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

Our geographic coverage this year remains impressive, covering 17 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.

It is frankly depressing to have to refer in the future tense to Brexit for the third successive edition. However, it remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond any ratified transitional period. Her Majesty’s Government has pronounced itself committed to the need for continued regulation of procurement, and has secured approval from the World Trade Organisation for the United Kingdom to become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, once Brexit happens.

In the UK and EU we are starting to see increasing use of the national legislation emerging from the Concessions Directive and there is also a growing body of case law on the Hamburg exception.

UK practitioners are coming to terms with the Court of Appeal’s landmark decision in the *Faraday* case, which has called into question the use of what had become reasonably widely utilised approaches to avoid the application of the procurement rules where a developer initially had a right (rather than an obligation) to carry out works. That case will continue to have wide-ranging implications for real estate development affected by procurement law.

Looking further afield, it is clear that law and policy on government contracting continue to be shaped by political developments at national and international level:

- with GPA parties giving formal approval in October, Australia joined the (revised) GPA on 5 May 2019;
- new international agreements on government procurement have emerged in the US, Mexico, Canada Trade Agreement (USMCA), executed in December to replace NAFTA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force between Canada, Australia, Mexico, Japan, New Zealand and Singapore in December;
- US sanctions against Venezuela constrain US financing for Venezuelan public bodies and the state-owned Petroleos de Venezuela, with the future outlook for government purchasing and procurement policy very much dependent on the outcome of the current political situation; and
Brazil, under a liberal political agenda, has launched a programme of privatisation involving the sale of public assets and the award of contracts for the management of public services across a range of economic sectors.

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

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

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2019
I INTRODUCTION

Argentina is a federal country, which means that the federal 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, called COMPRAR, 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 can be mentioned, and its regulation, issued by Decree 118/17, by which the public–private partnership contracts 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.
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:

- construing 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. Despite public trusts not being governed by the GRPP and its Regulation, Budget Law 2019 – Law No. 27,467 – states that procedures for the selection and contracting of works, goods and services carried out by public trusts shall comply with the guiding principles of the GRPP and its Regulation.

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 interest in the fields of infrastructure, housing, activities and services, productive investment, applied research or technological innovation. 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. 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. In 2018, the National Roadways Direction awarded the contracts by means of Resolutions 1126/2018. Through Resolution 81/2019, issued by the Federal Secretary of Energy, the second international public tender under PPP Law and Decree 118/17 was launched for the building and operation of high-voltage lines.

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.

This obligation applies to all federal 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.

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.

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

IV THE BIDDING PROCESS

i Procedures

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

- a public bid (the principal method of procuring), which implies a broad call to tender;
- a private bid, which consists of an invitation to tender addressed to certain specific bidders already enrolled with the National Procurement Office Registry; and
- 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.¹¹

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 less than 1.6 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 1.6 million pesos, a competitive procedure is required. In this case, if the contract is valued at over 1.6 million pesos but less than 8 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 8 million pesos must be awarded after a public bid procedure, which implies a broad call to submit offers and a general announcement.¹²

Finally, under the public–private partnerships regime, Decree 118/17 states that the mechanism of direct award is not applicable in any case.¹³

¹¹ Section 25(d), GRPP.
¹² Section 27, GRPP.
¹³ Section 12, Subsection 3.
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 website14 or in the Electronic Contracting System.15 In practice, the invitation to tender is also commonly published in the relevant national or local newspapers. The aforementioned publication must 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.16 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).17

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.18

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.19

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.20

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.21

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

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15 https://comprar.gob.ar.
16 Section 40, Regulation of the GRPP.
17 Section 32, GRPP; and Sections 40 and 42, Regulation of the GRPP.
18 Section 41, Regulation of the GRPP.
19 Section 44, Regulation of the GRPP.
20 Section 47, Regulation of the GRPP.
21 Section 17, CPM.
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; 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.22

iii Submitting and amending bids

Prior to the submission of a bid, it is necessary to comply with the federal tax regulation in order to participate in a public procurement for contracting with the federal government. In this sense, Resolution 4164-E/2017 of the Federal Administration of Public Revenue states the procedure throughout the federal administration can verify that the bidders comply with tax regulation. Also it is necessary 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.23 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.24

The submission of a bid implies, for the bidders, full knowledge and acceptance of the rules and clauses governing the tender;25 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.26 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

22 Section 12, Subsection 8.
23 Section 51, Regulation of the GRPP; and Section 22, CPM.
24 Section 22, CMP.
25 Section 52, Regulation of the GRPP.
26 Section 53, Regulation of the GRPP.
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.27

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. This term can be automatically extended, for the same 60-day period, every 60 days. A bidder who has decided not to maintain his or her bid for a new time period must give notice of this 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.28

The bids must be opened at the place, date and time stated in the tender documents, at a public event.29 The original version of each bid must be available to the bidders for the following two days.30

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 are a continuation, transformation, fusion or division of other companies with no authorisation to enter into contracts with the public administration or their controllers;31

b bidders who are not authorised to enter into contracts with the public administration;32

c bidders who, according to the precision and concordance of the bids, have cooperated with each other in the bidding process, arranging or coordinating positions. It is presumed that this case is configured between bids presented by spouses, partners or relatives within the first grade both naturally, adoption or any other, unless proof in contrary;33

d bidders who, according to the precision and concordance of the bids, have simulated real competition or concurrency;34

e bidders who, according to the precision and concordance of the bids, have created a simulation tending to elude the effects of these qualifications to enter into contracts with the public administration;35

f bidders who, 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;36

g bidders who have breached previous public contracts;37

27 Section 78(a), Regulation of the GRPP.
28 Section 54, Regulation of the GRPP.
29 Section 59, Regulation of the GRPP.
30 Section 60, Regulation of the GRPP.
31 Section 68(a), GRPP.
32 Section 68(b), GRPP;
33 Section 68(c), GRPP.
34 Section 68(d), Regulation of the GRPP.
35 Section 68(e), Regulation of the GRPP.
36 Section 68(f), Regulation of the GRPP.
37 Section 68(g), Regulation of the GRPP.
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; and

individuals or legal entities 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.

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 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).

According to Law 27,401 – the Criminal Liability of Legal Entities Act, legal entities willing to make agreements with the government shall have and comply with an integrity programme. Said integrity programme must contemplate, among other aspects, procedures to promote integrity, supervision and control, detecting and correcting irregularities and unlawful acts. The integrity programme required must be related to the risks inherent in the activity carried out by the legal entity, its size and economic capacity.

ii  Conflicts of interest

According to Decree 202/17, the bidders must complete, sign and attach to the bid an affidavit stating that they are not affected by any cause of conflicts of interest; otherwise, they will be excluded from the corresponding procurement procedure. Falsehood in the information included in the affidavit shall be considered as a maximum severity infringement, which could trigger the application of sanctions.

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 does not have a branch duly registered in Argentina.

As mentioned above, notices of invitation to take part in an international public tender must be published on the official website of the United Nations (UN Development

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38 Section 68(h), Regulation of the GRPP.
39 Section 68(i), Regulation of the GRPP.
40 Section 24.
41 Section 22 and 23.
42 Section 1, Decree 202/17.
43 Section 6, Decree 202/17.
44 Section 6, Decree 202/17.
45 Section 26(b), Subsection 2, GRPP.
Business) or the World Bank (DG Market), at least 40 calendar days before the date fixed for the opening of the bids.\(^{46}\) Under the public–private partnerships regime, in the case of international bidding, this 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.\(^{47}\)

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

If, for certain 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.\(^{48}\)

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.\(^{49}\)

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 consider the different aspects provided in the specification documents in order to compare them and determine their order of merit.\(^{50}\)

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, unless the opposite is expressly stated in the

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\(^{46}\) Section 32, GRPP; and Sections 40 and 42, Regulation of the GRPP.

\(^{47}\) Section 12, Subsection 8, Decree 118/17.

\(^{48}\) Section 61, Regulation of the GRPP.

\(^{49}\) Sections 62 and 63, Regulation of the GRPP.

\(^{50}\) Section 27, CPM.
tender documents, 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.\(^{51}\)

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.\(^{52}\) 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. 27,437 gives preference to bids offering '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.\(^{53}\)

In general terms, the preference provided under Law No. 27,437 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 15 per cent when such offers are made by companies classified as small and medium-sized enterprises, and 8 per cent when made by other companies.\(^{54}\)

**VII INFORMATION FLOW**

According to the GRPP and its Regulation, the principles of openness and publicity are general principles that govern all procurement procedures.\(^{55}\) 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;\(^{56}\) 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.\(^{57}\)

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.

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51 Section 15, GRPP.
52 Section 73, Regulation of the GRPP; and Section 28, CPM.
53 Sections 2 and 5, Law No. 27,437.
54 Section 2(a), Law No. 27,437.
55 Section 3(d), GRPP.
56 Section 4, Regulation of the GRPP.
57 Section 26, Regulation of the GRPP.
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.

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,

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58 Section 48, Regulation of the GRPP.
59 Section 12, Subsection 11.
60 Section 49, Regulation of the GRPP.
61 Section 50, Regulation of the GRPP.
62 Section 12, Subsection 11.
63 Section 60, Regulation of the GRPP.
64 Section 73, Regulation of the GRPP; and Section 29, CPM.
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 the basis 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.

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.

- **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 awarding of the rejection of the previous remedy.

- **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. 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, *per se*, a suspension of the procurement process. However, on its own initiative or by means of a request from a claimant, the

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65 Sections 73 and 78(d), Regulation of the GRPP.
66 Section 74, Regulation of the GRPP.
67 Section 74, Regulation of the GRPP.
68 Section 89, Decree 1759/1972.
69 Section 25(a), Law No. 19,549, Administrative Procedure Act.
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.\textsuperscript{70} 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.\textsuperscript{71}

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.

