided that there is a public tender process through which the successful bidders with whom the framework agreement is concluded are selected. The award of a job-specific contract under a framework agreement does not, by law, require an additional competitive procedure. However, in practice, most contracting authorities require quotations from at least three of the suppliers with whom framework agreements have been concluded, while some contracting authorities use a rotation system.

The National Treasury published the Standardised PPP Provisions as National Treasury PPP Practice Note Number 01 of 2004, which must be used in conjunction with the National Treasury PPP Manual issued as a series of National Treasury PPP Practice Notes in 2004.

Although the Standardised PPP Provisions provide standard terms, project-specific annexures dealing with a range of specifications, penalties, payments and other project-specific issues must be developed and included for each PPP agreement case by case.

Standardised PPP provisions have not yet been developed for municipal PPPs. The Municipal Service Delivery and PPP Guidelines of 2007\(^{31}\) require that such provisions be developed in accordance with the national and provincial Standardised PPP Provisions.\(^{32}\)

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\(^{28}\) Regulation 16A.6.6 of the Treasury Regulations 2005.

\(^{29}\) Regulation 32(1) of the Municipal Supply Chain Management Regulations.

\(^{30}\) [2016] 1 All SA 721 (ELC); [2015] ZAECCELLC 16 (ELC); [2016] JOL 35098 (ELC).

\(^{31}\) Paragraph 7 of Module 5. These guidelines were jointly issued by the Minister of Finance and the Minister for Provincial and Local Government pursuant to Section 168(1)(d) of the MFMA.

\(^{32}\) The writer of this section acted for lenders on the first ever municipal PPP to reach financial close in South Africa.
ii Joint ventures

PPPs have been dealt with above. PPPs are joint ventures between organs of state and the private sector. A PPP can only exist where the private party: 33
a performs an institutional function on behalf of the institution;
b acquires the use of state property for its own commercial purposes;
c assumes substantial financial, technical and operational risks in connection with the performance of the institutional function or the use of state property; and
d receives a benefit for performing the institutional function or from utilising the state property.

PPPs at a national, provincial and municipal level are procured by way of open tender. 34 Municipalities may choose to provide municipal services by entering into a service delivery agreement with a municipal entity, another municipality or a national or provincial organ of state. 35 In such instances, where the arrangement resembles a public–public partnership, the municipality is not required to comply with the usual procurement rules. Other instances where the ordinary prescripts of procurement law may potentially not apply will be where a contracting authority is contracting with its wholly owned subsidiary (where that subsidiary is practically an extension of the contracting authority). Procurement from a joint venture in which a private party has a shareholding will generally require that a procurement process be followed, unless the appointment of the private joint venture partner (i.e., the acquisition of shares by the private party in the joint venture) occurred through a public procurement process, and the contract between the joint venture and the contracting authority was specifically envisaged therein.

V THE BIDDING PROCESS

i Notice

The processing of bids through the centrally managed eTender Publication portal became compulsory for national and provincial government entities with effect from 1 April 2016, and became compulsory for municipalities from 1 July 2016. 36 In addition, bids must be advertised in at least the Government Tender Bulletin. 37 Organs of state must disclose up front the criteria that will be applied in the selection and evaluation process, and bids may not be evaluated on undisclosed criteria.

33 Definition of public–private partnership in Regulation 16.1 of the Treasury Regulations of 2005 and definition of public–private partnership in Regulation 1 of the MFMA PPP Regulations.
34 Regulation 16.5 of the PFMA PPP Regulations read as a whole, read with PPP Manual Module 5: PPP Procurement; Regulation 4 of the MFMA PPP Regulations read as a whole, read with Municipal Service Delivery and PPP Guidelines Module 5: PPP Procurement.
35 Section 80(1) of the Municipal Systems Act 32 of 2000.
37 National Treasury Instruction Note 1 of 2015/2016. However, in MEC for Public Works and Infrastructure, Free State Provincial Government v. Mofomo Construction CC (A138/2016) [2016] ZAFSHC 196 (24 November 2016), the court held that constructions tenders (which is subject to other specialised legislation requiring construction tenders to be advertised on the website of the Construction Industry Development Board) are not required to be published on the Government Tender Bulletin, as would be the case for non-construction tenders.
South Africa employs a single central supplier database (CSD) for the registration of all prospective suppliers intending to bid for government contracts. Accounting officers and authorities may not award any bid for a tender or a price quotation to a bidder or bidders not registered on the CSD. This excludes transactions concluded through petty cash, sundry payments and transactions with foreign suppliers with no locally registered entity. Organs of state must indicate in their requests for bids or proposals that prospective suppliers must be registered on the CSD prior to submitting bids.

ii Procedures
The type of procurement procedure to be used in each case is determined by the amount involved (see above regarding regulated contracts). All procurement, either by way of quotations or through a bidding process, must be within the threshold values determined by the National Treasury. The accounting officer or accounting authority must ensure that bid documentation and the general conditions of contract comply with the instructions of the National Treasury, and they must include evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA.

Generally speaking, the process followed in competitive bids is by way of a committee system involving at least a bid specification committee, a bid evaluation committee and a bid adjudication committee. The bid specification committee must compile the specifications for each procurement. The bid evaluation committee must evaluate bids in accordance with the specifications of each procurement and the points system as set out in the supply chain management policy of the procuring entity and as prescribed in terms of the PPPFA. Last, the bid adjudication committee must consider the report and recommendations of the bid evaluation committee, and either (depending on its delegations) make a final award or a recommendation to the accounting officer to make a final award, or make another recommendation to the accounting officer on how to proceed with the relevant procurement.

iii Amending bids
As a general rule, changes to the bid specifications after a call for bids has been advertised are not allowed as that would potentially defeat the requirements of fairness and transparency. Bidders also cannot validate defective bids by submitting mandatory documentation after the close of the tender.

VI ELIGIBILITY
i Qualification to bid
A bidder may not be awarded a tender if:

a the bidder or its directors are listed as a company or persons prohibited from doing business with the public sector;

38 Regulation, and Regulation 26(1)(a) of the Municipal Supply Chain Management Regulations.
39 Regulation 28(1)(a)(ii) of the Municipal Supply Chain Management Regulations.
40 Regulation 29(1)(b)(ii) of the Municipal Supply Chain Management Regulations.
the bidder fails to provide written proof from the South African Revenue Service that it has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations;

c the bidder has committed a corrupt or fraudulent act in competing for the particular contract;

d the bidder has abused the institution’s supply chain management system; or

e the bidder failed to perform on any previous contract.42

Before a bid is assessed on its merits, it will be checked whether it is ‘responsive’ in the sense that it includes all requisite information and documentation. Non-responsive bids are usually, in terms of the relevant bid documentation, disqualified and not considered any further. However, recently courts have applied the more flexible ‘purposive’ approach fashioned by the Constitutional Court by asking whether the purpose of the requirement with which there was non-compliance was nonetheless substantively achieved.43

ii Conflicts of interest

Employees in the public sector may not perform remunerative work outside their employment except with the written permission of the executive authority of the relevant department.44 The members of contracting authorities are also prohibited from holding private interests in contracts with that contracting authority.45 The PFMA requires supply chain management officials and other role players to ‘recognise and disclose any conflict of interest that may arise’.46 Municipalities are prohibited from making any award to a person who is in the service of the state or, if that person is not a natural person, of which any director, manager, principal shareholder or stakeholder is a person in the service of the state; or who is an adviser or consultant contracted with the municipality or municipal entity.47 In all tender processes, a bidder is required to complete and submit a declaration of interest form in which it is required to declare any relationship it may have with any employee of the state. Failure to submit this form generally results in disqualification.

The Public Administration Management Act48 (PAMA) promulgated in 2014 will, upon its commencement (the date of which is still to be announced), prohibit all state employees at all levels of government from doing business with the state. The PAMA will supersede and homogenise the legislation and regulations currently in place in respect of conflicts of interest.

The Prevention and Combating of Corrupt Activities Act states that any person who, directly or indirectly, accepts, agrees to or offers to accept any gratification from any other

44 Section 30(1) of the Public Service Act 103 of 1994.
45 Section 17(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
46 Regulation 16A8.3 of the Treasury Regulations of 2005.
47 Regulation 44(a) to (c) of the Municipal Supply Chain Management Regulations.
48 Act 11 of 2014 (commencement date still to be announced).
person, whether for the benefit of him or herself or for the benefit of another person, as an inducement to award a tender, is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.49

The National Treasury issued an Instruction Note to provide guidance on measures to prevent and combat abuse in the supply chain management system, which took effect from 1 May 2016. The Instruction Note is issued in terms of Section 76(4)(c) of the PFMA, applies to all institutions and public entities, and rules that the accounting officer or accounting authority must establish a system that deals with the management of complaints or allegations of abuse in the supply chain management system. To this end, the system must provide for the establishment of a register of all such allegations of abuse. The accounting officer or authority must investigate the complaints, and the investigation must be initiated within 14 calendar days of receipt of the complaint and completed within 30 calendar days from the date of initiation (unless an extension is approved by the relevant treasury). The accounting officer or authority must also implement remedial action for the complaints.

In addition to the above-mentioned preventative measures, legislation also provides corrective measures that permit decisions to be reviewed and set aside where the outcome was unduly influenced.50

iii Foreign suppliers
There is nothing prohibiting foreign suppliers from bidding. However, in order to qualify for B-BBEE status and earn the associated preference points allocated under the PPPFA they will need to form a bidding consortium or joint venture with appropriate B-BBEE entities. In order to be compliant and competitive, foreign bidders must meet minimum local content requirements where these apply. Foreign suppliers without South African tax obligations or any history of doing business in South Africa must complete a pre-award questionnaire on the revised version of the relevant standard bidding document for their tax obligation categorisation.51 Where a recommendation is made to award a bid to a bidder that responded as not being liable for taxation in South Africa, the accounting officers and authorities must refer such bidder to the South African Revenue Service and provide the prescribed information on the bidder.

VII AW ARD

i Evaluating bids
All bid documentation must include the evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA. Further, an invitation to tender must indicate whether that tender will be evaluated on functionality and, in such scenario, must also indicate the evaluation criteria for measuring functionality, the weight of each criterion, the applicable values and the minimum qualifying score for functionality.52 Functionality, price and preference (i.e., in respect of B-BBEE status) should be weighted and assessed in the manner prescribed by the PPPFA and the 2017 Preferential Procurement Regulations.53

49 Section 13(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
50 Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000.
51 National Treasury Instruction No. 7 of 2017/2018 – Tax Compliance Status.
52 Regulations 4(2) and 5 of the Preferential Procurement Regulations of 2017.
In terms of the 2017 Preferential Procurement Regulations, for a tender to be regarded as acceptable and to be considered further it must meet any pre-qualification criteria and the minimum qualifying score for functionality as indicated in the tender invitation. Only tenders that meet the pre-qualification criteria (if any) and the minimum functionality threshold shall progress to evaluation in terms of price and preference. At that stage, the tenders shall be assessed on the basis that, in contracts with a value equal to or above 30,000 rand and up to 50 million rand or less, price shall count for 80 points and preference shall count for 20 points; and in contracts with a value of more than 50 million rand, price shall count for 90 points and preference shall count for 10 points. Bid points are applied on the basis that the bidder with the lowest price will achieve 80 or 90 points for price, depending on the contract value, with the price scores of the remaining bidders being determined relative to that of the lowest-priced bid by employing the formula prescribed by the 2017 Preferential Procurement Regulations. The preference points, which are added to the points allocated in respect of price, are determined by having regard to each bidder’s status in terms of the codes issued under the B-BBEE Act.

Unless objective criteria justify otherwise, the tender must be awarded to the bidder scoring the highest number of points. If two or more tenderers score an equal number of points the contract must be awarded to the tenderer with the highest B-BBEE score.

It follows that the functionality of any given bid serves only as a gatekeeping measure, while the award of the bid to the ultimately successful bidder will be determined on the basis of how that bidder, once having passed the functionality threshold, scored in terms of price and preference. A division of the High Court has found that the functionality of a particular bid, especially where this is significantly superior to that of the lowest-priced bid without being considerably more expensive, may constitute an objective criterion justifying the award of the tender to somebody other than the highest scoring bidder. This approach is, however, yet to be endorsed by South Africa’s highest courts.

Once a tender award has been made it must be published on the eTender Publication portal. In addition to publication on the eTender Publication portal, accounting authorities or accounting officers for departments, constitutional institutions, public entities listed, or required to be listed, in Schedules 3A, 3B, 3C and 3D to the PFMA, or any subsidiary of any such public entities, are also required to publish all tender awards in the Government Tender Bulletin and other media by means of which the tender was advertised.

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54 Regulation 4(4) of the Preferential Procurement Regulations of 2017.
55 Regulations 6 and 7 of the Preferential Procurement Regulations of 2017.
56 Section 2(1)(b) of the Preferential Procurement Policy Framework Act 5 of 2000 and Regulations 6 and 7 of the Preferential Procurement Regulations of 2017.
57 Section 2(f) of the Preferential Procurement Policy Framework Act 5 of 2000. Regulation 11 of the Preferential Procurement Regulations of 2017 provides for any such objective criteria to be stipulated in the tender.
58 Regulation 10(1) of the Preferential Procurement Regulations of 2017.
60 National Treasury Instruction Note 1 of 2015/2016.
61 Regulation 16A.3(b) of the Treasury Regulations of 2005 and National Treasury Instruction Note 1 of 2015/2016.
National interest and public policy considerations

As indicated above, preferential procurement policies have been used to promote substantive
equality through the application of preferential treatment to designated groups when
awarding government contracts. As is apparent from the 2017 Preferential Procurement
Regulations, government is placing far more emphasis on the need to expedite demonstrable
economic transformation in South Africa through preferential procurement; however, there
are concerns regarding the lawfulness of the manner in which government is seeking to
achieve these objectives.

Notably, the 2017 Regulations impose a subcontracting requirement on all tenders
above 30 million rand in value, subject only to the condition that subcontracting must be
‘feasible’ in the circumstances. Therefore, whenever it is feasible to do so, the procuring organ
of state must state in the tender invitation that at least 30 per cent of the contract will be
subcontracted to a list of qualifying categories of entities, which essentially includes the same
entities as those that stand to benefit from the application of a pre-qualification regulation.
Such subcontracting is mandatory for both the organ of state and successful tenderer, subject
only to subcontracting feasibility. Winning tenderers will therefore be required to effectively
part with 30 per cent of the relevant contracts and associated profits.

In addition to this, the Department of Trade and Industry may designate particular
sectors in line with national development and industrial policies for local production,
where only locally produced services, works or goods or locally manufactured goods with a
stipulated minimum threshold for local production and content will be considered in respect
of government tenders.62 Where there is no designated sector, a specific tendering condition
may be included to the effect that only locally produced services, works or goods or locally
manufactured goods with a stipulated minimum threshold for local production and content
will be considered, on condition that the prescript and threshold are in accordance with
specific directives issued for this purpose by the National Treasury in consultation with the
Department of Trade and Industry.63

There is no express prohibition that tender invitations may not specify that goods
and services must have national quality marks. That being said, where it is necessary for a
tender to specify a particular brand name or quality mark to clarify an otherwise incomplete
tender specification, the tender must specifically indicate that an ‘equivalent’ product will
be permitted.64 For the most part, South African law on government procurement does not
provide for different rules for different sectors. Although the PFMA and MFMA regulate
the financial management of national and provincial government and local government
respectively, the principles and requirements underscoring both pieces of legislation are
much the same. There are a few bodies and industries with their own specific procurement
requirements, but these are by far the exception.