\textsuperscript{70} Section 5, Regulation of the GRPP; and Section 12, Law No. 19,549, Administrative Procedure Act.

\textsuperscript{71} 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. Further, the recent enactment of the Government Procurement (Judicial Review) Act 2018 (Cth) (the Government Procurement Act) provides suppliers with significant new rights to challenge a government procurement process for contravention of the CPRs.

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

There are a number of Commonwealth government procurement connected policies. Different government agencies are responsible for these policies. For example, the Department of Industry, Innovation and Science is responsible for the Australian industry participation policy, and the 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.
State, territory and local government – key legislation and official guidance

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

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

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

WTO Agreement on Government Procurement

In addition to the above, Australia has been an observer of the World Trade Organization (WTO) Agreement on Government Procurement (GPA) since 4 June 1996. The Commonwealth government has been working towards Australia’s accession to the Agreement, and Australia received an in-principle agreement to join the GPA in June 2018, followed by a formal invitation on 17 October 2018. On 28 November 2018, the Australian government tabled the text of the GPA in parliament, and the terms of accession are currently being considered by the Joint Standing Committee on Treaties.

ii Fundamental procurement principles

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

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

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

II YEAR IN REVIEW

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

Policy and guidance

The Federal Modern Slavery Act 2018 (Cth) (the Modern Slavery Act) came into effect on 1 January 2019 and establishes a supply chain reporting regime requiring the
Commonwealth, a corporate Commonwealth entity or a Commonwealth company to prepare a modern slavery statement for each financial year. The statement must describe any risks of modern slavery in the reporting entity’s operations and supply chains, and actions taken by the reporting entity to assess and address those risks. Statements must be provided for every 12-month period in which the reporting entity has annual revenue of at least A$100 million. Modern slavery statements will be published online on a central register, which is freely accessible to the public. While the Modern Slavery Act does not impose financial penalties for non-compliance, the Minister can request a non-compliant entity to provide an explanation and undertake specified remedial action, insofar as non-compliance with reporting requirements is concerned. Equivalent legislation applicable to commercial organisations has recently been passed in New South Wales.

The Government Procurement Act was assented to on 19 October 2018 and, as noted above, provides suppliers with significant new rights to challenge a government procurement process. Further detail about the new legislation and the equivalent legislation enacted in New South Wales is provided in Section IX.

ii Case law

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

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

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

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

ii Regulated contracts

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

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

a grants;

b investments and divestments;

c sales by tender;

d loans;

e purchases of goods or services for resale, or of goods or services used in the production of goods for resale;
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 those described below in Section IX.

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

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

- 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, noting that in recent years, all states and territories have released guidelines for the submission and assessment of unsolicited proposals (save for Western Australia, where draft guidelines are in the development phase); 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 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:

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

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

VIII INFORMATION FLOW

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

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

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

IX CHALLENGING AWARDS

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

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

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

At a state level, in New South Wales the Public Works and Procurement Amendment (Enforcement) Act 2018 (NSW) was assented to on 22 November 2018 and enables the NSW Procurement Board to issue policies and directions concerning the procurement of goods and services by and for government agencies. The new legislation establishes a set of enforcement powers and rules relevant to challenging awards, including:

- a procedure to lodge complaints about the conduct of government agencies where it is alleged they have contravened procurement provisions; and
- power for the Supreme Court to issue injunctions or award compensation for contraventions of procurement provisions.
Procurement decisions are now likely to come under judicial scrutiny as complainants challenge the conduct of government agencies at both a federal and state level under the remit of the new legislation.

However, awards made in relation to unsolicited proposals are governed by separate guidelines, and, therefore, it is unlikely such awards will be subject to challenge by judicial review.

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

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

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

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

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

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

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

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

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

ii Grounds for challenge
In practice, challenging procurement decisions can be difficult in the absence of serious wrongful conduct.
While complainants can now make an application under the Government Procurement Act to the Federal Court for an injunction or an order of compensation for contravention of the CPRs by a government body, or both, even if the court finds that the CPRs have been contravened, the court is not able to overturn the awarded contract.

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

Depending on the circumstances, private law remedies may be available. For example:

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

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

*Hughes Aircraft Systems International v. Airservices Australia*\(^2\) 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*\(^3\) 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.

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\(^2\) (1997) 146 ALR 1.

\(^3\) (1997) 147 ALR 419.
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, the Government Procurement Act now provides an avenue for seeking an order for payment of compensation for contravention of the CPRs in relation to a covered procurement.

X OUTLOOK

The focus in government procurement over the following year is likely to remain on Australia’s accession to membership of the WTO Agreement on Government Procurement.

Furthermore, going forward government procurement processes will likely be subject to a much larger scope of judicial scrutiny, as contractors seek to take advantage of the new remedies available to them under the Government Procurement Act. Government contractors should ensure they are familiar with the requirements under the CPRs and seek legal advice where they suspect a contravention of the CPRs affecting their interests in a tender process.

Finally, the enactment of the Modern Slavery Act is likely to compel government agencies to procure goods and services from organisations that comply with the requisite reporting requirements. Contractors will need to gain visibility into their local and global supply chains and take action to manage any identified risks.
I INTRODUCTION

The main sources of law for public procurement in Austria are the Federal Public Procurement Act 2018 (BVergG), the Federal Act on the Award of Concession Contracts 2018 (BVergGKonz) and the Federal Act on the Award of Contracts in the Fields of Defence and Security 2012 (BVergGVS) as amended. 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 transposes the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive and the Remedies Directive. The BVergGKonz implements the 2014 Concession Contracts Directive, whereas the BVergGVS transcribes the Defence and Procurement Directive. In addition, the case law of the Federal Administrative Court (BVwG), the nine administrative courts, the Supreme Administrative Court (VwGH), the Supreme Constitutional Court (VfGH) and the Court of Justice of the European Union (CJEU) applies.

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

The general principles of public procurement were formulated in compliance with the EU directives, the EC Treaty and the Federal Constitution. Accordingly, the basic principles for public procurement are free and fair competition, equal treatment of all candidates and tenderers in due consideration of the Community rules on fundamental freedoms, and non-discrimination. Pursuant to Section 20, Paragraph 1 of the 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 entry into force of an amended BVerG on 21 August 2018 (BVerG 2018), putting an end to a two-year, four-month period of failure of the Austrian government to implement the 2014 Procurement Directives. As the amended law tackled the entirety of the issues provided for in the aforementioned Directives and was, therefore, ‘big’, the Austrian legislator opted for a totally new BVerG 2018 rather than merely further amending the current law.

The key changes are as follows:

- extension of the applicability of the negotiated procedure with prior notice;
- introduction of the new procedure ‘innovation partnership’;
- common cross-border procurement procedures of (two or more) EU/EEA contracting authorities;
- compulsory e-procurement as of 18 October 2018;
- codification of the intercommunal cooperation (public–public cooperation);
- codification and extension of in-house procurement;
- 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;
- extension and tightening of exclusion grounds;
- enhanced consideration of ecological, social and innovative aspects;
- new obligation to cancel contracts under certain conditions;
- extended application deadline in proceedings for a declaratory judgment;
- new definition of preliminary works prior to the procurement procedure and provision on conflicts of interest;
- further strengthening of the most economically advantageous tender principle;
- clarification of the extent of permissible modifications of existing contracts (the ‘safe harbour rule’); and
- notification requirement regarding awarded works contracts with a contract value exceeding €100,000.

Concerning jurisprudence, one ruling stood out in the preceding year as to its relevance to contracting authorities and their responsibility to thoroughly prepare procurement procedures. The VwGH held that it was unlawful to write in a clause into the contract allowing the amendment of the contract itself in the second stage of the procurement procedure. Consequently, not all economic operators interested in the contract had knowledge of the clause from the outset. Therefore, this clause is inadmissible because of its invisibility.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

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

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

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

ii Regulated contracts

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

In addition, the BVergGKonz sets forth specific rules and provisions applicable for awarding service and works concession contracts. Pursuant to Section 5, Paragraph 1 and Section 6, Paragraph 1 of the BVergGKonz, 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 BVergGKonz, on concessions comprising both services and works, the provisions of the contract type that constitutes the main subject matter of the concession contract shall apply. The term of concession contracts must be determined. If the term exceeds five years, it must not pass the period in which the concessionaire is able to generate the capital expenditures plus a return. Generally, the BVergGKonz leans on the structure of the BVergG, but imposes a less strict regime. For instance, the contracting authority is generally free to shape the award procedure of the concessionaire as long as the provisions of the BVergGKonz are observed. Likewise, the remedy regime is similar to that of the BVergG, assigning the competence to the BVwG.

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

Pursuant to the respective Commission Delegated Regulations (EU) on the application thresholds for the procedures for the award of contracts, the following application thresholds for the procedures for the awards of contracts apply.

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3 Section 12, Paragraph 1 and Section 185, Paragraph 1 of the BVergG; Section 11, Paragraph 1 of the BVergGKonz; and Section 10, Paragraph 1 of the BVergGVS.
### Austria

<table>
<thead>
<tr>
<th>Public service and public supply contracts</th>
<th>Public Sector Directive</th>
<th>From €144,000 (specified contracting authorities, e.g., ministries) to €221,000</th>
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<tbody>
<tr>
<td>Public service and public supply contracts</td>
<td>Utilities Directive Defence Directive</td>
<td>€443,000</td>
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<td>Public works contracts</td>
<td>Public Sector Directive Defence Directive</td>
<td>€5.548 million</td>
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<tr>
<td>Concession contracts</td>
<td>Concession Contracts Directive</td>
<td>€5.548 million</td>
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Note that the BVergG, BVergGKonz and BVergGVS also apply below these thresholds. Whether the contract exceeds the thresholds is relevant for the scope of the applicable regulations (e.g., with regard to the number and conditions of the eligible tender procedures). The rules for contracts below the thresholds are, in general, less stringent (e.g., providing for simplified rules on publication obligations). In contrast, more formalised and transparent procedures apply above the thresholds.

Moreover, within the scope of the BVergG, contracts that do not exceed a value of €100,000 may be awarded directly. Direct awards with a prior market survey are applicable to 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 the utilities sector, irrespective of minor differences (e.g., in relation to contracts on financial services). However, certain exemptions are reserved to the utilities sector exclusively, such as specific contracts awarded for purposes of resale or lease to third parties.
IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

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

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

ii Joint ventures

Public–public joint ventures are common in Austria. In practice, one 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 BVergG 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 (e.g., Teckal and Stadt Halle). However, the BVergG 2018 extended and differentiated its scope. Pursuant to Section 10, Paragraph 1, contracts that a contracting authority award to a legally distinct entity do not come under the BVergG if the contracting authority exercises over the distinct entity in question a control that is similar to that over its own departments, if the entity carries out more than 80 per cent of its activities with the contracting authority or authorities that control it, and if there is no private ownership or participation in the entity. However, the BVergG 2018 introduces a narrow exemption from the interdiction of private participation. According to Section 10, Paragraph 1, Subparagraph 1 c, non-controlling and non-blocking forms of private capital participation required by national legislative provisions that do not exert a decisive influence are admissible. Further, the BVergG 2018 widens the scope of the ‘in-house’ exemption to the ‘bottom-up’ and ‘affiliate’ in-house awards.

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. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna.
Moreover, the BVerfG 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 BVerfGKonz). The notion of PPP is not recognised by Austrian public procurement law, and PPPs are typically classified as service or works concessions.

V THE BIDDING PROCESS

i Notice
Contracts that come under the procurement regulations must be advertised in the OJEU. In addition, they have to be published at a nationwide level. As of 1 March 2019, all domestic advertisements must be executed within the scope of the Open Government Data (OGD) system. The contract authorities are obliged to communicate the metadata of their procurement procedures accordingly. This should ensure better accessibility of information on tenders. Contracts not exceeding the thresholds may but do not need to be advertised at the EU-level.

ii Procedures
Contracting authorities must use one of the tender procedures provided for in the BVerfG: 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 BVerfG 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 BVerG 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, these negotiations must not modify the essential characteristics of the contract.

VI ELIGIBILITY

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

In this respect, the bidder is entitled to submit the European single procurement document pursuant to Section 80, Paragraph 2 of the BVerG. 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 BVerG).

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 BVerG 2018);
g. performance in earlier public contracts showing major or permanent deficiencies (newly introduced by the BVerfG 2018); or
h. guilt of serious misrepresentation in providing information.

However, in certain cases, a tenderer may be permitted to participate in a procedure despite the application of an exclusion ground if they provide evidence of ‘self-cleansing’. To do so, the tenderer is – in accordance with the respective tightened provisions pursuant to Section 83, Paragraph 2 of the BVerfG 2018 – obliged to prove that he or she has (1) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; (2) clarified the facts and circumstances in a wide-ranging manner by actively collaborating with the investigating authorities; and (3) taken effective technical, organisational, personal and other measures that are suitable to prevent further criminal offences or misconduct.

ii  Conflicts of interest

Pursuant to Section 26, Paragraph 1 of the BVerfG, the contracting authority must take appropriate measures in order to prevent conflicts of interest. Such a conflict of interest is established if personnel of the contracting authority involved in the tender procedure might have, directly or indirectly, a financial, economic or other personal interest that may impair their impartiality and independence. In addition, according to Section 25, Paragraph 2 of the BVerfG, economic operators or bidders that have advised the contracting authority or have participated by other means in the preparation of the tender procedure must be excluded if their participation would distort equal and fair competition in consideration of the principle of equal treatment. However, prior to any exclusion, the contracting authority is obliged to afford the economic operator the possibility to prove that his or her participation could not distort equal and fair competition.

iii  Foreign suppliers

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

In the utilities sector, a contracting authority can exclude a foreign candidate or bidder from an award procedure above the thresholds with regard to products originating from countries that are not EEA signatories or have no agreement with the EU according to which actual access to their national markets is guaranteed in favour of EU-based entities, and that have a legal situation comparable to the one provided by the BVerfG. 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 about the tender or pre-qualification documents. The contracting authority must respond to such requests. It must summarise the anonymised questions and the answers and communicate them to all participating candidates or bidders.

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

IX CHALLENGING AWARDS

i Procedures

There are two distinct main types of proceedings before the administrative courts: review proceedings that can be brought in prior to the award of the contract, and proceedings for declaratory decisions subsequent thereto. Applications for review proceedings seek to have decisions by the contracting authority declared null and void. Applications for declaratory decisions tend to seek to have award procedure faults declared unlawful.
Subject to the type of proceedings and the means of communication of the decision concerned, there are distinct time limits. Applications for review proceedings must be filed – 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 of the moment in which the applicant had or should have had knowledge of the challenged decision (e.g., award). However, the sanction to cancel the contract or to declare the contract null and void is subject to an (absolute) application term of six months subsequent to the challenged award.

ii  Grounds for challenge

According to the 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 2017 to 31 January 2018, 32 per cent of appeals filed with the BVwG were granted.

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

The decision deadline for the courts is six weeks.

iii  Remedies

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

The courts may declare contracts null and void. If they refrain from doing so, they generally must impose fines instead. The highest fine imposed (on BBG) to date amounted to €367,000.7 In this respect, the VwGH8 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.

8 Ra 2017/04/0005, 23 October 2017.
Infringements of the procurement law entitle disregarded economic operators to claim forbearance, abatement and damages under the Unfair Competition Act. In addition, they may claim damages under civil law. However, entitlement to bring a claim before the civil courts is conditional upon a declaratory judgment of violation of the procurement law.

X OUTLOOK

The entry into force of the PPRA 2018 on 21 August 2018 has put an end to a two-year, four-month period of Austria’s failure to transpose the 2014 Procurement Directives. As the BVerfG 2018 entailed a complete revision of the previous law, 2019 is – and will be – marked by a first experience as to new provisions and their implications in practice. In this respect, the new procedure ‘innovation partnership’ and the requirement to make the procurement documents available ‘completely’ with the public notice may be cited as examples.
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:

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

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

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

1. publication obligations (in principle, contracts below the threshold levels are only to be announced in an annex of the Belgian Official Gazette);²
2. 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
3. the standstill period, which does not apply to contracts below the European threshold levels, except for works contracts of half this estimated value.⁴

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2 Moniteur belge/Belgisch Staatsblad.
3 €443,000 in the utilities sector.
4 €2,774,000.

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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, the new European procurement and concession rules having now been fully implemented, 2018 was at first sight less interesting than previous years.

Nevertheless, it is worth mentioning the Royal Decree of 15 April 2018, which modifies the aforementioned Royal Decrees of 18 April 2017 and 14 January 2013. This Decree, which entered into force on 15 April 2018, contains additional rules regarding both the award and the performance phase of procurement and concession contracts.

Concerning the award phase, the Royal Decree of 15 April 2018 introduces an extended possibility for contracting authorities to demand a translation of the information concerning exclusion and selection criteria, if this information has not been drawn up in the same language as the notice of the tender or the tender documents. Moreover, the Royal Decree specifies that from now on, tenders will only be evaluated including value added tax (VAT) to the extent that this tax is a cost for the contracting authority (as there are situations in which VAT can be recovered and therefore does not constitute a real cost).

As to the performance phase, it should be noted that a contractor that does not object within 15 days to the shortcomings attributed to him or her by the contracting authority while performing the contract will not be able to oppose the withholding of the guarantee.

Furthermore, a contractor will no longer be able to claim damages if the contracting authority suspends the contract because of unforeseeable circumstances that, in the opinion of the contracting authority, make it impossible to continue performing the contract. Prior to the entry into force of the Royal Decree of 15 April 2018, the possibility of claiming damages was only excluded in the event of suspension as a result of unfavourable weather conditions. The contracting authority’s margin of appreciation is thus considerably extended.

In terms of case law, several interesting judgments were pronounced in 2018.

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.
First of all, the Council of State rendered a series of decisions concerning the European single procurement document (ESPD). According to the Council of State, a tender that contains a declaration of honour instead of an ESPD should be declared irregular. In addition, the lack of ESPD cannot be regularised during the judicial proceedings before the Council of State. The fact that the tender documents do not mention that an ESPD is mandatory or do not contain any specific sanctions in this regard, does not exempt tenderers from the obligation to include an ESPD in their tender. The Council of State further considers that it is not sufficient for a tenderer to enclose with the tender the proof of compliance with the selection criteria if no ESPD has been submitted. Finally, the Council of State has confirmed on several occasions that it is also required to submit an ESPD for the undertakings on whose capacities a tenderer relies.

With regard to the rules on abnormally low prices, the Council of State ruled that the fact that an undertaking is part of a large foreign group of undertakings that wishes to enter the Belgian market, and that it may benefit from cooperation with its parent company and the other undertakings within the same group, may satisfactorily account for the low prices proposed in the tender.