62 Regulation 8(1) of the Preferential Procurement Regulations of 2017.
63 Regulation 8(3) of the Preferential Procurement Regulations of 2017.
64 Paragraph 3.4.2 of the National Treasury’s Supply Chain Management Guide for Accounting Offices/
Authorities of 2005. In the matter of Searle and Others v. Road Accident Fund and Others [2014] (4) SA
148 ASP it was held that the National Treasury’s Guide forms part of what the Constitutional Court in
AllPay described as the ‘constitutional and legislative procurement framework’, which contains supply chain
management prescripts that are legally binding. It was accordingly held that the Guide is legally binding,
and not merely an internal prescript that may be disregarded at a whim.
VIII INFORMATION FLOW

Authorities must provide clear notification of the intended procurement, including the applicable process, methodology and criteria. Naturally, all bidders are entitled to the same measure of information, failing which the fairness and equity of the bidding process would be compromised.

Bidders are entitled to be notified of the outcome of their bids, irrespective of whether these are successful or not. Further, bidders are also entitled to be provided with notification of the award of the tender, which must be provided within a sufficiently reasonable time to enable aggrieved bidders to challenge the procurement decision should they so desire.65 Entities subject to the PFMA must publish notice of an award on the eTender Publication portal within seven working days of making an award.66 Where a procurement decision constitutes administrative action as defined in the PAJA (which is usually the case), the decision maker is also enjoined to provide adequate notice of any right of review or internal appeal available to interested parties, together with adequate notice of the right of such parties to request reasons for the decision.67

The above position is entrenched by Section 32(1) of the Constitution, which grants everybody the right of access to any information held by the state. The Promotion of Access to Information Act68 (PAIA), which was enacted to give effect to this constitutional right, permits any person to request any information held by the state, which the state is enjoined to provide, subject to there being no grounds for refusal. Within the procurement context, this normally results in bidders being entitled to the procurement file after the tender decision has been made, with certain confidential information belonging to other bidders being withheld.

The PAIA may not be relied upon following the commencement of judicial proceedings to challenge a procurement award. In that context, however, the procuring authority is obliged in terms of the rules of court to make the complete ‘record’ of the procurement decision (which includes all information received and generated by it in that regard) available to the applicant, which is then entitled to rely upon this in supplementing its case.

IX CHALLENGING AWARDS

Public procurement expenditure continues to account for a particularly high portion of South Africa’s GDP. Increased dependency on public contracts and ongoing irregularity and corruption within the government procurement context have caused judicial challenges of procurement awards to remain commonplace.

Generally speaking, judicial review proceedings take in the region of six months to one year to finalise, albeit that they can be conducted more quickly (where expedited time periods are agreed to between the parties or by the courts) or over longer periods (where complexities, interlocutory issues or appeals arise). The institution of judicial review proceedings does not automatically suspend the implementation of the tender, and it is therefore in an aggrieved bidder’s interests to interrupt the implementation of the tender, either by agreement or urgent interdictory application, pending the outcome of the judicial review proceedings.

65 Regulation 16A 6.3(d) of the Treasury Regulations of 2005.
66 National Treasury Instruction Note 1 of 2015/2016.
67 Sections 3(2)(b)(iv) and 3(2)(b)(v) of the Promotion of Administrative Justice Act 3 of 2000.
68 Act 2 of 2000.
Procedures
The overwhelming majority of procurement awards constitute administrative action, as defined in the PAJA. For this reason, the procedure ordinarily applicable for challenging procurement decisions is as prescribed in the PAJA. In consequence thereof, prior to instituting judicial review proceedings it is required that an applicant first exhausts any internal remedies provided for under any other law.\(^69\)

Any proceedings for judicial review under PAJA must be instituted ‘without unreasonable delay and not later than 180 days’ after the date on which any proceedings instituted in terms of internal remedies are completed or, where no such remedies exist, from the date on which the person concerned was informed of the decision, became aware of the decision and the reasons for it, or might reasonably have been expected to have become aware of the decision and the reasons.\(^70\) Our courts have found that the requirement that judicial review proceedings be instituted ‘without unreasonable delay’ is independent from that requiring such proceedings to be instituted within 180 days of the exhaustion of internal remedies or of having become aware of the decision and reasons for it.\(^71\) Judicial review applications can therefore be dismissed on account of an unreasonable delay, notwithstanding the proceedings having been initiated within the prescribed 180-day period. Aggrieved bidders must therefore act with the utmost expediency when seeking to challenge procurement awards. The Constitutional Court judgment in \textit{State Information Technology Agency SOC Limited v. Gijima Holdings (Pty) Limited}\(^72\) confirmed that the 180-day rule under PAJA does not apply to organs of state seeking to review and set aside their own procurement decisions, but found that the principle of legality nonetheless necessitates that a review be brought without undue delay.\(^73\)

In \textit{Joburg Market SOC Ltd v. Aurecon South Africa (Pty) Limited},\(^74\) where the organ of state in question brought a review application to set aside its own decision to award a tender just over a year after the award, the court rejected the argument that the time period only begins when the organ of state’s board of directors becomes aware of the irregularities in the award process, in line with the approach adopted by the higher courts. The court noted that any internal difficulties in identifying the irregularities cannot impact on the determination of the period of time that has lapsed since the decision was taken and the reasonableness thereof, but may be relevant in considering whether to grant condonation of the unreasonable delay.

Grounds for challenge
The PAJA enumerates various grounds of review that include:

\begin{itemize}
  \item \textbf{a} a lack of authority;
  \item \textbf{b} bias;
  \item \textbf{c} non-compliance with a mandatory and material procedure or condition;
  \item \textbf{d} procedural unfairness;
  \item \textbf{e} material influence by an error of law;
  \item \textbf{f} ulterior purpose or motive;
\end{itemize}

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\(^{69}\) Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000.

\(^{70}\) Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000.


\(^{72}\) \textit{State Information Technology Agency SOC Limited v. Gijima Holdings (Pty) Limited} [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).

\(^{73}\) Id at para 47 where the Court refers to \textit{Khumalo v. Member of the Executive Council for Education: KwaZulu Natal} [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC) at para 45.

\(^{74}\) \textit{Joburg Market SOC Ltd v. Aurecon South Africa (Pty) Limited and Others} (36801/2015) [2017] ZAGPJHC .
g. irrelevant considerations or failure to take relevant considerations into account;
 h. unauthorised or unwarranted influence;
 i. arbitrariness or capriciousness;
 j. unlawfulness;
 k. irrationality;
 l. failure to take a decision; and
 m. unreasonableness.\(^75\)

The grounds of review provided for under the PAJA are not specifically available for reviews brought in terms of the principle of legality. However, the principle of legality is rapidly developing as a parallel body of law and alternative basis for review, and encompasses general substantive grounds of review (such as lawfulness and rationality), while those of a procedural nature are increasingly being entertained by the courts.

### iii Remedies

South African courts are constitutionally obligated to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of such inconsistency.\(^76\)

Once having made a finding of Constitutional invalidity, South African courts are empowered in terms of the PAJA to ‘grant any order that is just and equitable’, which would include giving orders:

a. directing the procuring authority to give reasons or act in the manner the court requires;
 b. prohibiting the procuring authority from acting in a particular manner;
 c. setting aside the procurement decision and remitting this for reconsideration, or, in exceptional cases, substituting the procurement decision or correcting a defect resulting from it;
 d. in exceptional circumstances, directing the procuring authority to pay compensation;
 e. declaring the rights of parties relating to the procurement decision; or
 f. granting a temporary interdict or other temporary relief.

Subject to a court’s obligation to declare any conduct inconsistent with the Constitution invalid, the courts, in exercising their just and equitable jurisdiction, may either limit the retrospective effect of the declaration of invalidity or suspend the declaration of invalidity for any period and on any conditions.\(^77\)

The Constitutional Court in *Trencon Construction (Pty) Ltd v. Industrial Development Corporation of South Africa Ltd and Another*\(^78\) set out the test for exceptional circumstances justifying a substitution order in the context of unlawful tender awards. Having regard to the doctrine of separation of powers, the Court held that when determining whether to grant a substitution order, it must be determined whether the court is in as good a position as the administrator to make the decision and whether the decision of the administrator is a foregone conclusion. The Court held that these two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors (such as delay, bias or

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75 Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000.
76 Section 172(1) of the Constitution of the Republic of South Africa of 1996.
77 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others* [2014] (1) SA 604 (CC).
78 2015 (5) SA 245 (CC).
incompetence of the administrator). The Court concluded that the ultimate consideration is whether a substitution order is just and equitable, which will involve a consideration of fairness to all implicated parties. The Court emphasised that the exceptional circumstances enquiry requires an examination of each matter case by case that accounts for all relevant facts and circumstances.

Ordinarily, aggrieved bidders are not entitled to claim damages arising from breaches of procurement law, and must therefore act with haste to secure meaningful relief in relation to the tender itself. This would include either setting aside the tender decision for re-adjudication, obtaining an order of substitution in respect of the award of the tender, or alternatively obtaining an order directing the commencement of a new tender process where the initial process or formulation of the tender documentation was flawed. A bidder is, however, entitled to recover damages where it can show that it would have been awarded the tender but for fraud or dishonesty on the part of the procuring authority. In the case of otherwise unlawful tender decisions, compensation can be awarded for out-of-pocket expenses, with interest.79

Conversely, where a tender is found to be invalid, a successful bidder has no right to benefit from the unlawful contract.80 The Court reiterated this principle in its recent Black Sash judgment.81 The Court found that even where there has been no showing of misconduct or fraudulent conduct on the part of the successful bidder, it has no right to benefit from an unlawful contract, and any profit derived should not be beyond public scrutiny. This principle should serve to discourage successful bidders from continuing with the implementation of a potentially unlawful contract while the tender award is under review (which most successful bidders have historically done in the hope that, by the time the review application is heard, substantial or complete implementation will disincline a court from cancelling the contract resulting from the tender award).

Although not subject to fines, bidders in breach of procurement procedures can be listed on the National Treasury’s tender defaulters’ register, in terms of which they will be precluded from being awarded procurement contracts for as long as they remain on the register (which can be for between five and 10 years). Officers of the procuring authority who are in contravention of the procurement laws will incur liability and sanctions in terms of the governing legislation.82 The procedure for dealing with dishonest bidders is now specified in the 2017 Preferential Procurement Regulations.83 In terms of the 2017 Preferential Procurement Regulations, where a tenderer has submitted false information regarding its B-BEEE status level, local production content, or any other matter required in terms of the regulations that will affect or has affected the evaluation of a tender, or where a tenderer has failed to declare any subcontracting arrangements, the organ of state must allow such tenderer an opportunity to make representation in response to the allegations. If an organ of state concludes, after considering the tenderer’s representations, that false information was indeed submitted by the tenderer, it must disqualify the tenderer or terminate the contract

79 Darson Construction (Pty) Ltd v. City of Cape Town [2007] (4) SA 488 (C).
80 Supra 84 at para 67.
81 Black Sash Trust v. Minister of Social Development and Others [2017] (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) at para 50.
83 Regulation 14 Preferential Procurement Regulations of 2017.
in whole or in part; and, if applicable, claim damages from the tenderer, or if the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 per cent of the value of the contract. In addition, the organ of state is required to inform National Treasury in writing of any actions taken in this regard and provide written submissions as to whether the tenderer should be restricted from conducting business with any organ of state. The National Treasury must then determine whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years and maintain and publish on its official website a list of restricted suppliers.

In the recent case of *City of Cape Town v. Aurecon South Africa (Pty) Ltd*, the Constitutional Court declined to declare the awarding of a tender constitutionally invalid on the ground that the application was inexcusably late.\(^8^4\) The case illustrates that although the courts are obliged to declare any conduct that is inconsistent with the Constitution invalid, they may decline to discharge this obligation where a review application is brought out of time. Litigants therefore may not sit back and do nothing on the mistaken belief that the court cannot close its eyes to constitutionally invalid conduct.

**X OUTLOOK**

There has been a notable policy shift towards placing increased reliance on government procurement as a tool for increasing the speed and extent of socio-economic transformation. This is expected to intensify in the build-up to the 2019 national elections, as the ruling party attempts to reclaim political ground it has lost to opposition parties under the regime of former President Jacob Zuma.

As part of the policy shift, the government has reiterated that it is in the process of reviewing the entire supply chain management legislative framework with a view to developing a single procurement law that, *inter alia*, seeks to improve efficiency in the procurement environment and eliminate corruption. A draft Public Procurement bill has been anticipated since the beginning of 2016, and in a presentation to Parliament’s Appropriations Committee on 24 April 2018, the National Treasury indicated that the Public Procurement bill was still being developed and, once certified by the state law adviser, would be submitted to Cabinet and published for public comment following approval. They did not mention a timeline as to when the submission would be made. The Public Procurement bill is aimed at building upon and improving the current Public Procurement Regulations, and is expected to enable small businesses and those operating in rural and urban economies to participate more effectively in public procurement.

It is expected that the reshuffled cabinet under President Cyril Ramaphosa will continue the weeding out of corrupt influences within government and state-owned enterprises, with obvious benefits for public procurement in general. This ought to be given further momentum through the recent appointment of a commission of inquiry for purposes of addressing the matter of ‘state capture’ (at the behest of the Public Protector).

Last, the courts have continued to forcefully address corrupt influences in public procurement, offering effective redress to aggrieved and prejudiced bidders. These are all positive indicators that government-related business will continue to remain attractive to local and foreign players alike.

\(^8^4\) *City of Cape Town v. Aurecon South Africa (Pty) Ltd* [2017] ZACC 5.
I INTRODUCTION

The key procurement legislation applicable in England, Wales and Northern Ireland is the Public Contracts Regulations 2015 (PCR), the Utilities Contracts Regulations 2016 (UCR), the Concession Contracts Regulations 2016 (CCR), and the Defence and Security Public Contracts Regulations 2011 (Defence Regulations), referred to collectively in this chapter as the ‘procurement regulations’.

The PCR, UCR and CCR do not apply to Scotland, which has its own procurement legislation, while the Defence Regulations apply throughout the United Kingdom. The Scottish Ministers have devolved competence to make procurement regulations by virtue of Section 53 of the Scotland Act 1998. The key procurement legislation applicable in Scotland, which implements the corresponding EU directives, is similar to that in the rest of the United Kingdom: the Public Contracts (Scotland) Regulations 2015; the Procurement (Scotland) Regulations 2016; the Utilities Contract (Scotland) Regulations 2016; and the Concession Contracts (Scotland) Regulations 2016, all of which came into force on 18 April 2016.

The procurement regulations implement the corresponding EU directives. The PCR came into force on 26 February 2015,3 and the UCR4 and CCR came into force on 18 April 2016.5 Contracts for health services above £615,278 in value let by the National Health Service (NHS) and clinical commissioning groups can be subject to the ‘light touch regime’ in the PCR (see Section V.ii). Separate procurement regulations6 specific to the health sector continue to apply (alongside the PCR) to contracts for NHS healthcare services regardless of contract value.

The Small Business, Enterprise and Employment Act 2015 (SBEE Act) gives the UK government power to make further regulations in relation to procurement, although none have been made to date.

1 Amy Gatenby and Louise Dobson are legal directors, Andrew Carter is an associate and Bill Gilliam and Paul Minto are partners at Addleshaw Goddard LLP.
2 Except for defence and security procurement, where the rules are UK-wide, this chapter focuses on the legislation in England, Wales and Northern Ireland.
3 Replacing the previous Public Contracts Regulations (2006).
4 Replacing the previous Utilities Contracts Regulations (2006).
5 The EU directives corresponding to the UK regulations currently in force are, therefore, 2014/24/EU, 2014/25/EC, 2014/23/EC, 2009/81/EC and 89/665/EEC. References in this chapter to the EU directives are to those EU directives currently implemented in the United Kingdom, unless otherwise stated.
6 The Procurement, Patient Choice and Competition Regulations (No. 2) 2013.
Beyond the EU Directives and procurement regulations, it is also important to consider the case law of the Court of Justice of the European Union (CJEU) and the General Court, the general EU Treaty principles of transparency, equal treatment, non-discrimination and proportionality, and the decisions of UK courts.