Furthermore, the Council of State indicated that a lease contract should be deemed to be a public works contract and thus fall under the scope of the public procurement legislation, if the contracting authority exercises a decisive influence on the conception or the nature of the construction that will be leased. In this regard, the Council of State takes into account the importance of the works to be carried out by the lessor prior to the lease, in particular the extent to which the building must meet predetermined requirements set by the contracting authority.

The Council of State also confirmed that the contracting authority has a margin of appreciation when defining the award criteria. However, these criteria must be formulated in such a way that all informed and diligent tenderers can interpret them in the same manner. This entails that an award decision may be suspended and subsequently annulled if, because of the divergent interpretations that tenderers have given to the criteria in question, the tenders submitted are so different that they cannot be objectively compared.

Regarding the evaluation of the award criteria, it is not possible for a contracting authority to grant the maximum number of points to all tenderers for criteria such as technical quality and time-limit, merely because the technical quality of the tenders is ‘correct’ and the proposed time limits allow the works to be performed on time. According to the Council of State, these considerations relate to the regularity of the tenderers, instead of the comparison thereof in the light of the award criteria.

Finally, the Council of State ruled that a contracting authority is obliged to estimate the value of a concession contract in order to determine whether the Concession Contracts...

7 Council of State, 20 February 2018, No. 240.748, Bodemkundige Dienst van België.
Act applies before the call for competition is sent. If the contracting authority fails to demonstrate that it has carried out such an evaluation in due time, it should be presumed that the Concession Contracts Acts was indeed applicable. This is the case even if it appears from the tenders submitted that the threshold would in fact not be reached.\footnote{Council of State, 6 February 2018, No. 242.673, bvba Horeca Management.}

III  SCOPE OF PROCUREMENT REGULATION

i  Regulated authorities

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

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

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

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

ii  Regulated contracts

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

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

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

From 30 June 2017, concession agreements (i.e., contracts by means of which the execution of a work or service is entrusted to an economic operator that subsequently obtains the right to exploit the work or service in question and will also bear the operating risk thereof) are regulated by the specific 2016 Concession Contracts Act. As previously mentioned, this Act transposes Directive 2014/23/EU.
Land agreements are not subject to public procurement obligations. However, as there are no specific rules, obligations regarding the award of land agreements can be said to 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).¹⁵ Other principles of administrative law to be taken into account in this regard are the requirement of due care and the principle that decisions have to be duly motivated.

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

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

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

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

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

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¹⁶ Court of Justice, 19 June 2008, No. C-454/06, Presetext Nachrichtenagentur.
ii Joint ventures
There are no specific rules in Belgium regarding the establishment of contracts that initiate public–public joint ventures. As a general principle, these contracts will fall under the scope of the public procurement regulation if their actual objective is to provide works, supplies or services within the meaning of the latter regulation. This is, however, not the case if the in-house criteria are fulfilled.

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

V THE BIDDING PROCESS
i Notice
All contracts, whatever their value, must be advertised in advance in the Belgian Public Tender bulletin (BDA), which is an annex to the Belgian State Gazette. Since 2011, the BDA has been integrated in the electronic platform e-Notification 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:

- open procedures;
- restricted procedures;
- competitive procedures with negotiation;
- negotiated procedures without prior publication;
- competitive dialogue; and
- 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.

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17 Council of State, 19 June 2009, No. 194.417, SA Horizon Pleiades.
18 https://enot.publicprocurement.be.
19 These contracts are in principle outside the scope of the Public Procurement Directives.
20 €443,000 in the utilities sector.
In an open procedure, all interested providers can tender. In a restricted procedure, only a limited number of these providers are invited to tender after having been selected in a first phase by the tendering authority.

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

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

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

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

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

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

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

iii Amending bids

After the closing date for submission of tenders in the open or restricted procedures, it is no longer possible to amend the bids. The tendering authority may only contact tenderers to ask for clarifications or to complete the offer, as long as the content of the offer itself is not modified.\footnote{Council of State, 14 November 2017, No. 239.867, \textit{SA CFE, SA Vinci Environnement} and \textit{SA Cegelec}.}

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.\footnote{With regard to e-tendering, the Council of State ruled that a contracting authority violates not only the contract documents themselves, but also the principle of equal treatment if it states, on the one hand, in the contract documents that signed offers must be submitted before a certain deadline and, on the other hand, allows a tenderer who merely submitted an unsigned offer and, therefore, strictly speaking missed the deadline, to ‘regularise’ the situation afterwards by submitting a signed copy so that he or she can still join the negotiated procedure (Council of State, 10 December 2013, No. 225.775, \textit{NV Pit Antwerpen}).} There are no specific legal provisions concerning changes at the preferred bidder stage. However, it is generally accepted that ‘substantial’ changes to the contract are no longer possible at that stage, taking into account the aforementioned principles. The tendering authority has a margin of discretion to decide whether changes are to be considered substantial.

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

VI ELIGIBILITY

i Qualification to bid

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

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

ii ESPD

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

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

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

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

VII  AWARD
i  Evaluating tenders
The contracting authority must award the contract to the most economically advantageous tender. The contracting authority has large discretionary power to determine the economic and quality criteria for awarding the contract, insofar as these criteria relate to the object of the contract and enable tenders to be compared and assessed objectively. Under the 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 supposed to disclose information about the evaluation methodology.24 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.25

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 Act26 in this field. This example was followed by the federal government in 2014, that adopted a recommendation on 16 May 2014, containing very specific guidelines for federal authorities on how to implement social and environmental considerations. A similar recommendation has been adopted for the Walloon region.

VIII INFORMATION FLOW

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

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

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

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

24 Council of State, 23 November 2017, No. 239.937, Dimarso.
26 Regional Act of 8 May 2014 concerning the use of social considerations in public procurement.
c every selected tenderer whose offer is regular but has not been chosen, by sending a full copy of the motivated decision.

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

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

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

IX CHALLENGING AWARDS

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

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

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

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, 27 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. 28

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

Claim for damages

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

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

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

Damages can be claimed to compensate for all (tendering) costs that have been made and for the expected economic profit lost. The burden of proof lies 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.

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

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

\[ a \] the Public Procurement Act, the Defence Procurement Act and their implementing decrees;

\[ b \] the European Procurement Directives;

\[ c \] the principles of the TFEU (principles of transparency, non-discrimination, equal treatment, free competition and proportionality);

\[ d \] the principles of general Belgian constitutional and administrative law; and

\[ e \] the tender documents.

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

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

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

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

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

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

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

In this regard, certain novelties that were implemented by the new legislation, such as life-cycle costing and the self-cleaning mechanism, still raise a number of questions that have not yet been answered by the Council of State (or the Court of Justice). Consequently, in the forthcoming year, the case law will probably continue to be particularly interesting and relevant for practice.
Chapter 5

BRAZIL

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 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 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 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 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, or both.

In 2011, Congress passed Federal Law 12,462/2011, which created the Differentiated Government Procurement Regime. 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 so as to allow the regime to be applied to other public projects – such as (1) infrastructure works included in the Growth Acceleration Programme created by the federal government; (2) works and engineering services related to public healthcare; (3) works and engineering services for the construction and reform of criminal facilities;

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(4) actions in public safety; (5) works and engineering services related to urban mobility and logistics infrastructure; and (6) actions executed by entities dedicated to science, technology, and innovation.

In 2016, the Bill of the State-Owned Companies (Federal Law 13,303/2016) created a specific framework for public bids held by state-owned companies 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 (1) 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 (2) a secretariat, staffed to exert advisory functions to the council, with support from the state-owned company EPL.

II YEAR IN REVIEW

Bills aiming at producing a general overhaul in public tender and contracting regulations have slowly progressed in Congress – most notably Bill 6,814/2017, which, after having been approved by the Senate, is now under scrutiny at the Chamber of Representatives along with Bill 1,292/1995. If converted into law, the new bill will supersede, among others, Laws 8,666/1993 and 12,462/2011. At the end of 2018, a special commission created by the Chamber of Representatives approved its official report – along with a new version of Bill 1,292/1995. On 12 March 2019, the plenary chamber of the Chamber of Representatives decided that this bill should be submitted to a fast track procedure; at the time of writing, however, the date on which a final vote will be taken has not been set.

Also pending is the issuance of a presidential decree allowing Federal Law 13,448/2017 to be fully executed. Certain concessions awarded during the Rousseff administration, owing to a combination of incorrect modelling and supervening events, were rendered unprofitable. Federal Law 13,448/2017 allowed these concessions to be amicably ‘returned’ to the federal administration in order to be subsequently awarded to a different party. Although concession holders have manifested their interest in this procedure, the Temer administration refrained from issuing a decree that would have enabled its employment – even though it is rumoured that a draft version of such a document was prepared by the presidency. The Bolsonaro administration is expected to address the issue shortly.

Although not directly meant to regulate public procurement and public contracts, the enactment of Federal Law 13,655/2018 is bound to affect these areas. This federal statute included, in Federal Decree-Law 4,657/1942, 10 articles meant to serve as general guidelines and principles for the ‘creation and enforcement of public law’ – and marking a clear turn toward consequentialism. The new statute requires, for instance, that (1) the public administration, audit courts and the judiciary shall not decide based solely on ‘abstract legal values’ regardless ‘taking into account the practical consequences of its decision’; (2) ‘in the interpretation of rules about public management, the actual obstacles and difficulties faced by public managers shall be taken into account’; and (3) administrative or judicial review of administrative action shall be based on ‘general [legal] guidelines established at the time when

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the administrative action under review was issued’, so that it shall not be possible for ‘fully established legal situations to be declared null and void because of subsequent modifications in such general guidelines’.4

The new rules introduced by Federal Law 13,655 will certainly affect administrative and judicial litigation involving public procurement procedures and public contracts. They are expected to reduce legal uncertainty and, thus, enable the administration to move forward with its projects and contracts in a more expedited manner. As the Bolsonaro administration has recently assembled a task force in order to ‘study, consolidate and present legislative proposals regarding general rules of economic law’,5 it is expected that additional modifications in the foundations of the Brazilian public law system will take place within the next few years.