While Member States must implement most provisions in the EU directives, there are a number of optional provisions. On implementation the UK adopted some, but by no means all, optional provisions; for example, it allows the use of central purchasing bodies, but it postponed to the maximum extent possible the mandatory use of full e-communications.

The Cabinet Office (part of Her Majesty’s Treasury) has responsibility for central government procurement policy; it and the Crown Commercial Service (CCS), an executive agency of the Cabinet Office, publish guidance notes and procurement policy notes (PPNs) on a range of issues. One of the most recent sets of guidance issued by the CCS in relation to procurement was the publication of an updated model services contract on 19 February 2018. In Northern Ireland, policy and guidance are issued by the Central Procurement Directorate, and the Welsh Minister for Finance and Government Business has issued the Wales Procurement Policy Statement. The Scottish Ministers issue guidance under the equivalent Scottish legislation.

Formal legal challenges to procurement decisions are made in the High Court. However, less formal options exist. The Cabinet Office’s ‘mystery shopper’ scheme allows bidders to make complaints anonymously, and the SBEE Act reinforces this by enabling the investigation of procurement processes and practices of certain contracting authorities by a government minister. Bidders can also refer matters to NHS Improvement, where the contracting authority is a Clinical Commissioning Group or NHS England. NHS Improvement may use its investigation and enforcement powers under the Procurement, Patient Choice and Competition Regulations (No. 2) 2013 to prevent or remedy breaches of procurement law, and can even declare arrangements for the provision of NHS healthcare services ineffective if there has been a serious breach.

II YEAR IN REVIEW

This year has seen the UK and EU engaged in negotiations to establish how Brexit will be implemented and the relationship between the UK and the EU after the UK’s withdrawal. While Brexit will inevitably have an impact on UK procurement law in the long term, as the vast majority of its procurement rules are derived from EU directives, it appears the EU procurement rules (as implemented in UK regulations) will continue to apply until 31 December 2020, when the transitional agreement is expected to expire.

The UK government intends to retain all existing EU law, even after the transitional agreement expires, until there is space in the parliamentary agenda to review and amend individual laws in light of the UK’s new trading relationships. This may mean that the UK is unlikely to make substantive changes to its current regulations for some time. Further, the Repeal Bill (which is currently progressing through Parliament) will require UK courts to follow case law of the CJEU as it stands on the day that the UK leaves the EU and to have regard to relevant decisions of the CJEU after it has left. Quite how UK courts will apply

7 www.gov.uk/government/publications/model-services-contract#history.
this requirement is not likely to become clear until they have the opportunity to consider the
issue. In practice, however, UK procurement law is unlikely to see significant changes in the
short to medium term.

A key development this year was the liquidation of Carillion in January 2018 and the
related consequences felt in the public sector by both those designing and conducting tender
processes, and those seeking to ensure continuity of key services following liquidation, as well
as the impact on joint venture (JV) partners, among others. It may be that the liquidation of
a well-known public sector supplier will have further consequences in the future, particularly
in relation to how contracting authorities view and score financial robustness, business
continuity planning and the existing contract portfolio/margins of bidding entities.

There have also been several key court decisions, including *Cemex v. Network Rail*,
*MLS v. Secretary of State* and continuing litigation in the *EnergySolutions* case.

In the case of *Cemex*, the court clarified a number of points for those conducting
public procurement litigation, concerning the balance between speed, confidentiality and
disclosure, and emphasised the need for compliance with the timetable in such proceedings.
Any challenging bidder must plead its case accordingly and seek to amend its arguments at a
later date if new documents come to light, rather than wait for disclosure before attempting
to set out its case. The court denied the claimant's applications for an extension of time for
service of the particulars of claim and for further disclosure into a confidentiality ring, having
considered that the limited extension of time and disclosure already offered by the defendant
were sufficient. It also confirmed that, while the court is generally sympathetic to requests for
disclosure from unsuccessful bidders, requests for irrelevant or extraneous information from
another party's bid will not be accepted.

The case of *MLS* and other recent developments focus on transparency, and how
a reasonably well-informed and normally diligent (RWIND) tenderer would interpret
requirements. In *MLS*, the court found that the authority had not made it sufficiently clear
that a 'fail' on one 'pass/fail' question would result in disqualification from the tender process
as a whole. The increased focus on transparency has also seen a number of guidance notes.

The *EnergySolutions* case concerned a claim for damages brought by two unsuccessful
bidders against the Nuclear Decommissioning Authority in relation to the award of a £7 billion
contract for decommissioning 12 nuclear facilities. In April 2017, the Supreme Court heard
an application relating to the circumstances in which damages may be recoverable under the
procurement regulations and found that claimants are only entitled to damages for breaches
of the procurement regulations, where the breach is sufficiently serious (as determined by
application of the *Francovich* conditions). The decision of the Supreme Court imposes a
limit on claimants' ability to recover damages for breaches of the procurement regulations;
however, it remains to be seen whether this will lead to a decline in the number of cases
that are brought by challenging bidders and whether the UK courts will take an expansive

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10 *Nuclear Decommissioning Authority v. EnergySolutions EU Ltd* (now called ATK Energy EU Ltd) [2017]
   UKSC 34 (11 April 2017).
11 See footnote 9.
12 For example, PPN 01/17: The Transparency of Suppliers and Government to the Public, dealing with the
communication of pre-tender or early market engagement information to all bidders, and PPN 02/17:
Promoting Greater Transparency.
approach to assessing whether breaches are sufficiently serious. The position of the Supreme Court in Energy Solutions is consistent with the approach taken by the General Court in its decision, given subsequently, in Vakakis.\textsuperscript{14} It is worth noting, however, that the EFTA Court gave a contradictory opinion in October 2017,\textsuperscript{15} stating that a simple breach of public procurement law was sufficient to trigger liability for damages.

We have seen further consideration by the Court of the adequacy of damages for bidders who are charities, not-for-profit organisations or otherwise operating in the third sector, and the extent of disclosure obligations in the procurement context. We continue to await the first declaration of ineffectiveness in England, Wales or Northern Ireland. Challenging bidders continue to have mixed success in applications by contracting authorities to lift the automatic suspension. The suspension is activated as soon as proceedings are issued by a challenging bidder prior to the award of a contract and prevents the award of that contract pending the final outcome of a challenge, an earlier order of the Court or the consent of the challenging bidder. The challengers in the cases of Sysmex v. Imperial\textsuperscript{16} and Alstom\textsuperscript{17} have failed to maintain the suspension. However, in the case of Lancashire,\textsuperscript{18} we have seen a further, albeit rare, example of a challenging bidder successfully maintaining the suspension. This decision contrasts with the outcome in the earlier case of Kent,\textsuperscript{19} also involving an NHS foundation trust. In Kent the unsuccessful incumbent bidder argued that, as a not-for-profit organisation, damages were not an adequate remedy, but the court decided that there was no reason why damages should be regarded as inadequate simply because the challenging bidder had tendered on the basis of making little, if any, profit margin on the contract.

In Lancashire, the challenging incumbent bidder successfully argued that the loss of the contract would have a significant operational impact, which would be far wider than the contract that was the subject of the proceedings, therefore damages would not be an adequate remedy. Notwithstanding the outcome in Kent, the key element to any successful argument for maintaining the automatic suspension continues to be the challenging bidder’s status as an incumbent provider. It appears exceptionally difficult to argue that the suspension ought to be maintained where the challenger is not the incumbent provider of the goods or services in question.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PCR regulate most public sector entities. Many are specifically listed in the PCR (e.g., government departments); others are regulated on the basis that they are ‘bodies governed by public law’.\textsuperscript{20}

\textsuperscript{16} Sysmex (UK) Ltd v. Imperial College Healthcare NHS Trust [2017] EWHC 1824 (TCC).
\textsuperscript{17} Alstom Transport UK Ltd v. London Underground Ltd [2017] EWHC 1521 (TCC).
\textsuperscript{18} Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v. Lancashire County Council [2018] EWHC 200 (TCC).
\textsuperscript{19} Kent Community Health NHS Foundation Trust v. NHS Swale CCG and NHS Dartford, Gravesham and Swanley CCG [2016] EWHC 1393 (TCC).
\textsuperscript{20} PCR 2(1).
Contracts awarded by private firms are regulated by the PCR in limited circumstances for certain projects. Contracting authorities are required to ensure that, where they subsidise certain works and services contracts by more than 50 per cent, the subsidised contract is competitively tendered under the PCR. More generally in relation to grant-funded projects, a condition of the funding may in practice require grant recipients to let contracts for the project by competitive tender.

The UCR apply to utility activities carried out by a utility that is publicly owned or that operates on the basis of special or exclusive rights granted by a competent authority. Thanks to EU derogations, the UCR do not apply to exploration for and exploitation of oil and gas, or to the generation and supply (but not transmission) of electricity and gas, on the basis that these are competitive markets.

The Defence Regulations apply to utilities and contracting authorities as defined in the UCR and the PCR respectively, and in the equivalent Scottish regulations.

## ii Regulated contracts

Generally, contracts for the construction of works, supply of goods and provision of services valued at or above specified EU financial thresholds are subject to the procurement regulations.

The financial thresholds applying from 1 January 2018, are:

<table>
<thead>
<tr>
<th></th>
<th>PCR</th>
<th>UCR Defence Regulations</th>
<th>CCR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods</td>
<td>£118,133 or 181,302**</td>
<td>£363,424</td>
<td></td>
</tr>
<tr>
<td>Services*</td>
<td>£118,133 or 181,302**</td>
<td>£363,424</td>
<td>£4,551,413</td>
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<tr>
<td>Works</td>
<td>£4,551,413</td>
<td>£4,551,413</td>
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* For ‘light-touch’ services, the threshold is £615,278 under PCR, £820,370 under UCR and £4,551,413 under CCR (there is no light touch regime for the Defence Regulations)

** Broadly, the lower threshold applies to central government and the higher threshold to all other authorities.

Below-threshold contracts are not subject to the procurement regulations, but some form of advertisement and a fair, competitive tender procedure is required if there may be certain cross-border interest. The PCR, however, contain limited additional provisions for below-threshold contracts that are designed to assist small to medium-sized enterprises (SMEs) which go beyond the requirements of the 2014 Public Sector Directive (e.g., the advertising obligations outlined in Section V.i).

The UCR apply only to regulated utility activities. Procurements in relation to a utility’s other activities are unregulated unless the utility is also a contracting authority for the purposes of the PCR.

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21 PCR 13.
22 See Alstom Transport v. Eurostar International Limited [2012] EWHC 28 (Ch) paragraphs 70 and 71, where the court held that Eurostar was not a utility.
23 In this chapter, the term ‘above-threshold contract’ is used to refer to contracts meeting these EU financial thresholds and ‘below-threshold contract’ to those that do not meet them.
24 See Commission ‘Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives’, OJEU 2006 C 179/02.
25 See CCS ‘Guidance on provisions that support market access for small businesses’, August 2015.
26 As listed in UCR 9 to 15.
The Defence Regulations apply to the procurement of defence and sensitive security equipment, works and services.

One area that can cause particular difficulties is land redevelopment. Land redevelopment often requires cooperation between a local authority and a private developer, and these arrangements are negotiated directly between a major local landowner and the authority without a competitive process. In practice, a number of local authorities have taken such arrangements outside the procurement regulations by avoiding imposing any legally binding obligation upon the developer to build.\textsuperscript{28}

\section*{IV SPECIAL CONTRACTUAL FORMS}

\subsection*{i Framework agreements and central purchasing}

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. The CCS frameworks for central government are an example of this. Single-supplier frameworks are also common.

Framework agreements are often established by one authority on behalf of itself and a (frequently very large) number of other authorities.

Dynamic purchasing systems are not widely used at present.

Utilities have used both framework agreements and qualification systems widely to reduce the burden of procurement processes, often establishing single-supplier framework agreements for one or two control periods (i.e., five or 10 years). Under the UCR, frameworks must now be limited to eight years, unless a longer period can be justified.

\subsection*{ii Joint ventures}

Public–public JVs are common. They have typically relied on the \textit{Teckal}\textsuperscript{29} or the \textit{Hamburg Waste}\textsuperscript{30} exceptions for ‘in-house’ and cooperation agreements in the public sector that meet certain conditions, which are not subject to competitive tender under the procurement regulations. These exceptions are ‘codified’ in the PCR, UCR and CCR.\textsuperscript{31}

JVs have sometimes been used in public–private partnerships (PPPs), but typically the appointment of the JV partner is advertised and tendered.

PPPs have typically been procured under the competitive dialogue procedure. The PCR now provide the option of the competitive procedure with negotiation.\textsuperscript{32} This has obvious similarities with competitive dialogue, but the greater flexibilities\textsuperscript{33} offered by the competitive dialogue procedure may mean that it remains the more attractive option.


\textsuperscript{29} C-107/98 Teckal Srl v. Comune di Viano and another.

\textsuperscript{30} C-480/06 Commission v. Germany.

\textsuperscript{31} See CCS ‘Guidance on ‘public/public’ contracts’, August 2015.

\textsuperscript{32} See Section V.ii.

\textsuperscript{33} For example, under competitive dialogue the authority is not required to set out its minimum requirements at the outset of the procurement, and there is more flexibility to clarify, fine tune and optimise final tenders.
The UCR have separate rules on JVs and intra-group supplies. In practice, however, they have not been as widely used as the public sector rules embodied in the Teckal and Hamburg Waste exceptions.

V THE BIDDING PROCESS

i Notice

Above-threshold contracts must be advertised in the Official Journal of the EU (OJEU). The PCR also require contracting authorities to publish details of these contracts on the government portal (Contracts Finder). Similarly, the PCR require that, where a contracting authority advertises contracts that meet lower minimum thresholds (£10,000 or more in the case of central government authorities, and £25,000 or more for sub-central contracting authorities or NHS trusts), it must also publish information about the opportunity on Contracts Finder, regardless of any other means it uses to advertise the opportunity. These transparency obligations were reiterated by the CCS in late 2017. This requirement does not apply to contracting authorities carrying out devolved functions in Scotland, Wales and Northern Ireland. In Scotland, contracts that meet a minimum threshold of £50,000 (for supplies and services contracts) or £2 million (for works contracts) must be advertised on the Public Contracts Scotland website.

Voluntary ex ante transparency (VEAT) notices are increasingly used where authorities directly award a contract without a competitive process, to seek to overcome the risk of the contract being declared ineffective because it was not properly advertised in the OJEU. However, a VEAT notice is unlikely to offer such protection unless the authority, acting diligently, had a legitimate belief that the procurement regulations did not apply.

ii Procedures

For above-threshold contracts, the procurement regulations generally require use of one of the prescribed procedures. Under the PCR these are the open, restricted, competitive with negotiation, competitive dialogue and innovation partnership procedures. The PCR also provide for the negotiated procedure without prior publication of an OJEU advertisement (that is, a direct award) in certain exceptional circumstances. The procedures available under the UCR are the open, restricted, negotiated, competitive dialogue and innovation partnership procedures.

The PCR and UCR include light-touch regimes for the award of contracts for health, social, education and other specific services. Subject to compliance with certain mandatory requirements (e.g., principles of transparency and equal treatment), contracting entities have significant flexibility in determining the procedures to be applied.

and to confirm financial commitments and other terms of the winning bid, provided essential aspects are not materially altered and there is no risk of distortion of competition or discrimination.

34 See footnote 23.
36 Section 23, Procurement Reform (Scotland) Act 2014.
37 C-19/13 Ministero dell’Interno v. Fastweb SpA, paragraph 50.
38 See CCS ‘Guidance on the new light touch regime for health, social, education and certain other service contracts’, October 2015.
39 Set out in PCR Schedule 3, UCR Schedule 2 and CCR Schedule 3.
The PCR apply a number of procedural requirements to below-threshold contracts. In addition to the advertising requirements (described in Section V.i, supra), these are a prohibition on including a separate pre-qualification stage in the tender process and a requirement to publish information on Contracts Finder in respect of contracts that have been awarded.

Under the CCR, contracting entities are free to decide on the procedure to be followed, subject to certain specified safeguards; even lighter requirements apply in respect of light-touch services.

The Defence Regulations offer unrestricted use of the restricted and the negotiated (with prior advertisement) procedures. The competitive dialogue procedure is available for particularly complex contracts and the negotiated procedure (without prior advertisement) in extremely limited circumstances.

Historically the competitive dialogue procedure was widely used for public sector procurements but, as part of the drive towards lean procurement, there has been a presumption against its use since January 2012.40

Under the Defence Regulations and the UCR, authorities and utilities generally use the negotiated procedure with prior advertisement in the OJEU.

iii Amending bids

In a number of court cases, the courts have upheld an authority’s refusal to allow bidders to correct defects in, or omissions from, their bid.41

However, whether the authority may allow correction of defects in, or omissions from, bids has not often arisen in the courts. In our experience, authorities take different approaches to this issue.

The PCR and UCR contain express provisions dealing with tenders where information or documentation appears to be incomplete or erroneous.42 Although those provisions appear to allow authorities to request information or documentation to clarify or complete information or documents at tender stage (as well as pre-qualification stage), the authority must observe the principles of equal treatment and transparency in exercising this right. Therefore any decision to allow the submission of such information must be taken with care and with regard to those principles.

VI ELIGIBILITY

i Qualification to bid

The procurement regulations replicate the grounds for assessing bidders’ fitness to contract set out in the corresponding EU directives.

42 PCR 56(4); UCR 76(4).
There are also Cabinet Office and CCS publications on the qualification stage, which require that:

a authorities use a standard Selection Questionnaire (which has been aligned with the requirements of the European Single Procurement Document) and have regard to associated CCS guidance on the selection stage that develops general principles including self-certification, ‘self-cleaning’ and proportionality;43

b selection criteria relating to a bidder’s reliability, as demonstrated by its performance of past contracts, are established and applied in procurements by central government departments, their executive agencies and non-departmental public bodies for contracts relating to information and communications technology, facilities management and business processing outsourcing and which have a value of £20 million or greater;44 and

c bidders convicted of tax offences or successfully challenged under the ‘General Anti-Abuse Rule’ may be excluded from public procurements.45

ii Conflicts of interest

The PCR, UCR and CCR require authorities to take appropriate effective measures to prevent, identify and remedy conflicts of interest.46 Economic operators may be excluded from participation in a procurement procedure where a conflict of interest cannot be effectively remedied by other less intrusive means.47 The provision is very wide, extending to ‘financial, economic and other personal interest’ that is either actual or even ‘perceived’ to compromise impartiality. In Counted4,48 the court noted that ‘other personal interest’ need not be financial but could amount to anything pertaining to the relevant individual. This has become an area of increased scrutiny by both challenging bidders and contracting authorities, as the circumstances where a conflict may arise, or an allegation of conflict could be made, are wide ranging.

iii Foreign suppliers

The procurement regulations do not prevent foreign suppliers from tendering for public contracts, but utilities may (or in some cases must) reject certain bids to supply goods from third (non-EU) countries with which the EU does not have reciprocal agreements.49

43 Cabinet Office and CCS PPN ‘Standard Selection Questionnaire (SQ)’, 9 September 2016. The guidance is issued under PCR 107(1).
46 PCR 24; UCR 42; CCR 35. There are no express conflict of interest provisions in the Defence Regulations, but the same obligations arise because of the duty to comply with the principle of non-discrimination – see T-160/03 AFCon Management Consultants and others v. Commission, paragraphs 75 and 90; although this case was decided under internal Commission rules, the same principles are likely to apply under the Defence Regulations.
47 PCR 57(8)(e); UCR 80; CCR 38(16)(d).
49 UCR 85.
The PCR, UCR and CCR only confer a right to challenge a breach of the regulations upon:

- a person from an EEA 50 state;51
- a person from a World Trade Organization Government Procurement Agreement (GPA) state, 52 where the GPA applies to the procurement concerned;53 and
- a person from another state if a relevant bilateral agreement applies.54

The Defence Regulations only confer rights to challenge breaches of the regulations on persons who are nationals of, and established in, an EU Member State.

Arguably, foreign persons who do not have a right to challenge under the procurement regulations may seek to bring a similar challenge by way of judicial review or for breach of an implied contract. In practice, however, many foreign-owned businesses have rights to challenge because they bid through a subsidiary incorporated within the EEA.

VII AWARD

i Evaluating tenders

Most contracts are awarded using award criteria implementing a blend of quality and price.55 Approaches to setting award criteria vary. Many authorities use a very detailed marking scheme with each small element of the project receiving a predefined mark (e.g., 0.3 per cent for proposals on staffing levels); others take a much broader approach, with no subcriteria and global figures for each criterion of, say, 15 or 20 per cent. Tenders structured to be entirely pass or fail on quality aspects, with the rest of the evaluation based on price, are also encountered.

Under the PCR, UCR and CCR, authorities must disclose the evaluation criteria from the date of publication of the notice in the OJEU. This allows bidders to understand what is important to the authority and to decide whether to participate accordingly.56 Where the Defence Regulations apply, authorities must disclose the marking criteria, at the latest, when issuing the contract documents (e.g., in the invitation to tender).

The courts tend to uphold disclosure of the main criteria and subcriteria only, on the basis that disclosure of the finer detail would not in fact affect the content of bids.57 Nevertheless, in practice many authorities disclose full details of the marking scheme, regardless of whether this is strictly required by law.

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50 The EEA comprises the EU Member States plus Liechtenstein, Norway and Iceland.
51 For example, PCR 89.
52 In addition to the 28 EU Member States, the other GPA states are Armenia, Canada, Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Montenegro, Moldova, the Netherlands (with respect to Aruba), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States.
53 For example, PCR 90(1)(a).
54 For example, PCR 90(1)(b).
55 In Scotland, contracts must be awarded on the basis of best price–quality ratio; price or cost alone cannot be used as the sole award criterion (section 67, The Public Contracts (Scotland) Regulations 2015).
56 PCR 49; UCR 69; CCR 32.
57 In Healthcare at Home Ltd v. The Common Services Agency [2014] UKSC 49, the Supreme Court endorsed the test of whether the ‘reasonably well-informed and normally diligent’ bidder would have understood the criteria in the same way.
There has also been a move by some authorities towards adoption of ‘real time’ evaluation, where evaluators discuss and score bids orally in a panel meeting to arrive at a group score. This leaves processes especially vulnerable and it is also incompatible with the decision in Geodesign\textsuperscript{58} and the reporting and documentation requirements.

\textbf{ii National interest and public policy considerations}

Under the procurement regulations, national interest can be taken into account only to a limited extent. Authorities may not favour local business. For example, while specifications may refer to British Standards, they must expressly permit equivalent standards from other European jurisdictions. Authorities may take account of social and environmental considerations only where there is a sufficient link to the subject matter of the contract. The issue of national interest came to the fore in early 2018 with the award to Franco-Dutch company Gemalto of the contract to print and supply Her Majesty’s Home Office with British passports after Brexit. The award of the contract to a non-UK company attracted adverse press coverage in the UK, even though Gemalto’s bid would ultimately offer substantial cost savings to the UK taxpayer.

The government has adopted a policy on how procurers should deal with businesses that have adopted certain aggressive tax avoidance measures.\textsuperscript{59}

Another key government policy is securing access to public contracts for SMEs. This policy is in part implemented through the PCR\textsuperscript{60} and reinforced by CCS guidance.\textsuperscript{61} The government has acknowledged the importance of prompt payment for SMEs by requiring public sector contracting authorities to pay invoices to their suppliers within 30 days and to ensure that prompt payment is enforced through the supply chain. Contracting authorities are required to publish data demonstrating compliance with these requirements at the end of each financial year.\textsuperscript{62}

The Cabinet Office recently announced a further package of measures designed to assist SMEs. To coincide with the launch, the CCS has issued a new PPN on supply chain visibility,\textsuperscript{63} which states that, from 1 May 2018, authorities tendering contracts under the PCR with a value above £5 million per annum must require the successful prime suppliers to:

\begin{itemize}
  \item [a] advertise on Contracts Finder any subcontract opportunities with a value over £25,000 that arise after contract award (although authorities may consider setting a higher threshold where the £25,000 threshold is overly burdensome to suppliers); and
  \item [b] report on how much they spend on subcontracting and how much they spend directly with SMEs in the delivery of the contract.
\end{itemize}

In addition, the Cabinet Office and CCS have announced a consultation seeking views on whether it would be appropriate to exclude suppliers from major government procurements if they cannot demonstrate a fair, effective and responsible approach to payment in the

\textsuperscript{58} Geodesign Barriers Ltd v. The Environmental Agency [2015] EWHC 1121 (TCC).
\textsuperscript{59} See Section VI.i.
\textsuperscript{60} See Sections III and V.i
\textsuperscript{61} For example, PPN 05/15 ‘Prompt payment policy and reporting of performance’, 27 March 2015.
\textsuperscript{62} PPN 03/16 ‘Publication of payment performance statistics’, 29 March 2016.
\textsuperscript{63} PPN 01/18 ‘Supply Chain Visibility’, 10 April 2018.
supply chain. One of the proposals being considered is whether, for contracts with a value over £1 million per annum, authorities would be required to assess suppliers’ approach to subcontractor payment as part of the selection process.

Further policies include obtaining commitments from suppliers to provide training and apprenticeships.64

VIII INFORMATION FLOW

During the procurement process, authorities must ensure they give bidders sufficient information to enable them properly to understand the authority’s requirements and to ensure a ‘level playing field’. This is particularly important where an incumbent service provider will be in a privileged position when a new procurement is run because it has additional information. The PCR and UCR require authorities to take appropriate measures to ensure that competition is not distorted by the participation of bidders that have had prior involvement in the procurement procedure (e.g., in the preparation stage).65 Where the distortion of competition cannot be effectively remedied by other less intrusive means, bidders may be excluded from the procedure.66

Authorities may withhold information from bidders on a number of grounds such as the public interest, the legitimate commercial interest of any person or possible prejudice to fair competition between economic operators.67 Additionally, authorities must not disclose information reasonably stipulated by the bidder as confidential,68 and under the Defence Regulations an authority may impose measures to protect classified information.69

Under the procurement regulations, authorities are required to notify bidders and supply certain information when they make an award decision. They must then ‘stand still’ for a minimum of 10 calendar days before signing the contract.70 This period allows unsuccessful bidders time to bring a legal challenge to prevent the contract award if they consider that the award decision is unlawful, provided that the bidders are otherwise within the limitation period for procurement claims. The standstill requirement often proves to be onerous for authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid to each unsuccessful bidder.

Many authorities consider that best practice is to give fulsome details of their reasons in the standstill notice, so as to be seen to be transparent, to flush out any complaints as soon as possible, to seek to ensure that the time for bringing a challenge in the courts is running on any complaints (see Section IX.i), and to reduce the risk of delay where a bidder asks for more information and claims that the standstill notice is defective. Authorities should also be mindful of the need to provide standstill information to all bidders, even those who have previously been disqualified, unless the disqualification has been upheld by a court or the full extended limitation period for any challenge stemming from that disqualification has passed.

64 PPN 14/15 ‘Supporting apprenticeships and skills through public procurement’, 27 August 2015.
65 PCR 41; UCR 9.
66 For example, PCR 57(8)(f).
67 See, for example, PCR 50(6) and 86(6).
68 See, for example, PCR 21.
69 Defence Regulations 11.
70 See, for example, PCR 86 and 87.
CHALLENGING AWARDS

The EU rules on challenging procurement decisions, some of which are optional, have been implemented in the procurement regulations. The main options that have been adopted are that courts are not to make declarations of ineffectiveness where overriding reasons relating to the general interest require the contract to be maintained and that, in certain circumstances, courts may shorten the contract instead of declaring it ineffective.\(^71\)

The courts may agree to expedite procurement cases at the parties’ request, which means that a typical first instance judgment may be handed down within a number of months following commencement of proceedings. Nonetheless, because of the cost, delay and inherent litigation risk in proceedings, many cases are settled without a full trial. Expedition can be key to the success of any procurement challenge by an unsuccessful bidder; it significantly increases both the likelihood of maintaining the automatic suspension (as such a suspension would only be in place for a short time pending a full expedited trial)\(^72\) and the ability to adhere to a timetable, which means obtaining judgment on a mid-tender challenge before any contract is awarded.\(^73\)

Procurement challenges necessarily require the establishment of confidentiality rings to protect tenderers’ commercially sensitive and confidential information. Disclosure of key information may be anticompetitive, prevent a fair and equal re-tender, or negatively affect the commercial interests of a bidder. The recent approach has been for contracting authorities to adopt a ‘neutral’ position on disclosure, as Merseytravel did in the Bombardier case,\(^74\) so that the real focus of any dispute is between the successful and challenging bidders who are often competitors in the same market. However, the court in Bombardier ruled that costs will be payable by a successful tenderer (even if it is a non-party) if it does not permit the contracting authority and challenging bidder to agree sensible and reasonable disclosure directions.

The Technology and Construction Court in England and Wales published guidance in the summer of 2017 on confidentiality rings in procurement proceedings, disclosure and pre-action conduct in an annex to the Technology and Construction Court Guide.\(^75\) The protocol also seeks to encourage the use of alternative dispute resolution to resolve cases. While the protocol is not binding, failure to follow the protocol may lead to a party being penalised in costs.

The losing litigant is generally required to pay 60 to 70 per cent of the other party’s legal costs in addition to all of its own legal costs, and in procurement cases this can extend to meeting the majority of the legal costs of the successful bidder if, as an interested party, the presiding judge feels the successful bidder has assisted the court.\(^76\)

The trend continues towards increased challenges. Pre-action correspondence challenging a decision is frequently written and can be successful. In England, it is still rare for a bidder to be successful in a court challenge, although there have been more bidder-friendly decisions in recent years, particularly on upholding the automatic

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71 See Section IX.iii.
72 Lancashire Care NHS Foundation Trust, see footnote 18.
suspension, as in *Lancashire*,77 *Bristol Missing Link*78 and *Counted4*.79 Northern Ireland is perceived by some to be more bidder-friendly due to recent decisions. However, as with the courts in England, in reality much turns on the specific facts and merits of the cases that have actually proceeded to a hearing or trial (and the appetite of the specific bidders and authorities to fight or to settle challenges). The case of *Lowry Brothers*80 shows that the authority can succeed in Northern Ireland.

i  Procedures

Procurements can provide their own complaints mechanisms, but High Court litigation is the main method of challenge to awards.

Each High Court jurisdiction (England and Wales, Northern Ireland and Scotland) is separate, and has its own case law, save that the Supreme Court is the highest appellate court for all UK jurisdictions. Each court will have regard to relevant case law from the other jurisdictions.