Another attempt to simplify the current legal framework was made by the Temer administration through Federal Decree 9,188/2017, which created a ‘special divestment regime for [federal] state-owned enterprises’ (SOEs). Under this special regime, SOEs would be able to sell some of their assets through a simplified ‘competitive procedure’6 – with the support of ‘independent and specialized financial institutions’.7 On 27 June 2018, however, Justice Ricardo Lewandowski of the Brazilian Supreme Court granted an injunction affirming that this simplified procedure could not be employed, regardless of previous and specific statutory authorisations, for transactions involving the sale of corporate control of state-owned enterprises or their subsidiaries. On 18 December 2018, the Federal Attorney’s Office presented a legal opinion supporting Justice Lewandowski’s position. The Supreme Court is expected to render a decision on the merits of the issue within the coming months.

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 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 followed the general ideas structured in Federal Law 8,666/1993, Decree 2,745/1998 was heavily criticised over the years, especially after the beginning of the Operation Car Wash investigation. As of mid-2018, Petrobras – as other state-owned and controlled enterprises – follows the rules set forth in the Bill of the State-Owned Enterprises (Federal Law 13,303/2016) and created a new internal procedure for the purposes of procuring goods

5 Administrative Order No. 32, issued by the Minister of Economy on 14 January 2019.
6 Article 5, Federal Decree 9,188/2017.
7 Articles 19 and 20, Federal Decree 9,188/2017.
and services. Petrobras has complied with this command as of October 2017. Most Brazilian state-owned enterprises issued their sets of procurement regulations, complying with Federal Law 13,303/2016, by the end of June 2018.

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 8,666/1993 sets forth some exceptional and specific cases in which a 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 and 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.

Federal Law 13,303/2016 grants state-owned enterprises more leeway to enter into contractual relationships regardless of a public tender. These entities are allowed to freely choose their business partners ‘when such choice results from [the partner's] particular features, is connected to defined and specific business opportunities, and [the SOE] duly justifies why it would not be feasible to promote a competitive procedure [in the case at hand]’. This provision’s proper scope of application, though, is still under discussion – as an abuse of this prerogative could easily undermine the very purposes for which Federal Law 13,303/2016 was enacted.

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

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8 Article 28, §3º, II.
have been paramount ever since. Among the reasons for their large acceptance was the possibility to use the Portal de Compras Governamentais (ComprasNet) online system, 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.

Furthermore, 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, for example, 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 8,666/1993 allows the following models:

- competitive bidding (most commonly used);
- price quotations (preferred for routine purchases using a preselected list of providers);
- invitation to bid (used for lower value purchases);
bidding contests (used for technical, scientific or artistic works); and
auction (used for selling of goods).

With respect to the auction, Federal Law 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 strict adherence to the request for proposal, which is one of the most important principles prescribed in Federal Law 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 Convection (in force in Brazil since August 2016).

Through the ordinary procedure prescribed in Federal Law 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 (1) best price; (2) best proposal in technical terms; or (3) a combination of best price and best technical proposal.

In addition to the procedure established in Federal Law 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 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 because of 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.

Furthermore, Federal Law 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 these 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. Furthermore, documents must be translated into Portuguese by a sworn translator in Brazil.

When submitting documents that are equivalent to Brazilian documents and where 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

1. 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:

- best price;
- best proposal in technical terms; or
- 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 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
g a combination of two of the lowest tariff, highest offer and highest offer after the technical proposal qualification.

Federal Law 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.

ii National interest and public policy considerations
As provided for by Law 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. This 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 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.

VIII 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 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 8,666/1993 sets forth that any citizen may file an opposition to the RFP in the event of irregularities or any violation of the law.

IX 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 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 (1) qualify or disqualify bidders to continue in the contest and (2) 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 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 (1) grant injunctions suspending acts or allowing acts to occur, and (2) 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 the 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

After a controversial and polarised presidential election in 2018, the newly elected President Bolsonaro kicked off 2019 with promises of radical changes in the country’s economy. The first major project tackled by the new government is pension reform; the new government believes that, without a substantial modification in its pension system, the country will not be able to maintain steady growth. Many commentators believe that Bolsonaro’s ability to implement new projects and radically shape Brazil’s economy will be tested with the results of his proposed pension reform, a naturally controversial subject, which is expected by to be voted on in the Chamber of Representatives in the first half of 2019. Moreover, it is certain that public opinion will be shaped, and Bolsonaro’s legacy will be measured, by how much his reforms will allow the economy to grow after several years of recession.

The markets have reacted fairly well in the first months of the new government, with the IBOVESPA index of the São Paulo market exchange reaching a historical high in mid-March 2019.

The market’s appetite is in line with the liberal agenda being implemented by the new President, who has elected as one of his priorities the sale of public assets and the concession of public services to private parties. For example, in March 2019, a major public bid took place regarding the concession of 12 airports, and a new bid was announced for 2020 for the concession of 22 airports – as the Bolsonaro administration intends to have all national airports managed by private companies by the year 2022. Furthermore, several privatisation and concession projects are expected to occur in the near future, including: (1) three concessions of railroads; (2) 19 leases of ports; (3) the privatisation of Eletrobras (the power company controlled by the Federal Government); (4) eight concessions of major federal roads; (5) the concession of the Federal Lottery; and (6) the privatisation of the Brazil Mint.
I INTRODUCTION


The works and services concessions are regulated by the Concessions Act,\(^4\) in force as of 3 January 2018, which implements the provisions of 2014 Concession Contracts Directive.

In addition, the case law of the Bulgarian Commission for Protection of Competition (CPC), the Supreme Administrative Court (SAC) and the Court of Justice of the European Union applies.

The general principles of public procurement regulated by the 2016 PPA are equality and non-discrimination; free and fair competition; proportionality; publicity and transparency, as well as efficiency of funds spending that are in compliance with the EU legislation and the Bulgarian Constitution. To the extent that public procurement contracts are awarded under administrative procedures, the principles of legality, sequence, promptness, foreseeability and procedural economy of the administrative process as also applicable.

The Bulgarian independent body implementing the state policy in the field of public procurement is the Public Procurement Agency (the Agency). The Agency is also responsible for keeping and developing the Public Procurement Register (PPR) and for ensuring the application of best European practices in public procurement. The Agency also has competence for performance of ex ante control over public procurement contracts.

The competent judicial review bodies of the decisions of the public procurement competent authorities or entities are the CPC and the SAC as final instance.

II YEAR IN REVIEW

A new set of legislation changes was introduced in 2018 to facilitate the implementation of a centralised electronic web-based platform to provide a basis for ‘e-Procurement’. A single national electronic web-based platform – Centralised Automated Information System

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1 Katerina Novakova is a senior associate and Radoslav Mikov is a partner at Wolf Theiss.
2 Published in State Gazette No. 13/2016.
3 Published in State Gazette No. 28/2016.
4 Published in State Gazette No. 96/2017.
Electronic Public Procurement (CAIS EPP) – is implemented by the Agency as the platform to enable submitting bids electronically, introducing purely electronic communication during the procurement process and awarding public procurement contracts.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The regulated authorities covered by the 2016 PPA are divided into two categories – public and sectoral.

The public contracting authorities include bodies, governed by public law: administrative structures of the executive power on central level; judicial bodies; state commissions; agencies; executive agencies; the Bulgarian National Bank; the National Assembly; the President; the Ombudsman; governors and mayors; representatives of bodies governed by public law; state or municipality – owned healthcare institutions (where 50 per cent of their revenue originates from the state or municipal budget and the national health insurance fund’s budget); persons in charge of central purchasing bodies, established to meet the contracting authorities’ needs; and associations of contracting authorities.

Within the utilities sector, three groups of contracting entities are regulated by law: entities representing public undertakings engaging in a utility activity; entities carrying out utility activities on the basis of special or exclusive rights (electricity, natural gas, water supply, transport and post services, exploitation of geographical area); and heads of central purchasing bodies, established to meet contracting entities’ needs.5

The Bulgarian law recognises the figure of the ad hoc contracting authorities. Those are not covered by public procurement rules per se unless the contract they assign is more than 50 per cent directly financed by public funds and is related to: (1) public works with forecast value, larger, or equal to 10 million levs; or (2) services, related to these public works, where their forecast value is larger or equal to 430,000 levs.

ii Regulated contracts

Three categories of public procurement contracts are regulated by the 2016 PPA depending on their object: supply, service and works contracts.

The threshold values of public procurement under the 2016 PPA depending on the types of contracting authorities, procedures and thresholds are provided in the table below. Defence and security contracts are subject to specific thresholds.