The reason that challenges tend to be brought in the High Court stems largely from the very short time limit set for commencing these proceedings. At 30 calendar days (from when the claimant knew or ought to have known of grounds for bringing a claim), the limitation period for procurement claims is the shortest in English law. It can be extended (to three months) where the court determines there is good reason. The trend in England has been to uphold the limitation period strictly,81 but in Northern Ireland the courts are more flexible.82

Claims under the procurement regulations can be brought in the High Court by economic operators, including contractors, suppliers and service providers. Some bidders and third parties, such as subcontractors, who do not enjoy protection under the procurement regulations, bring claims in judicial review in the High Court, asking the Court to review the decision of the public authority. However, it does appear that the approach to procurement challenges by sub-contractors is changing after the *Sysmex* case,83 when Sysmex challenged as an embedded sub-contractor only, even when it was not in a position to sign the contract, nor to deliver the services required as a whole.

ii  Grounds for challenge

Claims may be brought for breach of a duty owed to the bidder under the procurement regulations if the bidder either suffers or risks suffering loss. Examples include:

- undisclosed evaluation criteria and weightings, in breach of the obligations in the procurement regulations, or the duty of transparency under the Treaty on the Functioning of the European Union, or both;84

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77 See footnote 18.
78 *Bristol Missing Link Ltd v. Bristol City Council* [2015] EWHC 876.
79 See footnote 48.
83 See footnote 16.
There are four main grounds for judicial review of decisions:

- error of law;
- irrationality or *Wednesbury*[90] unreasonableness (which is the closest that judicial review comes to a review of the merits);
- procedural unfairness or breach of natural justice; and
- legitimate expectation.

### iii Remedies

The procurement regulations provide three main remedies: suspension, ineffectiveness and damages.

The ‘automatic’ suspension, which is unique to procurement challenges, arises when a claim form is issued before the contract is awarded, and does not require a court hearing. Once in place, the authority cannot award the contract until the court ends the suspension, or the parties end it by agreement or a consent order.

In England, in cases where authorities have applied to lift the automatic suspension, they have usually been successful (although much turns on the merits of those cases in which applications are actually made). Traditionally, it has been extremely difficult to maintain the suspension in contracts in the health and social care sector, where patient wellbeing and safety are paramount, but in *Lancashire*,[91] *Bristol Missing Link*[92] and *Counted4*[93] the courts were persuaded to do so. In Northern Ireland, suspensions have generally been maintained.[94]

Under the procurement regulations, the court may also set aside the decision or amend a document.

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89 C-454/06 pressetext Nachrichtenagentur GmbH v. Republic of Austria and others. In Gottlieb, R (on the Application of) v. Winchester City Council [2015] EWHC 231 (Admin) the claimant was granted relief on this basis in a judicial review claim. The pressetext principles are now codified in the PCR, UCR and CCR (e.g., PCR 72).
91 See footnote 18.
92 See footnote 79.
93 Counted4 Community Interest Company v. Sunderland City Council [2015] [392] TCC.
A declaration of ineffectiveness may be made when one of the grounds for ineffectiveness is satisfied. For the PCR, these are:

- awarding a contract illegally without advertisement in the OJEU where this is required;
- awarding a contract in breach of the standstill period or automatic suspension with another breach of the procurement regulations; and
- awarding a specific contract under a framework agreement when the requirements relating to the re-opening of competition are not followed or when tendering procedures are not followed in a dynamic purchasing system.

Ineffectiveness means that a contract is prospectively, but not retrospectively, ineffective from the date of the declaration. The court can deal with matters consequent on the contract being declared ineffective. It must also impose penalties and may award damages. Some contracting authorities and utilities make contractual provision for the parties’ rights and responsibilities in the event of a declaration of ineffectiveness (as expressly permitted by the procurement regulations and encouraged by government guidance).

2015 saw the first ever successful claim in the UK for a declaration of ineffectiveness. This was in Scotland in the Lightways Contractors case. The court found that a call-off contract under a framework had been awarded to an economic operator not on the original framework. In the absence of any other valid procurement process, the award was unlawful and the contract declared ineffective.

Unless grounds for ineffectiveness exist, damages are the only remedy that can be awarded under the procurement regulations after the contract has been entered into. Claims for damages are usually for wasted bid costs, or loss of profit or opportunities. As noted above, the EnergySolutions case now requires that an authority’s breach of the procurement regulations be sufficiently serious before damages can be awarded. It remains to be seen whether this will have a material impact upon the ability of claimants to recover damages.

The remedies available in judicial review are a quashing order (to set aside the decision made) and a mandatory order (requiring the authority to make the decision again). Damages may also be sought, although not as a sole remedy.

With substantial increases to court fees in April 2015, there has been a trend towards non-monetary procurement claims, as the court fees to issue proceedings for such claims are considerably lower than for claims involving damages, but still have the benefit of attracting the automatic suspension. If no damages are claimed at the outset, non-monetary claims may become a potential means to frustrate applications to lift until there is judicial consideration of the issue, but it is likely a court would consider a decision not to claim damages from the outset as definitive in such a case.

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95 Under the UCR, the third ground (c) only relates to contracts awarded under a dynamic purchasing system; under the CCR, only the first two grounds (a) and (b) apply.
96 For example, PCR 101(5) and (6).
99 See footnote 10.
X OUTLOOK

Over the next year, we will see the implementation of certain elements of the UK regulations that are not yet fully in force, such as the rules relating to e-communications, which will in most circumstances apply from 18 October 2018. This will be the first full year in which the Technology and Construction Court’s ‘Guidance Note on Procedures for Public Procurement Cases’ is in effect and it remains to be seen whether this guidance will lead to an increased use of alternative dispute resolution and a reduction in the number of applications made relating to procedural issues, such as confidentiality rings and disclosure.

Naturally, in the long term the focus will be on Brexit’s impact on the UK’s procurement regime, particularly once any transitional agreement expires. Various groups in the UK are already making their views known, for example, the Local Government Association, which has called for simplification of the procurement rules after Brexit and increased flexibility to use local suppliers and labour. However, given the large number of complex legal issues that will require resolution during the transition period, it seems unlikely that major changes to the UK’s procurement regime will be at the top of the government’s agenda.
I INTRODUCTION

The federal government of the United States is the world’s largest consumer of goods and services. Annually, it spends nearly US$500 billion on federal contracts, a significant portion of which through the Department of Defense, which has a budget roughly the size of the next seven-largest military budgets around the world combined.

All three branches of government have a role in procurement. Congress appropriates funds to federal agencies, passes legislation governing the conduct of acquisitions and performs oversight of contracting agencies. Executive branch agencies purchase goods and services, and issue regulations implementing procurement laws. The President can also issue executive orders adopting procurement-related policies. Although many procurement disputes are handled as administrative matters within federal agencies, the judicial branch has the final say in adjudicating disputes in connection with government contracts.

One of the overarching principles of the US federal procurement system is fair and open competition. Although there are exceptions, contracts are generally awarded on a competitive basis to ensure that the government receives the best value for its money. To ensure there is meaningful competition, procurement laws and regulations attempt to ensure that contractors compete on a relatively equal basis. This includes, among others, providing prospective offerors equal access to information, requiring proposals to be evaluated on the basis of publicised criteria and preventing improper influence or conflicts of interest.

Contractors can challenge award decisions that they believe were erroneously made by filing a bid protest. For most procurements, bid protests can be filed with the procuring agency, the Government Accountability Office (GAO) or the Court of Federal Claims (COFC). The purpose of the bid protest system is to ensure that government contracts are awarded in accordance with the tender documents, and procurement laws and regulations.

Federal contracts contain standard contract clauses that set forth the terms and conditions of the award. The US government frequently uses federal contracts as vehicles to effect public and social policies. Thus, in addition to addressing items such as quality, schedule and cost, federal contracts also require contractors to take actions to implement certain public policies, such as labour standards and the minimum wage.

This chapter provides a general overview of the US procurement process and identifies some of the more significant developments of the past year. As it focuses on procurement by government agencies at the federal level, procurement at the local level by states, cities, counties and municipalities are beyond the scope of this chapter.

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II YEAR IN REVIEW

i Deregulation

On 20 January 2017, Donald Trump was sworn in as the 45th President of the United States. One of the foundations of his campaign was a pledge to overturn ‘unconstitutional and burdensome’ executive orders issued during the Obama administration, including those affecting government contractors. Trump also expressed a desire to reduce regulations, reform the regulatory code and place a moratorium on new agency regulations not compelled by Congress or public safety in an effort to cut down on wasteful spending.

Although widely predicted, upon taking office President Trump did not immediately rescind executive orders issued by Obama. The Trump administration has, however, taken significant steps towards their goal of reducing the flow of new regulations and repealing existing rules they view as overly burdensome for business. On his first day in office, President Trump’s Chief of Staff issued a memorandum to all executive departments and agencies imposing a freeze on all new or pending regulations until the new administration has an opportunity to review them. President Trump subsequently issued two executive orders constraining the promulgation of new regulations:

a Executive Order 13771, ‘Reducing Regulation and Controlling Regulatory Costs’, 30 January 2017, requiring executive departments and agencies to identify for repeal at least two existing regulations for every one new regulation they promulgate; and

b Executive Order 13777, ‘Enforcing the Regulatory Reform Agenda’, 24 February 2017, directing the head of each regulatory agency to designate an agency official as its regulatory reform officer to oversee regulatory reform initiatives. Under this order, each agency is also instructed to establish a regulatory reform task force to evaluate regulations and recommend rules for repeal, replacement or modification.

In December 2017, the Trump administration released its Unified Agenda of Regulatory and Deregulatory Actions (the Agenda). Required annually by federal law, the Agenda reports on the actions administrative agencies plan to issue in the near and long term. According to the Agenda, agencies plan to finalise three deregulatory actions (instead of two) for every new regulatory action in the fiscal year 2018. The Agenda further reported that in the first year of the Trump administration, agencies withdrew or delayed 1,579 planned regulatory actions.

As a result of these initiatives and others, only one change was made to the Federal Acquisition Regulation (FAR) in 2017. That change was removing FAR provisions implementing President Obama’s Executive Order 13673, ‘Fair Pay and Safe Workplaces’, which was repealed by Congress in March 2017.

ii The False Claims Act

The False Claims Act (FCA) imposes liability on persons and companies who defraud US government programmes. It is the government’s primary tool for combating fraud in connection with government contracts. The FCA imposes civil liability on any person who, among other things, ‘knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval’, or ‘knowingly makes, uses, or causes to be made or used, a false
record or statement material to a false or fraudulent claim’. Under the FCA, the government can recover damages equal to three times its loss, as well as penalties of US$10,957 to US$21,916 per false claim submitted.

The Department of Justice enforces the FCA. Additionally, a private whistle-blower may bring a civil suit under the FCA ‘in the name of the Government’. Known as a *qui tam* relator, the whistle-blower can receive a percentage of the government’s recovery plus his or her attorney’s fees if the case results in a settlement or judgment against the defendant. The Department of Justice recovers several billion dollars every year through FCA judgments and settlements, a sizeable portion of which relates to government contracts.

In June 2016, the Supreme Court issued a landmark decision in *Universal Health Services Inc v. United States ex rel. Escobar*, addressing a controversial theory of liability under the FCA known as ‘implied certification’. The theory of implied certification is that a party can violate the FCA for more than just making a false statement on the face of an invoice or in the express language of a certification. Implied certification means that a party can be liable under the FCA for seeking payment from the government while knowingly violating a contractual provision or administrative regulation, even in the absence of an express certification of compliance with that standard. The idea is that by seeking payment from the government, the contractor is impliedly certifying that it is complying with all relevant laws and contractual provisions. In *Escobar*, the Supreme Court held that implied certification is a viable theory of liability under the FCA if a government contractor submits a claim for payment and fails to disclose its non-compliance with material statutory, regulatory or contractual requirements.

*Escobar* fundamentally altered the landscape for FCA litigation. Since the decision, lower courts have been charged with scrutinising the materiality of alleged false statements to the government’s decision to pay a claim. This has raised the bar for successful prosecution of FCA actions. It is no longer sufficient for the Department of Justice or a relator to simply allege that the government would not have paid a claim had it known the contractor was not in compliance with a statute, regulation or contractual requirement. Now they must establish that the non-compliance was material to the decision to pay the claim, a standard that the Supreme Court said in *Escobar* is ‘demanding’ and ‘rigorous’. Lower courts have only just begun to issue decisions implementing the materiality standard set forth in *Escobar*. It will be several years before the full impact of *Escobar* is known.

### iii Acquisition Reform

Government and industry stakeholders continue to push for acquisition reform. These efforts often focus on ways to streamline and lower the cost of acquisitions by the Department of Defense, which issued over US$300 billion in contract awards in fiscal year 2017. Acquisition reform initiatives often start within the Department of Defense and are subsequently adopted by civilian agencies.

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2 31 USC. § 3729(a)(1), (2).
3 Id. § 3729(a); 28 C.F.R. § 85.3(a)(9).
4 31 USC. § 3731(a).
5 Id. § 3731(b).
6 Id. § 3731(d).
The National Defense Authorization Act (NDAA) for fiscal year 2018 was signed into law by President Trump on 12 December 2017.\(^8\) The NDAA sets federal funding levels and outlines the spending and policy priorities for the Department of Defense. The NDAA authorises a total of US$634.2 billion in Department of Defense funding for the current fiscal year and includes more than 75 provisions related to acquisition policy and management. Several provisions addressing acquisition reform are outlined below.

**Private auditors for incurred costs\(^9\)**

The Department of Defense will begin using private auditors to perform incurred cost audits to reduce the current backlog and focus resources of the Defense Contract Audit Agency (DCAA) on forward pricing audits, which yield a higher rate of return. This provision is intended to support the need for timely and effective incurred cost audits, and to ensure that the DCAA allocates resources to higher-risk and more complex audits. The Department of Defense must submit a plan to Congress for implementing this direction by 1 October 2018 and issue contracts to at least two qualified private audit firms by 1 April 2019.

**Enhanced post-award debriefing rights\(^10\)**

Revisions to the Department of Defense FAR Supplement (DFARS) will provide for enhanced post-award debriefings for disappointed offerors in Department of Defense procurements for awards exceeding US$100 million. These enhanced debriefings will include the right to receive a redacted copy of the agency’s written source selection award determination and the right to ask follow-up questions within two business days of receiving a post-award debriefing. The agency must provide written responses to any follow-up questions within five business days and the debriefing will not be concluded until the agency delivers its written response.

**LPTA source selection limitations\(^11\)**

In an amendment to the DFARS, the Secretary of Defense is required to add two additional circumstances for when the Department of Defense may use lowest price technically acceptable (LPTA) source selection criteria. Specifically, in addition to the seven circumstances that were established in the previous NDAA, LPTA procurements may be used in instances when the Department of Defense would realise no or minimal additional innovation or future technological advantage, or, with regard to a contract for procurement of goods, the goods procured are predominantly expendable in nature, non-technical or have a short life expectancy.

**Pilot programme on payment of costs for denied GAO bid protests\(^12\)**

In an effort to reduce the number of bid protests related to Department of Defense procurements, the NDAA establishes a three-year pilot programme requiring contractors with revenue in excess of US$250 million during the previous year to reimburse the Department

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\(^8\) Public Law No. 115-91.
\(^9\) § 803, NDAA.
\(^10\) § 818, NDAA.
\(^11\) § 822, NDAA.
\(^12\) § 827, NDAA.
of Defense for ‘costs incurred in processing covered protests’ if the GAO denies the protest in a written opinion. The pilot is scheduled to begin two years from the date of enactment of the NDAA and will apply to protests filed between 1 October 2019 and 30 September 2022.