<table>
<thead>
<tr>
<th>Works*</th>
<th>Supplies*</th>
<th>Services*</th>
<th>Social services*</th>
<th>PP type*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Official Journal publication</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Classic authorities</td>
<td>≥ 10 million</td>
<td>≥ 280,000</td>
<td>≥ 280,000</td>
<td>≥ 1 million</td>
</tr>
</tbody>
</table>

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5 Article 5(4) of the 2016 PPA.
<table>
<thead>
<tr>
<th></th>
<th>Works*</th>
<th>Supplies*</th>
<th>Services*</th>
<th>Social services*</th>
<th>PP type*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utilities entities</td>
<td>≥ 10 million</td>
<td>≥ 860,000</td>
<td>≥ 860,000</td>
<td>≥ 1.5 million</td>
<td>Open procedure; Restricted procedure; Negotiation with and w/t publication of call for competition; Competitive dialogue; Innovation partnership; Design contest.</td>
</tr>
<tr>
<td>Defence and security authorities</td>
<td>≥ 10 million</td>
<td>≥ 280,000</td>
<td>≥ 280,000</td>
<td>≥ 1 million</td>
<td>Restricted procedure; Negotiation with or w/t publication of contract notice; Competitive dialogue.</td>
</tr>
<tr>
<td></td>
<td>(specific supplies)</td>
<td>(other supplies);</td>
<td>(services, related to military or sensitive equipment or specific military or purposes services or sensitive services)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No Official Journal publication</td>
<td>All CAs</td>
<td>270,000 – 10 million</td>
<td>70,000 – up to the threshold applicable to the respective contracting authority above</td>
<td>Public competition**</td>
<td>Direct negotiation**</td>
</tr>
<tr>
<td></td>
<td>50,000 – 270,000</td>
<td>30,000 – 70,000</td>
<td>N/A</td>
<td>Prior notice or call for invitation</td>
<td>Direct awarding</td>
</tr>
<tr>
<td></td>
<td>&gt; 50,000</td>
<td>&gt; 30,000</td>
<td>&gt; 70,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* In lev. 1 lev = approximately €0.51; VAT excluded.
** Not applicable to defence and security authorities.

Contracting authorities and entities are free to apply restricted procedure and competitive dialogue. Open procedure is also applicable to utilities entities and classic authorities, save for the those operating in the fields of defence and security.

Different types of negotiated procedures are envisaged for the contracting authorities and contracting entities.

The public competition and direct negotiation are procedures applicable only for contracts below the EU thresholds. Under the direct negotiation procedure, the contracting authority conducts negotiations with one or more preselected persons to determine the terms and conditions of the public contract. It is applicable only if the indicative value of the public contract is under the thresholds and only if specific circumstances exhaustively listed in the law are in place (e.g., extreme urgency, failed procurement and IP rights; competition is absent for technical reasons or protection of exclusive rights, including intellectual property rights).

The Concessions Act sets forth specific rules and provisions applicable for awarding concession contracts. Three types of concessions are regulated, depending on the subject of the concession agreement: concession for works; for services; and for use of public state or municipal property. Concessions for extraction and use of natural resources, are excluded from the scope of the Concessions Act and are regulated under the Natural Resources Act.6

6 Published in State Gazette No. 23/1999.
of the concession. In concessions without transnational interest, including works and service concessions below the EU threshold and the concessions for use, the concessionaires are selected only through open procedure.

The 2016 PPA allows various exemptions for contracts. The procurement regulations shall not apply, for instance, to: land, buildings or other immovables acquisition or lease agreements; arbitration and conciliation services; certain international contracts; central bank services and certain financial services; in-house procurement; certain legal services; certain broadcasting services; notarial services; loan including bank loan agreements; and employment agreements.

The 2016 PPA also does not apply to some contracts concluded by certain public authorities, for example, those concluded by the National Health Insurance Fund for purchases and negotiating discounts in sales of medical products, medical devices or devices and equipment for people with disabilities.

Exemptions are also reserved to the utilities sector, such as specific contracts awarded for purposes of resale or lease to third parties; water supplies by utility entity; energy supplies if those are performed by fixed network operators or public suppliers.

Transfer of a public contract to a different supplier is generally not permitted unless:

1. it has been envisaged in the tender documentation and the award contract by way of clear, precise and unambiguous clauses, related to the emergence of concrete conditions;
2. in the event of universal or partial transformation by the initial contractor where the following conditions are met cumulatively for the replacing contractor: (a) he or she meets the established selection criteria under the tender procedure at stake; and (b) the transfer would not bring any other significant changes in the public contract and does not aim circumvention of the law.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are not widely used by contracting authorities and are scarcely used by the utility entities in Bulgaria. Most of these contracts are concluded by the centralised purchasing bodies in cases where regular and uniform purchases are required. Framework agreements can be concluded between one or more contracting authorities on one side and one or more entities on the other. The maximum term of the framework agreement for classic contracting authorities is four years, and for utilities, eight years.

Central purchasing is possible under the 2016 PPA. It allows contracting authorities and entities to call a centralised purchaser to purchase and conclude a procurement contract for works, supplies or services to the benefit of the contracting authorities or entities. The contracting authorities may acquire works, supplies and services through public procurements, awarded by the centralised purchaser using dynamic system for purchases, or framework agreement, signed by this purchaser.7

Bulgarian public procurement law also regulates the following specific techniques and instruments: dynamic purchasing systems; electronic auctions and; electronic catalogues.

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7 For example, in health care the central purchasing entity is the Ministry of Health Care and its main task is to perform public procurements for medical products supplies and to conclude public framework agreements on behalf of health care institutions.
Joint ventures

Public–public joint ventures in the form of ‘in-house’ contracting have become more common in Bulgaria in the recent years. The in-house exemption from the public procurement rules applies, however, if the following conditions are met: (1) the contracting authority exercises control over the undertaking in similar manner to its own departments (i.e., it has decisive influence on the strategic objectives and important decisions of the controlled company); (2) over 80 per cent of the undertaking’s activities consist of performing tasks entrusted to it by the contracting authority, its departments or other legal entities controlled by the contracting authority; and (3) there is no direct private participation in the capital of the controlled undertaking.

There are no specific provisions requiring a procurement procedure under the 2016 PPA to set up a public–private partnership.

The Concessions Act envisages the possibility for the grantor to decide that a concession contract is awarded to a public–private partnership, in which case the private partner will be selected by conducting a procedure under the Concessions Act. The public–private company will be formed for a period until the termination of the concession contract and will be in the form of a capital company. By law, the public–private company will be managed by the private partner where the public partner will participate in the management. The public partner will have a blocking right over, inter alia, proposed capital increases or decreases; and transactions disposing of property contributed by the public partner as a non-cash asset in the company. The private partner shares joint liability with the public–private company for the performance of the concession contract.

THE BIDDING PROCESS

Notice

Information on public procurement procedures and concluded contracts has to be published in: (1) the EU Official Journal for procurements with value equal or above the certain thresholds; (2) the PPR; and (3) the buyer’s profile. In addition, contracting authorities and entities can announce publicly by notice the public contracts they intend to award throughout the next 12 months.

Procedures

Based on the forecast amount of the public contract, the public contracts are awarded through: (1) a procedure for the award of a public contract; (2) collecting proposals with an advertisement or an invitation to certain persons; or (3) directly, without applying a public procurement procedure (only if the relevant conditions allowing direct awarding are met).

The 2016 PPA defines 13 types of procedure for public contracts awarding. Generally, the open procedure and the restricted procedure can be chosen regularly, while other procedures can be applied only subject to existence of certain conditions. Competitive dialogue is a procedure that can be used both by classic and defence and security contracting authorities as well as sectoral entities.

8 http://rop3-app1.aop.bg:7778/portal/page?_pageid=173,1&_dad=portal&_schema=PORTAL.
Some procedures are specifically envisaged to be used only by contracting authorities (e.g., competitive procedure with negotiation), while others are reserved specifically for the utility contracting entities (e.g., negotiations without preliminary call for competition).

Under the 2016 PPA, awarding authorities are allowed to use electronic auctions and electronic catalogues. Electronic auctions are possible under the open or restricted procedure, competitive procedure with negotiation, negotiation procedure with prior call for competition, public competition and public call for invitation, as well as in awarding public contracts in a dynamic purchasing system (DPS).

Electronic auctions are not applicable for service contracts and public construction contracts, those related to intellectual activity, including construction design activities, and those that cannot be evaluated automatically by electronic means.

The DPS is applied for commonly used purchases, the basic characteristics of which satisfy the contracting authority’s requirements.

Electronic catalogues are usually used along with framework agreement and dynamic purchasing system.

Design contests are used usually in spatial planning, architecture, engineering activities and data processing, by way of which the contracting authority acquires a plan or design after selection held by an independent jury. These procedures can be conducted with or without prizes or payments to participants. The contests are followed by a negotiated procedure to award the public contract.

### Amending bids

Generally, the participants are allowed to modify their bids freely (including with respect to the bid consortium members and subcontractors) prior to the expiry of the term for submission of the bids. Upon the submission of the bids, amendments thereof would be admissible in certain cases only taking into account also the type of procurement procedure.

In open or restricted procedures, participants are generally not allowed to change bids upon submission. This change would be possible only if during its review of compliance with the selection criteria (qualitative selection), the contracting authority or entity: (1) established omission, ambiguity or non-compliance with the selection criteria envisaged in the tender documentation; and (2) has provided an additional term to the participant to remedy the discrepancy. Change of bids at a stage of a public procurement procedure where those were already assessed should not be permissible.

### VI ELIGIBILITY

#### Qualification to bid

The choice of participants is based on whether they meet all requirements set by law and in the tender documentation that are related to the applicable: (1) grounds for exclusion from participation; and (2) selection criteria related to the economic operator’s suitability to pursue the specific professional activity; economic and financial standing; and technical and professional ability.

The grounds for exclusion from participation require mandatory or potential exclusion from participation and other grounds for exclusion.