**Commercial item online marketplaces**

The Department of Defense is required to contract with multiple commercial online marketplaces for the procurement of certain commercial off-the-shelf products. These marketplaces must provide procurement oversight controls, including the ability to screen suppliers and products to ensure compliance with existing laws. This measure also requires the GAO to report to Congress on small business participation in the marketplaces.

**Service contracting**

A pilot programme is established for the Department of Defense to enter into longer term multi-year contracts for certain services. It may enter up to five service contracts for a maximum of 10 years, which may be extended for up to five additional one-year terms. The NDAA also requires more specificity in Department of Defense service contracts, which now must be submitted through the Department of Defense’s budget process.

**OTA**

A preference is established for other transaction authority (OTA) agreements in the execution of both science and technology and prototyping programmes, and it doubles the funding authorised for OTA prototype projects. The use of OTAs as methods for entering into research agreements with industry, academia, and other researchers and technology developers is also expressly authorised, and the Department of Defense may provide for the award of follow-on production contracts without further competition. Additionally, the NDAA requires the Secretary of Defense to ensure that management, technical and contracting personnel responsible for awarding and administering OTAs maintain minimum levels of continuous experiential learning, and reach certain training levels to meet acquisition certification requirements.

**Modernising government IT**

Under the NDAA, the Modernizing Government Technology Act is incorporated with provisions to authorise funding for modernising the federal government’s legacy information technology (IT) and incentivise IT savings in federal civilian agencies. Specifically, agencies covered by the Chief Financial Officer Act are authorised to establish agency-specific IT modernisation funds, and the US Office of Management and Budget will oversee a government-wide IT modernisation fund to be administered by the General Services Administration.

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13 § 846, NDAA.
14 §§ 851, 854, NDAA.
15 §§ 861–868, NDAA.
16 §§ 1076–1078, NDAA.
17 H.R. 2227, S. 990.
iv Cybersecurity

On 21 October 2016, the Department of Defense issued a final rule imposing safeguarding and cyber incident reporting obligations on defence contractors whose information systems process, store or transmit covered defence information. The final rule is implemented through a standard contract clause,18 which requires covered defence contractors to comply with more than 100 security requirements specified by the National Institute of Standards and Technology Special Publication 800-171 (NIST SP 800-171), Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations. The requirements address, among other things:

- access control;
- awareness and training;
- audit and accountability;
- configuration management;
- identification and authentication;
- incident response;
- maintenance;
- media protection;
- personnel security;
- physical protection;
- risk assessment;
- security assessment;
- system and communications protection; and
- system and information integrity.

The requirements also provide for documenting how unimplemented security requirements will be addressed, and require a plan of action and milestones for such items.

Under the final rule, covered defence contractors had until 31 December 2017 to implement a cybersecurity plan in compliance with NIST SP 800-171. Going forward, contractors’ compliance with these cybersecurity requirements may also be considered as part of the evaluation for new contract awards.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Virtually all US agencies, including the largest buyers, such as the Department of Defense and the Department of Energy, are subject to the FAR. Most applicable procurement regulations are found in Title 48 of the Code of Federal Regulations, which contains the FAR as well as agency-specific supplements such as the DFARS.

Very few agencies are exempt from the FAR. Examples include the United States Postal Service, the Federal Aviation Administration and the Federal Reserve. Also exempt are certain mixed-ownership government corporations, such as the Federal Deposit Insurance Corporation and National Railroad Passenger Corporation. While these agencies are not

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18 DFARS 252.204-7012.
subject to the FAR, they must observe their own agency-specific procurement regulations, which often mirror provisions in the FAR, as well as generally applicable procurement statutes, like the Service Contract Act, the Fair Labor Standards Act and the Anti-Kickback Act.

ii Regulated contracts

All federal contracts are regulated, including contracts for services, supplies and construction. Contracts contain different clauses, however, depending on the type of contract, the dollar value and the identity of the procuring agency, among other factors. Procurement regulations do not apply to federal grants and cooperative agreements.

Commercial and non-commercial item contracts

There is a significant difference in the treatment of contracts for government-unique supplies and services, and purchases of commercial items. Acquisitions of government-unique items (such as weapons systems) are subject to more stringent and complex requirements governing, for example, the submission of certified cost or pricing data, implementation of cost-accounting and contract-management systems, and audit requirements. Purchases of commercial items, on the other hand, are generally subject to less stringent requirements.

Commercial items are those items that are ‘of a type’ customarily used by the general public for purposes other than governmental purposes, and have either been or offered to have been sold, licensed or licensed to the general public. For commercial item purchases, agencies select from a list of roughly 70 pre-drafted standard terms and conditions from the FAR for incorporation into the contract. This pales in comparison with the several hundred clauses typically found in contracts for non-commercial items.

Acquisition thresholds

Some acquisitions are exempt from the competition requirements in the FAR because of their low dollar value. Contracts valued at less than US$3,500 are deemed micro-purchases and can be awarded on a non-competitive basis. Contracts below the simplified acquisition threshold, which is currently set at US$150,000 (or US$7 million for commercial items), are typically awarded on a streamlined basis, with fewer terms and conditions and less-stringent competition requirements.

Regulation of agreements with third parties

Some clauses in federal contracts require prime contractors to ‘flow down’ certain terms to their subcontractors. Generally, these clauses support public policies that are important to the government, such as non-discrimination in employment or payment of a minimum wage. The prime contract will identify those clauses that must be flowed down to subcontractors.

Federal contracts generally cannot be transferred or assigned. The Anti-Assignment of Contracts Act prohibits the assignment of government contracts from one entity to another.

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19 41 USC. § 351 et seq.
20 29 USC. §§ 201–219.
21 18 USC. § 874; 41 USC. § 276(c).
22 FAR § 2.101 (definition of ‘commercial item’).
23 FAR §§ 52.222-26 (Equal Opportunity), 52.222-35 (Equal Opportunity for Veterans).
24 FAR § 52.222-55 (Minimum Wages Under Executive Order 13658).
without the consent of the government. The ‘novation’ process is the mechanism by which that consent is provided. It may be possible to structure a transaction to avoid the need to novate the seller’s contracts – for example, where the transaction is a stock purchase. Even then, however, the applicable regulations provide the government discretion to require the contractor to address the change in ownership through a formal agreement with the government.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The government uses a variety of contracting vehicles. Over the past 10 years, the government has increasingly relied upon multiple-award, indefinite-delivery or indefinite-quantity (ID/IQ) contracts to procure common supplies and services, especially IT. One common form of ID/IQ contract, known as a government-wide acquisition contract (GWAC), allows any agency in the government to make GWAC purchases through the issuance of a task or delivery order. GWACs often have dozens of contract holders and combined contract ceiling values of several billion dollars.

The General Services Administration also establishes long-term government-wide ID/IQ contracts (Federal Supply Schedules), for commercial items and services. All government agencies are permitted to place orders off of Federal Supply Schedules contracts at pre-negotiated prices, terms and conditions.

In 2014, the Obama administration adopted a ‘category management’ initiative in an attempt to eliminate duplicate contracts, increase savings and provide best practice for procuring agencies. The federal marketplace was divided into 10 super-categories of commonly purchased goods, each with a category manager charged with gathering and analysing historical data behind the procurement of the goods and services in that category. The intent of the category management initiative is to allow agencies to access that data, analysis and other tools through an online web portal, and encourage them to share best practices across agencies.

ii Joint ventures

Although not a major feature of US government procurement, public–private partnerships (PPPs) do exist at the federal level. Under the Obama administration, the Department of Transportation created the Build America Transportation Investment Center, whose goals included promoting the use of PPPs by providing them access to federal credit and assistance with federal requirements. The Trump administration has proposed using PPPs as part of its infrastructure plan.

Another type of PPP is federally funded research and development centres (FFRDC). FFRDCs are private sector, non-profit organisations that operate in the public interest. They perform work closely associated with inherently governmental functions and assist the government with its long-term research or development needs. FFRDCs enjoy a special relationship with their government sponsors, marked by special access to government data and resources.

25 41 USC. § 6305.
26 See: FAR Subpart 42.12.
27 PPPs are more common at the local level in the United States.
V  THE BIDDING PROCESS

i  Notice

Agencies are required to give public notice of new contract opportunities to maximise competition. Solicitations for new contracts or services are posted publicly, usually on the Federal Business Opportunities website (www.fbo.gov) or, for orders issued under multiple-award ID/IQ contracts, on web portals specific to those contracts.

The solicitation sets forth the procedures for bidding on the opportunity, the content and form of the proposals, and the criteria for evaluating proposals. While the FAR imposes some general restrictions on what the solicitation must contain, agencies generally have broad discretion in how best to meet their requirements. As a result, the content of solicitations can vary considerably depending upon the agency and the procurement.

ii  Procedures

The bidding procedures can vary depending on the nature of the procurement. Two of the most common competitive procedures are sealed bids and competitive proposals. Sealed bids are preferred when:

a  time permits the solicitation, submission and evaluation of sealed bids;

b  the award is made on the basis of price and other price-related factors;

c  it is not necessary to conduct discussions with offerors about their bids; and

d  there is a reasonable expectation of receiving more than one sealed bid.

When one of these four factors is absent, agencies must solicit competitive proposals or employ one of the other competitive procedures outlined in the FAR.

For sealed bidding procurements, the agency publishes an invitation for bids. Once all bids are received, the agency reveals them publicly. The bids are then examined for mistakes and, if none are found, the agency awards the contract to the lowest responsive bid.

In a procurement using competitive proposals (i.e., negotiated acquisitions), the agency issues a solicitation identifying the agency’s requirement, the anticipated terms and conditions that will apply to the contract, the information required to be in the offeror’s proposal, and the factors and significant subfactors that will be used to evaluate the proposal and their relative importance. Agencies typically evaluate cost or price, past performance and technical ability. In negotiated acquisitions, agencies can choose to hold substantive discussions with offerors and give them feedback on areas of their proposals that could be improved.

iii  Amending bids

Sealed bids may be modified or withdrawn by any method contemplated by the solicitation, so long as the agency receives notice prior to the time set for the opening of the bids.

28  FAR § 6.102.
29  FAR § 6.401(a).
30  FAR §§ 14.204, 14.205.
31  FAR § 15.203(a).
32  FAR § 15.305.
33  FAR § 14.304.
For competitive negotiations, proposal amendments must generally be made before the time specified in the solicitation for receipt of proposals. After that time, the amendment is deemed late and will not be considered by the agency except in certain circumstances where an award has not been made and considering the proposal will not unduly delay the solicitation. However, late proposals that make terms more favourable to the government will be considered at any time and may be accepted.

VI ELIGIBILITY

i Qualification to bid
Eligibility to bid on an opportunity depends upon the requirements of the solicitation. Some opportunities are available only to small businesses, or certain types of small businesses, while others are available to any offeror. The FAR requires that contracts be awarded only to ‘responsible’ contractors. Prime contract offerors must be registered in the System for Acquisition Management, which allows prospective offerors to complete standard representations and certifications online.

ii Conflicts of interest
In some cases, a prospective offeror may be ineligible for a contract opportunity because of an organisational conflict of interest (OCI), which arises where:

...because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

There are three types of OCIs addressed in the FAR: ‘unequal access to information’ OCIs, where a firm has access to non-public information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract; ‘biased ground rules’ OCIs, where a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications; and ‘impaired objectivity’ OCIs, where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.

34 FAR § 15.208(a).
35 FAR § 15.208(b)(1).
36 FAR § 15.208(b)(2).
37 FAR § 9.104-1.
38 FAR § 9.501.
39 FAR § 9.505-4.
41 FAR § 9.505-3.
Contract agencies are required to ‘identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible’, and ‘avoid, neutralize, or mitigate significant potential conflicts before contract award’. Contracting agencies must also avoid ‘even the appearance of a conflict of interest in Government-contractor relationships’. Conflicts of interest can also exist for individuals, commonly where a government employee leaves public service and begins working for a contractor. These personal conflicts of interest are governed by federal statutes, such as the Ethics in Government Act and the Procurement Integrity Act, as well as by provisions of the FAR. In some cases, violations of conflict of interest laws can expose individuals to criminal and civil penalties.

### iii Foreign suppliers

Foreign suppliers can bid on most contracts, although there may be restrictions on their eligibility for certain Department of Defense opportunities, or those involving sensitive or highly classified information. Individual solicitations can favour US companies and goods through application of the Buy American Act or the Trade Agreements Act, depending on the nature and value of the procurement. US export laws may require foreign entities to obtain licences from US export authorities before accessing certain restricted types of data and services.

### VII AWARD

#### i Evaluating tenders

Because agencies have significant discretion in determining the evaluation and award criteria, the requirements can change significantly from solicitation to solicitation. That said, the FAR does require that agencies always consider cost or price, quality and, in most instances, the contractor’s past performance. Although some awards are made on an LPTA basis, most procurements allow the government to award to a higher-priced offeror if the agency determines that the proposal presents the best value to the government. Agencies commonly establish evaluation committees to evaluate proposals and make a recommendation to the source selection authority – the individual who makes the final award decision.

Agencies may not deviate from the announced criteria when evaluating proposals. Agencies are also required to document the bases for their decision, and where called for by the solicitation, engage in a comparative trade-off among competing proposals.

#### ii National interest and public policy considerations

Both the national interest and public policy goals play a significant role in government procurement. Procurements can take into account the need for aiding US-based industries, either for economic reasons or to ensure that there is a sufficient domestic supply of critical goods.
supplies and services. Additionally, when national security interests demand it, agencies can make awards on a non-competitive basis\(^{48}\) or override a statutory stay of performance of an award during the pendency of a bid protest.\(^{49}\)

The government can also favour certain types of businesses, such as small businesses, and further public policy goals through the contracting process that may be difficult to achieve through the legislative process. In the past, these goals have included raising the minimum wage, placing restrictions on whom federal contractors may hire or imposing protections on handling sensitive personal data.

**VIII INFORMATION FLOW**

Prior to proposal submissions, offerors are typically free (and often encouraged) to ask the agency questions regarding the solicitation and the agency’s expectations. Agencies then publish the questions and their responses publicly so that all offerors have access to the same information. Following receipt of proposals, agencies may make an award, ask narrow clarifying questions or engage in more substantive discussions to allow offerors to revise their proposal to address any perceived deficiencies.

Following award, in most instances, disappointed offerors and awardees can request a debriefing from the agency, which provides the offeror an opportunity to learn more about how its proposal was evaluated and why it was not selected. While the level of detail provided in a debriefing can vary greatly, in the most recent NDAA (Section 818), Congress expressed its clear preference for providing more meaningful and substantive debriefings. The purpose of this provision is to provide disappointed offerors a better understanding of agency expectations, which can lead to better proposals in the future. Congress also anticipates that the provision will reduce the number of protests filed by offerors who failed to obtain sufficient information about the agency’s award decision through the debriefing process.

**IX CHALLENGING AWARDS**

Contractors can challenge government contract awards by filing a bid protest. Bid protests of most awards can be filed directly with the contracting agency, at the GAO or at the COFC. Some contract actions can be challenged only in certain fora. For example, the GAO has exclusive jurisdiction over protests of task and delivery orders awarded under ID/IQ contracts (and only for orders in excess of US$10 million).\(^{50}\)

i **Procedures**

Bid protests can be filed only by interested parties.\(^{51}\) To qualify as an interested party to challenge a contract award, the protestor must have submitted a proposal in response to the solicitation.\(^{52}\) The protestor also must demonstrate that, if the protest is successful, it has a substantial chance of receiving the award.\(^{53}\)

\(^{48}\) See FAR §§ 6.302-3, 6.302-6.

\(^{49}\) 31 USC. § 3553(d)(3)(C).