Disqualification from participation is mandatory if: (1) the participant has been convicted by an effective sentence; (2) the participant has unpaid tax or social security obligations to the
state or the municipality; 9 (3) the participant has submitted documentation with incorrect
data to certify lack of grounds for exclusion or compliance with the procurement selection
criteria; or has not submitted the required information for lack of grounds for exclusion
or compliance with the selection criteria; (4) it has been established by way of enforceable
penal ruling or court decision that upon performing a public procurement contract that the
participant has infringed certain obligations under the Bulgarian Labour Code; (5) there is
a conflict of interest for the participant that cannot be eliminated; (6) a breach of the equal
treatment principle has been established as a result of the participant taking part in the
market consultations or drawing up the tender documentation.

Specific grounds for exclusion applicable in the defence and security public
procurements would be a case where it has been established by the national security agencies
that the participant is not reliable, and there is a risk for national security.

Pending insolvency or liquidation procedure against the participant or disqualification
from practising of a specific profession or activity is an optional ground for exclusion. Potential
but not mandatory grounds for exclusions are also cases, where the participant has entered
into an agreement with the aim of distortion of competition, which has been established by
a competent authority or entity; or has been proved guilty of non-performance of a public
procurement or concession for construction or service that led to its early termination,
payment of compensations or other similar sanctions (except where the non-fulfilment affects
less than 50 per cent of the value of the contract).

Specific grounds for exclusion are also cases where the participant does not meet the
rules and requirements of the environmental, social and labour law.

To be qualified to bid, the participants must prove their suitability, technical and
professional ability and economic and financial standing. To prove suitability to pursue a
specific professional activity, contracting authorities or entities may require participants to
be enrolled in one of the professional or trade registers. The requirement to be enrolled in a
professional or a trade register should originate from the subject matter of the public contract
(e.g., works contracts, provision of services related to design and engineering, etc.).

To ensure that participants possess the necessary economic and financial capacity to
perform the contract, contracting authorities and entities may require certain minimum
yearly turnover (including a certain minimum turnover in the area covered by the respective
contract) and may require that economic operators to provide information on their annual
accounts. The rule is that the required general turnover (calculated on the basis of yearly
turnovers) of the tenderer or candidate may not exceed two times the estimated contract
value. Requirements related to economic and financial standing may also include appropriate
level of professional risk indemnity insurance.

To examine whether the participants possess the necessary human and technical
resources and experience to perform the public contract, contracting authorities or entities
may impose requirements related to, among other things: (1) previous implementation of
similar or identical projects by subject matter; (2) having at their disposal equipment, means
and personnel required for the execution of the public procurement; and (3) compliance with
relevant quality assurance and environmental protection standards. They may not include
as part of the selection criteria requirements that are limited only to the implementation of
public procurement contracts and may not set up requirements related to a specific number
of contracts fulfilled with a defined subject matter.

9 Unless those do not exceed 50,000 levs – this requirement is applicable as from 1 March 2019.
In the defence and security area, competent authorities may apply the following additional selection criteria to participants, among others: (1) description of the technical equipment, materials, means, number of employees and know-how that the participant has to fulfil the procurement in order to meet the eventual increasing of the needs of the contracting authority in the event of crisis; or (2) confirmation for granted access to classified information in the meaning of the Protection of Classified Information Act,\(^{10}\) including for the possibility for processing, storage and provision of this information at the certain level of protection.

### ii Conflicts of interest

By 2016 PPA rules, the existence of a conflict of interest of a participant with respect to the contracting authority that cannot be removed represents grounds for mandatory exclusion from participation in the procedure.

### iii Foreign suppliers

Suppliers that do not originate from the EU may also participate in procurement procedures should they comply fully with the conditions and requirements of the tender documentation including, \textit{inter alia}, the minimum eligibility and qualification criteria. Establishment of a local branch or subsidiary is in principle not a precondition to participate.

In utilities procurements, the contracting entity can eliminate a bid for supplies if the share of the products of origin from third countries, with which the EU or Bulgaria has not signed a multilateral or bilateral agreement, providing comparative or effective access, exceeds 50 per cent of the total value of the products included in it.

### VII AWARD

#### i Evaluating tenders

Public procurement tenders in Bulgaria are evaluated on the basis of the most economically advantageous tender that can be defined on the basis of one of the following evaluation criteria: (1) the lowest price; (2) the cost level while accounting the cost effectiveness, including the costs for the whole life cycle; or (3) the optimal ratio quality-price, which shall be evaluated on the basis of the price or the level of costs, as well as of indicators, including quality, ecological and social aspects, related to the procurement subject matter.

The evaluation criteria also may refer to technical parameters, accessibility, social, aesthetic and functional characteristics, environmental and social characteristics or innovative techniques and conditions, after-sales services and technical assistance, delivery date and delivery period or period of completion.

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\(^{10}\) ‘Classified information’ within the meaning of Article 1(3) of the Protection of Classified Information Act (PCIA), published in State Gazette No. 30/2006 as amended from time to time, is any information representing state or official secret, as well as foreign classified information. State secret is information, the non-authorised access to which could endanger or impede national security, external policy or constitutional order protection national interests (Article 25 of the PCIA). Official secret is information that has been established or stored by the state or local authorities that is not state secret, but non-authorised access could have a negative effect on the state interests or could impede other legitimate interest (Article 26(1) of the PCIA).
The contracting authority is required to notify the methodology for the complex assessment and the way of defining the evaluation of every indicator in the tender documentation. The way has to allow, among other things, the technical proposals to be compared and evaluated objectively and provide for the participants sufficient information about the rules that will be applied in defining the evaluation in every indicator.

According to the Concession Act, the offers are evaluated based on objective criteria, the assessment of which could allow the contracting authority to determine the economically most advantageous offer under the best ratio quality-price.

ii National interest and public policy considerations

In principle, domestic suppliers may not be favoured for reasons of national interest. For military procurement, the contracting authority may set additional conditions; however, none of the above could be related to the inclusion of a local content.

Any inclusion of a requirement related to the nationality of participants would be considered a breach of principle for non-discrimination and ground for cancellation of the decision of the contracting authority.

Bulgarian law also does not require appointment of a local agent or intermediary by a non-Bulgarian bidder for the purposes of participation in a public procurement. In practice, it is not uncommon for non-Bulgarian entities to appoint a local representative to represent them before the contracting authority for the purposes of tendering and contracting. An authorised representative could be either an individual or a legal entity.

According to the 2016 PPA, the contracting authorities or entities are entitled to set additional requirements for the performance of contracts. Conditions for performance of the contract could relate to employment of long-term jobseekers or young persons in the course of the performance of the contract.

VIII INFORMATION FLOW

By law, contracting authorities and entities are obliged to assure fair and transparent award procedures in accordance with equal treatment and non-discrimination principles. During the procurement process, participants may ask the contracting authority or entity for clarification on the information provided in the tender documentation. The latter is obliged to respond to such requests and to distribute the replies to all participants should the request has been made not later than 10 days before the deadline for bidding. The information flow is required to be performed only by electronic means.

Information, the publication of which is prohibited or contradicts to the public interest, as well as information that a participant has marked as confidential as technical or trade secret, would prevent a contracting authority or entity from communicating publicly.

Unsuccessful participants must be notified by the contracting authority or entity.

The 2016 PPA provides for a 14-day standstill period as of notification of the contract award decision to the participants. The contracting authority or entity may sign a public contract before the expiry of the standstill period only if the procedure allowed only one participant to be invited, or the selected contractor was the only interested participant and there were no others, or the contract is signed on the basis of a framework agreement with one participant.
The contract may only be concluded after the entry into force of all the decisions in the procedure, unless a preliminary enforcement has been granted or in the event of force majeure.

**IX  CHALLENGING AWARDS**

**i  Procedures**

The contracting authority or entity’s decisions may be appealed within 10 days of publication or receipt of the said decision before the CPC. The CPC decisions are subject to review by the SAC as a final instance.

A specific case of appeal may be set out where a notification for contracting authority’s violation in the conduct of a procurement procedure prior to the conclusion of a contract is sent by the European Commission to the Agency. In this case, if it considers that the alleged violation results from an act of the contracting authority, the Agency is entitled to file an appeal against that authority with the CPC.

Generally, appeals against contracting authority’s decisions (unless a contract award decision has been appealed) do not suspend the procurement procedure, except for cases where an interim measure ‘suspending the procedure’ has been requested and granted. Should the contract award decision be appealed, to suspend the procurement procedure the contracting authority or entity may request the CPC to grant provisional enforcement of the contract award decision.

The suspending of the procedure may be imposed by CPC subject to assessment of the possible harm that imposition of this measure may cause to third parties interests, including the public interest and interests related to defence and security. The assessment is made on the basis of the statements on the appeal, the opinion of the contracting authority and the attached evidence from the parties. The CPC decides on the interim measure request within seven days of the initiation of the proceeding. The CPC decision on the interim measure is subject to appeal before the SAC within three days of the notification to the parties, and the court will rule on the appeal within 14 days. The appeal of the interim measures imposed or CPC refusal to impose these does not suspend the pending appealing proceedings before the CPC.

The 2016 PPA provides for short deadlines for review of the public procurement appeals. The CPC is obliged to make a decision within 15 days of the initiation of the proceedings, except in cases related to procurements with values above the thresholds established in the EU Directives, for which the deadline is one month. The decision, together with its motivation, must be prepared and announced within the seven days after it has been pronounced.

The decision of the CPC can be appealed before the SAC within 14 days of its notification to the parties. By law, SAC has to issue its ruling within one month, and it is final.