\(^{50}\) 41 USC § 4106(f).

\(^{51}\) 31 USC § 3553(a).

\(^{52}\) 31 USC § 3551(2)(A).

\(^{53}\) 4 CFR § 21.0(b)(1).
Bid protests are subject to rigid time requirements. Protests filed at the agency or GAO must be filed within 10 days after the basis for the protest is known or should have been known. Protests at the COFC are not subject to strict timeliness requirements, but should still be filed soon after the contractor learns of the basis for the protest.

If a post-award protest is filed at the GAO within 10 days of award or five days of a required debriefing, the agency is required to stay performance of the contract until the protest is resolved. Protests at the COFC do not trigger an automatic stay of performance, but protesters can request a temporary restraining order or preliminary injunction.

ii Grounds for challenge

The standard of review for bid protests is highly deferential to the contracting agency. The focus is on whether the agency followed procurement law and regulation, made the award consistent with the announced criteria, and performed a reasonable evaluation. The purpose of a bid protest is not to re-evaluate proposals or second-guess the judgment of the agency.

Most successful protests allege objective or procedural errors in the process. Mere disagreement with the agency’s evaluation is not a valid basis for overturning an award. The GAO issues an annual report containing data on bid protests filings during the prior fiscal year. For fiscal year 2017, the five most common reasons that protests were sustained by the GAO were: unreasonable technical evaluation; unreasonable past performance evaluation; unreasonable cost or price evaluation; inadequate documentation of the record; and flawed selection decision-making.

The vast majority of protests are filed at the GAO, whose annual report for fiscal year 2017 indicates that it received 2,596 protests (approximately 7 per cent fewer than in fiscal year 2016). In 2017, GAO’s ‘effectiveness rate’ was 47 per cent. This means the protester obtained some form of relief (either because of voluntary agency corrective action in response to the protest or a protest sustained by GAO on the merits) in 47 per cent of protests filed at GAO in fiscal year 2017. Of the 581 protests for which the GAO reached a formal decision on the merits, the GAO sustained only 99 protests, a sustain rate of 17 per cent.

iii Remedies

The potential remedies available for a protest depend on the forum. Because it is a legislative agency and not a court, the GAO can only make recommendations for corrective action by agencies if it finds an error was made in the procurement process. However, agencies almost always follow the GAO’s recommendations (it is required to report to Congress any instances in which an agency does not follow its recommendations). Common recommendations

54 4 CFR § 21.2(a)(2).
55 See Software Testing Solutions, Inc v. United States, 58 Fed.Cl. 533 (2003) (finding claim of irreparable injury unconvincing where disappointed offeror waited four months after award to seek temporary restraining order)
57 See US Ass’n of Importers of Textiles & Apparel v. United States, 413 F.3d 1344, 1347-48 (Fed. Cir. 2005).
59 See id.
60 See id.
61 See id.
resulting from a sustained protest include re-evaluating proposals, holding discussions with offerors, providing offerors an opportunity to submit revised proposals and making a new source selection decision.

Unlike the GAO, the COFC can provide declaratory and injunctive relief in bid protest cases. Thus, its instructions for remedying flaws in the procurement process are backed by a court order and must be followed by the contracting agency.

X OUTLOOK

Procurement in the United States has always been heavily regulated; however, the level of regulation varies under each respective administration and the Trump administration has clearly made deregulation a priority. The hope is that this will make it easier for government buyers to tap into private sector innovation and expertise, and allow agencies to fulfil their missions more efficiently and effectively.

Only time will tell whether the US government can meet the challenge of acting more like a commercial entity when buying goods and services or if the pendulum of regulation will swing back in the other direction again, as it is inevitably wont to do.
In Venezuela, public procurement is regulated by different statutory instruments. The main piece of legislation applicable to public procurement is the Public Procurement Act 2009 (PPA). The PPA is applicable to all contracts except those for the execution of works, acquisition of goods and provision of services, which are within the framework of international cooperation agreements between Venezuela and other states; employment contracts; real estate and financial leasing; and the sponsorship of sports, art, literature, science and academia. The authority in charge of enforcement of the PPA is the National Contracting Service, which oversees compliance with the PPA by the contracting authority and contractors.

The Rationality and Uniformity Law in Public Contracting (EWA) was enacted by the constituent assembly in January 2018. Although the EWA is an independent piece of legislation, it is essentially an amendment to the PPA aimed at modifying certain rules of the bidding procedure and the enrolment of contractors in the national contractors registry. There is also the Simplification of Proceedings for the Exportations and Importations of State-owned Companies Act 2009, which was published in the Extraordinary Official Gazette No. 5,933. This statutory legislation allows state-owned companies previously authorised by the central planning commission to use the direct adjudication of the contract in all their contracts for the procurement of goods from foreign providers.

Since the last modification of the PPA, the Fair Prices Act is applicable to public procurement matters, and must be taken into account for the contracting entity when preparing the basic budget of the project and by the bidder when preparing their offers.

Finally, there is the Decree-Law for the Promotion of Private Investment under the Concessions Regime 1998 (DLPPICR), which regulates the way private investors may enter into concession contracts for the building and exploitation of infrastructure and the provision of services offered by the national government.

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1 José Gregorio Torrealba R is a senior partner at Leiga Abogados.
3 Official Gazette No. 41,318, dated 11 January 2018, the ‘Constitutional’ Law against economic war for rationality and uniformity in the acquisition of goods, services and public works.
II YEAR IN REVIEW

The most relevant development in the past year has been the de-enactment of the EWA by the constituent assembly in January 2018. Although the constituent assembly does not have legal or constitutional powers for the enactment of statutory instruments or ‘Constitutional Acts’, the fact that the Supreme Tribunal of Justice has not set this law aside allows its enforcement by the government.

The main changes implemented by the EWA in the Venezuelan public procurement regime are the:

a creation of the integrated system for government contracts, which prevails over any other feature of the public procurement regime. The integrated system will be ruled under the policy of simplification of proceedings, technological standardisation, the preferential use of electronic and digital mechanisms, and the promotion of new economic undertakings;

b creation of a new ‘unit for the arithmetic calculation of the maximum and minimum threshold’ (UCAU), which determines the limits for the bidding process applicable for awarding a contract;

c abolition of the need to renew the enrolment before the national contractors registry; and

d establishment of new criteria for determining advantages to the national industry in the bidding proceedings for the adjudication of contracts.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PPA applies to the following subjects, which are the only contracting authorities:

a all public bodies and government agencies of the national, state and municipal levels of government, either centralised or decentralised;

b public universities;

c the Central Bank of Venezuela;

d civil partnerships and mercantile companies where the state and subjects named in (a), (b) and (c) above have an interest equal or above 50 per cent of the patrimony or shareholding (state-owned companies in the first degree);

e civil partnerships and mercantile companies where state-owned companies in the first degree have an interest equal or above 50 per cent (state-owned companies in the second degree);

f the foundations incorporated by any of the subjects named in (a) to (e) above; and

g community councils or any other community organisation handling public funds.

ii Regulated contracts

According to Articles 4 and 5 of the PPA, there are some contracts that are excluded from the application of its rules (see Section I). The type of contracts excluded from the application of procurement procedures include contracts dealing with:

a the provision of professional services and employment;

b the provision of financial services;

c the acquisition and renting of real estate, including leasing;

d the acquisition of cattle;

e the acquisition of artistic, literary or scientific works;
f commercial and strategic alliances for the acquisition of goods and provision of services between natural or juridical persons and contracting public bodies;
g the utilities required for the functioning of the public contracting entity;
h the acquisition of goods from other public entities;
i the acquisition of goods and services:
  • with day-to-day cash;
  • during the validity of emergency decrees; and
  • for defence and intelligence operations; and
j the provision of services and execution of works entrusted to other public entities.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing
Framework agreements are defined in Article 6.33 of the PPA and widely regulated in the Regulations of the PPA. Article 6.33 and Regulation 2 of the PPA define the framework agreements as the contract establishing the unit price for the allowances composing the acquisition of goods, provision of services and building works with a maximum total amount for the contract, which will be performed through purchase orders, establishing the terms and conditions of the particular requirement. The public entity will not be obliged to issue purchase orders for a given amount or pay the upper limit of the price established in the contract. The terms and conditions of the framework agreement is deemed as incorporated in the purchase orders.

Article 7 of the PPA Regulations obliges public entities to consider framework agreements when the preparatory activities lead to the conclusion that the recurrence of the object of the contract makes it viable to use a single bidding proceeding for the adjudication of a framework agreement. According to Article 90, the contracting entity is required to elaborate a global estimate of the price limit and quantities to be included in the list of the price of the framework agreement. On the basis of this amount, the contracting entity will be obliged to apply the corresponding bidding proceeding. The price of each unit will be set by the contracting entity on the basis of the offers submitted (if the requirements exceed the limits).

The PPA also provides for a different kind of framework agreement in Article 6.34, where the service of national contractors selects providers for the contracting entities to purchase goods and services offered through electronic catalogues. This kind of framework agreement will be executed directly by the contracting entity.

ii Joint ventures
Public joint ventures and public authorities are not required to participate in bidding procedures, and contracts will be awarded directly to them in accordance with Article 5 of the PPA. Therefore, public joint ventures and other public entities are allowed to supply their parents with goods, services or works without a prior procurement process.

In the case of public–private partnerships (PPPs), the rules apply in their full extent unless the public partner is a subsidiary of a state-owned company. Since the PPA applies only to state-owned companies and their subsidiaries, in this case, a PPP would be out of the scope of the PPA. When the private sector partner is participating in a project under the DLPPICR, the choice of such a partner must have been done through a competitive bid in accordance with the PPA rules for the open contest.
The Organic Law on Hydrocarbons establishes rules for the incorporation of PPPs, but the bidding process is not established in this statute.

V THE BIDDING PROCESS

i Notice
All contracting entities are obliged to publish the call for bids on their websites when the contract is to be awarded through an open contest. All calls for bids must also be published on the website of the national contracting service. In both cases, the call must remain online until the day before the receipt of the bids. Article 79 of the PPA allows public entities to publish the call for bids in open contests in the national, regional or local media, particularly where building works are concerned. In the case of open international contests, the call for bids may be published in foreign media if authorised by the central planning commission.

The call for bids must contain, among others:

a the object of the bid concerned;
b identification of the contracting entity;
c the address, unit and date of when the terms for the bidding process will be available;
d the place, day and time of the public hearing, or time that the bids and other documentation will be received; and
e the bidding procedure applicable.

ii Procedures
The type of procedure depends upon the value of the contract. The different procurement procedures are applicable according to the following thresholds:

a open contest: when the value of the goods is above 20,000 UCAU, above 30,000 UCAU for services subject to the contract, or, in the case of building works, above 50,000 UCAU. The open contest takes three different forms:
- a single hearing for the letter of intent, clarification and offer;
- a hearing for two statements concerning the letter of intent and offer; however, only the letter of intent and qualifying documents will be reviewed, while the offer will be reviewed in a separate hearing the following day; or
- separate hearings for the submission of the letter of intent, which will be received in the first hearing to evaluate who is qualified to submit an offer and who will be called for the second hearing for the submission of the offer.

b closed contest: when the contract for the acquisition of goods is between 5,000 and 20,000 UCAU, provision of services is between 10,000 and 30,000 UCAU, or, in the case of building works, between 20,000 and 50,000 UCAU;

c request for quotations: when the contract for the acquisition of goods and services is below 5,000 UCAU and, in the case of building works, below 20,000 UCAU; and

d direct award: this is the only procurement procedure related to exceptional circumstances and not the value of the contract.

The PPA allows awarding authorities to use electronic auctions. To be able to participate, the call for bids must be under the principle of neutrality and include the technical specifications of the technology used in the bidding process.
ii **Amending bids**

Once an offer has been submitted, it cannot be amended. It is possible for the contracting entity to change the conditions of the bid up to two days before the hearing (whichever is first, in accordance with the applicable procedure).

### VI **ELIGIBILITY**

i **Qualification to bid**

The disqualification of a bidder is regulated by Article 84 of the PPA, which is fully reproduced in Article 106 of the Regulations of the PPA and provides for the following grounds for disqualification:

- if the required information has not been submitted by the participant;
- if the participant is declared bankrupt during the qualification process;
- if one of the parties to a consortium or alliance withdraws;
- if the participant does not comply with one of the criteria established in the bidding package; and
- if the contracting entity determines that the participant has submitted false information.

The aforementioned rules only apply to bidding procedures for the adjudications of contracts within the scope of the PPA and for the adjudication of concessions in accordance with Article 12 of the DLPPICR.

ii **Conflicts of interest**

In Venezuela, conflicts of interest with regard to public officials gives rise to disciplinary and administrative sanctions, as established in the Statute of Public Function Act, which provides for the removal of the public official. These administrative sanctions are provided for in the Controller General’s Office and National System of Accountability Act, which establishes sanctions that vary from a fine to the suspension of the official for up to 24 months, or his removal and prohibition from performing a role in the public sphere for up to 15 years. The Organic Law on Administrative Proceedings also provides for remedies in the case of conflicts of interest with regard to public officials, who may be challenged by the participants in public procurement procedures.

iii **Foreign suppliers**

Foreign suppliers may bid unconditionally. While domestic value added (DVA) enables local companies to obtain better assessment, it may be applicable to foreign bidders if they employ a local workforce or use local products, and under other similar conditions.

Foreign bidders are also allowed concession contracts, provided they are able to give evidence of their financial and technical capabilities, among others.

### VII **Award**

i **Evaluating tenders**

Once the offers are submitted, the awarding authority is obliged to evaluate them on the basis of the information provided in the tender documents. Particularly, Article 66.13 of the...
PPA provides a system of evaluation that determines the points reached by the offers and the weight given to each factor, including price. The awarding authority is free to determine the value to be given to each criteria, and the lowest price is not always the most important factor.

ii National interest and public policy considerations

In the Venezuelan system, the concepts of public policy and national interest are found in every aspect of public law, and contracts are no exception. Article 151 of the Venezuelan Constitution provides for a relative Calvo Clause when it includes the compulsory jurisdiction of Venezuelan courts of law and Venezuelan law for contracts of public interest, when their nature does not allow otherwise.

In concession contracts, the DLPPICR provides that, in projects originated by private parties, some of the key requirements for the assessment by the authorities are the description of the social benefits that the project may bring, and the study of environmental impact. Also, all bidders for contracts within the scope of the PPA are obliged to include a social responsibility commitment that would not exceed 3 per cent of the price of the contract and may be offered in money or products, building works or services.

Domestic suppliers are given some possibilities to level the playing field with foreign bidders. Chapter III of the PPA is focused on ‘Measures for the Promotion of Economic Development’ and gives the President the power to establish categories of contracts to be awarded to local bidders, incorporation of goods produced in Venezuela, transfer of technology, hiring of local staff and workforce, and others. When offers differ by less than 5 per cent from the best offer, the awarding authority must award the contract to the offer with the largest DVA when it concerns the procurement of goods. When the contract is for building works, the award will be for the bidder headquartered in Venezuela that has the largest incorporation of local products, and largest participation of local staff and workforce.

Article 16 of the EWA provides for the elements that make up the DVA for the purposes of the award:

- raw material;
- workforce;
- equipment;
- technology;
- basic and detailed engineering studies performed by companies domiciled in Venezuela;
- professional services rendered by Venezuelan professionals;
- financial costs paid in Venezuela; and
- depreciation of the equipment installed in Venezuela.

The EWA also includes a description of the way that the DVA is to be valid in order to be taken into account for the assessment of the offers and establishes some aspects that will not be considered as DVA.

VIII INFORMATION FLOW

Bidders are obliged to submit legal and financial information specified in the tender documents for the proper assessment of the bidder and his or her offer. If the information required by the awarding authority in the tender documents is not supplied by the bidder, the authority is obliged to disqualify him or her.
The awarding authority is obliged to notify all the bidders of the outcome of the evaluation of the offers before the execution of the contract. Once the notification of the award has been performed, all bidders will have access to this information.

**IX  CHALLENGING AWARDS**

Challenging awards is rare in Venezuela. Since the decision of the award is rendered by a government authority, administrative legal remedies are available. Unsuccessful bidders will have two main options: administrative remedies, including a reconsideration petition and an appeal before the highest authority; or judicial remedies, through applications for judicial review of administrative matters before a court of law.

In practice, the time frames established in the law are rarely respected. According to the Organic Law on Administrative Proceedings, the administrative remedies should not exceed 15 working days in the case of a reconsideration petition or 90 working days in the case of appeal before the maximum authority. Judicial remedies are governed by the Organic Law on Administrative Jurisdiction 2010 and the proceedings may take a year and a half to reach the deliberation phase. However, it is extremely difficult to predict how long take the judge may take to render a decision.

**i  Procedures**

If the bidder decides to challenge the award of the contract through administrative remedies, the process is simple. A petition for reconsideration should be filed with the contracting authority that rendered the decision, and any documentary evidence should be produced jointly with the petition, but there will be chance to produce evidence up to the day before the decision is rendered. If the contracting authority dismisses the petition, the general rule is that an appeal before the maximum authority of the awarding entity may be filed. If the decision of the highest authority is to dismiss the appeal, the bidder is entitled to file an application for judicial review of administrative matters. The filing of administrative or judicial actions must not prevent the execution of the contract.

The reconsideration petition and appeal before the highest authority must be filed within 15 working days of the decision being notified to the bidder. The mentioned deadlines are established in Articles 94 and 95 of the Organic Law on Administrative Proceedings.

According to Article 32 of the Organic Law on Administrative Jurisdiction 2010, the application for judicial review must be filed:

- **a** within 180 days of the notification to be challenged or within 90 days of the filing of an administrative remedy that has not been decided by the authority; or
- **b** if the administrative decision has temporary effects, within 30 days of notification.

**ii  Grounds for challenge**

In general terms, a challenge to the award of a contract may be brought on the grounds of unconstitutionality or illegality of the decision. The Organic Law on Administrative Proceedings provides for grounds of absolute nullity of the decision based on:

- **a** the determination by a constitutional rule;
- **b** violation of res judicata administrative decisions;
when the content of the decision is impossible to enforce or when enforcement would be illegal; and

when the decision has been rendered by an incompetent authority, or with complete prescience of the legal proceeding.

Other defects or facts may bring a relative nullity of the decision.

Article 121 of the PPA establishes that the contracting entity is obliged to set aside the contract when there is evidence that the award was granted without following the proceedings established in the PPA or any other rule governing public procurement, and when the contract executed differs from the terms and conditions established in the tender documents and offers.

### iii Remedies

The courts are entitled to grant injunctions, set aside contracts, order new tenders and award damages for breaches of procurement law.

Article 166 of the PPA establishes that public officers will be subject to administrative liability, which is sanctioned by the Controller General with a fine, because of the omission or the wrongful application of the bidding procedures provided for in the PPA.

### X OUTLOOK

It is highly unlikely that there will be any developments in government procurement legislation in the mid term. The current economic situation in Venezuela has resulted in public contracting entities incurring breaches of contracts on a large scale because of a lack of payment to government contractors, regardless of how big the projects may be. Currently, several international contractors are exploring options to collect these payments from the government or state-owned entities, and it is possible that the initiation of legal proceedings before local courts or a new wave of international arbitration cases started by these contractors may force the government to reach a settlement of those disputes, or be subject to the enforcement of judgments or arbitral awards in other jurisdictions.
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Javier specialises in project finance and public–private partnerships (PPPs), restructuring and insolvency, real estate and asset-based financing. His practice is focused on PPPs, where he has been involved in structuring, development and financing of infrastructure projects, and advised government agencies, banks, funds and developers in various industries. Javier is a key member of the firm’s restructuring and insolvency practice and has over 15 years’ experience, mainly representing creditors.

He has been recognised by the main publications of the legal environment for his exceptional ability and experience. Chambers Latin America listed him as a leader in the areas of aviation, projects, and banking and finance, and he is recommended by different clients, who emphasise that ‘he is a great facilitator with a deep understanding of legal and business issues’. Another of his clients states that ‘he is really impressive’ and ‘understands laws from other jurisdictions and he can compare them with the laws in Mexico’.

Javier speaks fluent English and spent a year working at Mayer Brown LLP in New York. He obtained his law degree (with honours) at the Instituto Tecnológico Autónomo de México and obtained a diploma in commercial law (with honours) from Universidad Panamericana. In addition, he studied law at the Northwestern Pritzker School of Law in Chicago (with honours) and received a diploma in Management from JL Kellogg School of Management. Javier actively participates as a speaker at national and international forums and is a member of the American College of Commercial Finance Lawyers.

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Vincent Brenot, a member of the Paris Bar, worked for 10 years at Freshfields Bruckhaus Deringer LLP, where he became counsel in 2008, and five years at Willkie Farr & Gallagher LLP as a partner in the public and environmental law practice area. He joined August Debouzy in 2014 as a partner.

Vincent Brenot has extensive experience in all types of French public procurement contracts, assisting and representing before the courts a number of French and international clients, including bidders and public awarding entities and authorities.
He co-heads the public, regulatory and environmental law team. The team in charge of this practice handles all aspects of public matters and regulated industries, including general administrative law, constitutional, European and international public law, human rights and fundamental freedoms, governmental contracts, expropriation law, public finance, urban planning and environmental law.

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Andrew Carter qualified as a solicitor 2015 in England and Wales, and is an associate in Addleshaw Goddard's commercial and procurement team. He advises contracting authorities, utilities and private sector bodies on procurements subject to EU and UK procurement law, from determining whether the regulations apply through to contract award. As well as advising on procurement law, he advises clients on the negotiation and drafting of contractual terms.

He has advised contracting authorities and utilities on a number of complex procurement procedures, including drafting invitations to tender, drafting evaluation methodologies and drafting award decision notices. In addition, he has advised on responding to letters before claim from unsuccessful tenderers.

Mr Carter's recent experience includes advising the Department for Transport on the West Coast rail franchise and advising a university on structuring the procurement of a creative arts centre.

JONATHAN DAVEY
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Mr Davey specialises in procurement and commercial law, and heads Addleshaw Goddard’s 60-lawyer strong commercial group.

First ranked in Chambers UK for procurement law, Jonathan frequently advises a variety of public bodies as well as significant private sector clients on procurement law and commercial matters. Chambers’ directory describes him as ‘very much at the forefront of the procurement circuit’ having noted previously that ‘his advice is excellent, particularly in minimising risk’ and that ‘He has a great grasp of the rules and gives solid commercial advice’.

He was founder of and first chair of the Procurement Lawyers’ Association, and speaks and writes widely on procurement and commercial law topics in the UK and abroad. He won the Who’s Who Legal Global Procurement Lawyer of the Year award in 2014 and 2015 and Government Contracts Lawyer of the Year in 2016 and 2017.

His experience includes leading the AG team advising the Danish government on the Fehmarnbelt Tunnel project, a €6 billion, 19 kilometre road and rail tunnel linking Denmark and Germany; advising the Department for Transport on aspects of rail franchising; and advising Parliament on their proposed multibillion-pound refurbishment programme.

LOUISE DOBSON
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Since qualifying in 2007, Louise Dobson has specialised in commercial dispute resolution and risk management, with a focus on procurement challenges and high-value complex contractual disputes. She acts for both public and private sector clients and provides advice on live claims alongside dealing with dispute avoidance and risk management work, assisting
with contract negotiations, terminations, exit strategies and payments and supporting tender teams with high-value procurement processes and the related contracts.

Ms Dobson is a Legal Director and is ranked in *Chambers and Partners* as an ‘Associate to Watch’ for litigation and sources note that Louise ‘is establishing herself firmly . . . by acting on a number of high-profile procurement cases’ (*Chambers and Partners, 2017*) and has ‘very good understanding of tactics and strategy’ (*Chambers and Partners, 2018*). Louise is ranked as a ‘Next Generation Lawyer’ in *The Legal 500* in 2018 and is noted as ‘very hard working’ with specialist knowledge of the health and pharmaceuticals sector.

Ms Dobson has particular experience working in the health sector, advising arm’s-length bodies of the NHS on complex contractual claims, businesses in the healthcare, life sciences and pharmaceutical sectors, and dealing with the management of confidential and commercially sensitive data and information in procurement disputes (whether personal, patient or business data). She successfully acted alongside Bill Gilliam for the claimant in *Counted4 Community Interest Company v. Sunderland City Council* [2015] EWHC 3898 (TCC). She is also a member of the Procurement Lawyers’ Association.

**CLARE DWYER**  
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Clare Dwyer is a commercial litigator, described by *Chambers and Partners* as having a ‘particular expertise in public procurement litigation’. She has been involved in several high-profile cases in this field, including the recent case of *CEMEX v. Network Rail Infrastructure Limited* and regularly advises on procurement challenges, both for and against public authorities.

She is a member of the Procurement Lawyers’ Association and was involved in drafting and launching in 2017 the litigation protocol for the conduct of public procurement claims in the English Court. She also trains clients in dealing with problems arising from the conduct of public procurement processes, and other matters of public law such as health and transport.

Mrs Dwyer deals with a wide range of other disputes, from multimillion-pound warranty claims to tax litigation, specialist rail arbitration and judicial review. Her clients range from those in the public sector (such as transport infrastructure providers, NHS trusts, and other public bodies) to leading manufacturers, retailers and service providers.

She is a CEDR-accredited mediator, and has higher rights of audience in civil proceedings.

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Rodrigo Esteves de Oliveira has a law degree and a master’s degree (LLM) in administrative law, both from the University of Coimbra faculty of law, where he was also admitted to a PhD.

He is an assistant professor at the University of Coimbra faculty of law, and is a lecturer there in postgraduate studies in law and at the University of Lisbon faculty of law, the Catholic University of Portugal, Lisbon and the Catholic University of Portugal, Oporto. He also lectures regularly at the Centre for Judicial Studies (for the training of judges and public prosecutors).

He joined VdA in 2006 and is currently a partner in the public law area of practice. In this capacity, he has been involved in several projects and transactions, mainly in public procurement, public regulation and matters concerning administrative concessions.

Rodrigo is the author of various articles and publications on matters within his fields of expertise, and is admitted to the Portuguese Bar Association.
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Ada Esposito is a managing associate in the Administrative Law department of Legance. She assists national and international clients taking part in public procurement biddings for works, services and supplies contracts. Her main focus is on infrastructures (highways, airport, ports, railways), public utilities and privatisations, in addition to PFI/PPP projects and the bankability of the relevant agreements. She also provides legal assistance in relation to the different steps of the procedures (from the pre-qualification to the execution of the relevant agreements), supporting the clients in the executive phase of the public contracts, and in relation to any issues concerning the performance of the public contracts in general.

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Vanessa specialises in real estate finance and investment, projects and project finance, energy, structured finance, financing of public entities and M&A. She has particularly strong experience in financing and investments in the hospitality sector as part of a wide real estate practice that also covers the retail, residential and industrial markets.

Vanessa is also an expert in project finance and PPPs, including energy and infrastructure projects. She was instrumental in implementing the PPP schemes in Mexico, advising both the national government and the government of Mexico on the structuring, bidding and implementation of the first PPP projects, and has since been involved in major hospital, road, water and prison PPP projects. Vanessa has also advised clients on the preparation of unsolicited proposals and bids under the Mexican PPP Law.

Her international experience is substantial and she is fluent in English. She regularly advises multinational and national clients, and has advised LCA Capital in many real estate transactions. She provides ongoing advice to Marriott and FibraHotel, a Mexican real estate investment trust, in its multiple business class hotel acquisitions. She also advised the Ministry of Transport and Communications on various road concessions and project restructurings.

Vanessa is listed in Chambers Latin America as a key partner, ‘highly praised by clients’ and ‘a hugely capable lawyer who always thinks of a solution rather than a problem’. She obtained her LLM from the University of Chicago Law School, having graduated as an attorney from the Instituto Tecnológico Autónomo de México with honours.

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Ryan counsels and represents government contractors and subcontractors on a broad range of legal issues, including bid protests, organisational conflicts of interest, ethics compliance, and contract claims and disputes. He graduated from the Georgetown University Law Center and was a law clerk for the Hon. Edward G Smith for the United States District Court for the Eastern District of Pennsylvania.
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Amy Gatenby has been a solicitor in England and Wales since 2006 and is a legal director in Addleshaw Goddard’s procurement team. She specialises in all aspects of EU and UK public procurement law and regularly advises both public and private sector clients on a wide variety of non-contentious and contentious procurement matters.

She routinely advises public authorities and utilities on high-profile procurement processes for major projects, and advises on all aspects of the procurement process from the structuring of a transaction and whether the public procurement regulations apply, to pre-market engagement, choice of procedure, drafting contract notices, designing effective evaluation models, material change risk and handling award challenges. She is also a member of the Procurement Lawyers’ Association.

Her recent experience includes advising the Corporate Officer of the House of Lords and House of Commons in relation to the restoration and renewal programme for the Palace of Westminster and the development of the House of Commons Northern estate. She is also advising the Department for Transport on the West Midlands and West Coast rail franchise competitions.

BILL GILLIAM
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Bill Gilliam is a commercial dispute resolution and litigation partner. He specialises in heavyweight disputes. He has particular expertise in the management and resolution of procurement challenges. He has an enviable track record of success in litigation and arbitration, together with all forms of alternative dispute resolution, including expert determination, negotiation and mediation.

Mr Gilliam acts for national and international clients in a wide range of fields and has considerable experience of advising both private and public bodies in a range of sectors, including health, transport, retail and technology. He has led many of the highest-profile procurement litigation cases in recent years, including *Network Rail v. Mermec* (successful strikeout of a claim that was just out of time), *Covent Garden Market Authority v. Bouygues* (including a major hearing dealing with a complex disclosure exercise) and *Roche Diagnostics v. Mid Yorkshire Hospitals NHS Trust* (precedent-setting application for specific and early disclosure from the defendant trust). In December 2015, he successfully acted for the claimant in *Counted4 Community Interest Company v. Sunderland City Council* [2015] EWHC 3898 (TCC), the first reported case dealing with automatic suspension under the Public Contracts Regulations 2015.

As noted in *Chambers and Partners* 2018, he is praised by sources for his ‘great tactical acumen and his understanding of all the relevant considerations of all the relevant commercial concerns.’ Mr Gilliam is praised by clients in *The Legal 500* for being ‘immensely liked and respected . . . his common sense and straight-talking analysis of any situation is first class.’

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Filippo is mentioned in *Chambers and Partners* as follows: ‘Lauded for his ability to manage complex issues’ (2015), he ‘handles a broad range of contentious and advisory issues with a particular focus on public contracts’ (2014). ‘A very strong lawyer who is always at the disposal of his clients’ (2013), and he ‘receives considerable positive recognition’ (2012), ‘a wonderful administrative lawyer and explains the problems very clearly’ (2011).

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John represents a wide array of organisations that do business with the federal government. He represents some of the largest defence contractors in the world in high stakes bid protest and claims litigation. He also regularly assists small and emerging firms, as well as commercial and foreign companies with a limited footprint in the government market, with navigating the complex requirements of performing federal contracts. John also advises for-profit and non-profit organisations on federal grants matters.

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