**ii  Grounds for challenge**

All actions or omissions of the contracting authority or entity that prevent participation in procurement procedures are appealable. In particular this includes: (1) the decision for opening a public procurement; (2) the decisions for disqualification of tenderers in the restricted and negotiated procedures and the competitive dialogue; (3) the contract award decision; and (4) the decision for termination of procedure.
Challenges of public procurements are quite frequent in Bulgaria. The CPC publishes regular statistics about the submitted appeals under the PPA in its annual reports. According to these statistics, between 2015 and 2017, the number of submitted appeals increased from 914 in 2015 to 1,322 in 2017. The main reasons for the extensive increase of the appeals was considered both (1) the low thresholds of statutory fees for appeal and (2) the option for appellants to temporarily suspend the procedure until the appeal is completed with a final judicial act.

With the latest amendments in the 2016 PPA, the appealing fees amounts were changed. Currently, they are fixed and depend on the forecast amount of the public procurement contract. The fees are as follows: (1) for procurements up to 1 million levs – 850 levs; (2) for procurements valued from 1 million levs to 5 million levs – 1700 levs; and (3) for procurements above 5 million levs – 4500 levs. Cassation appeal fees before the SAC are in the amount equal to half of the above fees.

### Remedies

The PPA provides for legal protection in cases where a contract has been awarded without any procurement procedure (if this was mandatory) or in breach of law provisions. A claim seeking the annulment of a procurement contract may be submitted by any person having a legitimate interest, in accordance with the general civil procedure rules, within two months of the contract announcement in the PPR or of becoming aware thereof, but in any case not later than one year after contract conclusion.

If the contract is annulled, each of the parties must return to the other party everything received from that party or, if this is impossible, its money equivalent.

A 10 per cent sanction could be applied to the contracting authority or entity in the event that preliminary enforcement of an appealed decision has been granted but it has been found by the CPC that the appealed decision violated the law, leading to affecting the possibility for the appellant to participate in the procedure or to be awarded the public contract. If the violation did not affect the appellant’s right to participate in the procedure or be awarded the public contract, the sanction imposed to the contracting authority would be in the amount of 3 per cent.

In the event that there is an enforceable CPC decision imposing a sanction of 10 per cent or 3 per cent of the contract value on the contracting authority, depending on the type of violation beforehand, no annulment of the public contract will be proclaimed.

### OUTLOOK

As of 1 November 2019, in Bulgaria all public procurement contracts including those under a DPS, framework agreements and the qualification system are to be carried out only by electronic means through a centralised electronic platform. The centralised platform should serve contracting authorities and entities throughout the entire e-tendering process.

The implementation of the platform will take place in two stages. As a first stage, the platform will allow electronic opening of procedures and receipt and opening of electronic applications to participate and bids, as well as electronic communication in the course of the contracts award. It will be fully completed with all functionality by the end of 2020,
and as from 1 January 2021 the platform will allow also bids assessment, conclusion of public contracts and electronic contract payments. Once the platform starts to operate at full capacity, this will also reflect the terms for submission of bids; those will be shortened by five days.

Derogation from the mandatory requirement for electronic public procurement is possible for the public contracts in defence and security should the latter be related to classified information.
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), the North American Free Trade Agreement (NAFTA), the Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which are discussed in greater detail below. There are also numerous policies and directives that apply to federal government procurement. Public Services and Procurement Canada (PSPC), which is the department responsible for the federal government’s internal servicing and administration, develops, implements and maintains the Supply Manual, 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 2010 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 CPTPP

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

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4 CQLR c C-65.1.
5 SO 2010, c 25.
Canada

royal assent. On 30 December 2018, the CPTPP entered into force among the first six nations to ratify the CPTPP (Canada, Australia, Japan, Mexico, New Zealand and Singapore), and on 14 January 2019, the CPTPP entered into force for Vietnam. The CPTPP incorporates the provisions of the TPP, with the exception of a number of provisions that have been suspended. The government procurement provisions of the TPP remain largely unchanged in the CPTPP; therefore, the CPTPP provides parties with improved access to each other’s government procurement markets. The government procurement provisions of the CPTPP are largely based on the GPA and include core commitments relating to national treatment and non-discrimination, access to information about procurement opportunities and fair and transparent procurement procedures.

ii CUSMA

On 30 November 2018, Canada, the United States and Mexico signed the Canada–United States–Mexico Agreement (CUSMA), a free trade agreement intended to supersede the North American Free Trade Agreement (NAFTA), which has governed trade between the three nations since 1994. CUSMA will enter into force once it has been ratified and implemented by each nation domestically; until such time, NAFTA remains in force. CUSMA maintains the tariff-free market access from NAFTA and includes updates and new chapters to address modern-day trade challenges and opportunities in areas such as agriculture, autos, labour environment, culture, indigenous peoples, gender, energy, intellectual property and government procurement. Canada is not a named party in CUSMA’s chapter concerning government procurement, which applies only between the United States and Mexico. However, Canada and the United States retain access to each other’s procurement markets.


8 ibid.


12 ibid.

through the binding commitments that they have made under the GPA.\textsuperscript{14} Canada and Mexico retain access to each other's procurement markets through the binding commitments that they have made under the CPTPP (as discussed above).\textsuperscript{15}

iii Provincial government procurement legislation
On 24 March 2018, Newfoundland and Labrador’s Public Procurement Act, which is aimed at modernising the procurement framework in the province, entered into force.\textsuperscript{16} Key features of the 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 legislation enables 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’ is a significant departure from the framework established under the Public Tender Act, which had governed the public procurement process in the province since 1990 and which generally required public bodies to award contracts to the bidder offering the lowest price.

iv Integrity Regime and deferred prosecution agreement (DPA) regime
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.\textsuperscript{17} Under the Integrity Regime, suppliers that have been convicted of certain offences are declared ineligible or suspended from doing business with the Canadian government. Between September and December 2017, public consultations were held to seek input on potential enhancements to this regime, in addition to a possible Canadian ‘deferred prosecution agreement’ (DPA) regime.\textsuperscript{18} On 27 March 2018, the government announced it would be enhancing the Integrity Regime to grant greater flexibility in debarment decisions, to increase the number of circumstances that could render a company debarred, and to expand the scope of business ethics considerations within the regime.\textsuperscript{19} The enhanced Integrity Regime was reflected in a revised Ineligibility and Suspension Policy, which was released on 15 November 2018 and came into effect on 1 January 2019.\textsuperscript{20} In addition, on 19 September 2018, amendments to the Criminal Code came into force that formally established a DPA regime in Canada.\textsuperscript{21}

\textsuperscript{15} ibid.
\textsuperscript{16} SNL 2016 Chapter P-41.001.
\textsuperscript{20} ibid.
\textsuperscript{21} RSC 1985, c C-46, Sections 715.3–715.43.

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The DPA regime allows prosecutors to enter into remediation agreements with organisations accused of having committed an offence. These agreements, if complied with, would enable a prosecutor to stay any proceedings related to the alleged offences.

v Better Buying programme
On 5 March 2019, PSPC announced a comprehensive plan intended to improve the federal procurement process. The programme, titled ‘Better Buying’, endeavours to modernise PSPC’s procurement processes by building a modern procurement foundation, delivering a simpler, responsive and accessible procurement system and advancing socioeconomic goals, increasing competition and fostering innovation. Key features of the programme include the deployment of an electronic procurement solution to replace the current paper-based system, the development of novel tools to track and manage vendor performance and the simplification and streamlining of PSPC contracting documents to make procurement less burdensome for suppliers.22

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.

ii  Regulated contracts

All contracts for the supply of goods, services or works with the above-described public bodies are regulated by government procurement rules. The question of which rules apply depends on the contracting public body at issue and the type of contract at issue. For example, the GCRs apply to federal government entities and set out certain requirements that apply to all federal procurement contracts. However, some contracts, such as National Film Board contracts, Veterans’ Land Act construction contracts and legal services contracts, are exempt from the bulk of the requirements in the GCRs. 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:

\[\begin{align*}
\text{a} & \quad \text{the need is one of pressing emergency in which delay would be injurious to the public interest;} \\
\text{b} & \quad \text{the estimated expenditure does not exceed C$25,000 (and it would not be cost-effective to solicit bids) or C$100,000 for specific types of contracts;} \\
\text{c} & \quad \text{the nature of the work is such that it would not be in the public interest to solicit bids;} \\
\text{d} & \quad \text{only one person is capable of performing the contract.}
\end{align*}\]

\[\text{23 GCRs, Section 3.} \]
\[\text{24 RSC 1985, c D-1.} \]
\[\text{25 GCRs, Section 6.} \]
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.\(^\text{26}\) 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.\(^\text{27}\)

**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.\(^\text{28}\) 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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27 Re IBM Canada Ltd (2003).
28 SNB 2012, c 20, Section 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.29 P3 Canada is the public body responsible for advancing the use of PPPs on the federal level.

V THE BIDDING PROCESS

Notice

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

a Alberta: Purchasing Connection and COOLNet;30
b British Columbia: e-Procurement in B.C. (BC Bid);31
c Manitoba: Government Tenders (MERX);32
d Newfoundland and Labrador: the Government Purchasing Agency;33
e New Brunswick: e-Procurement in NB (New Brunswick Opportunities Network);34
f Nova Scotia: Nova Scotia Tenders;35
g Ontario: Supply Chain Ontario;36
h Prince Edward Island: Tender Opportunities;37

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i Quebec: Le système électronique d’appel d’offres (SEAO); and

j Saskatchewan: SaskTenders.

ii Procedures

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

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

Electronic bidding is permissible and offered on selected tenders.

iii Amending bids

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

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

VI ELIGIBILITY

i Qualification to bid

Public entities enjoy a significant amount of freedom to stipulate any criteria that bidders must satisfy to be eligible to bid, and to define situations in which a bidder will be disqualified. This freedom is subject to certain restrictions. First, under the federal procurement framework

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and those of certain provinces, bidders are automatically liable to be disqualified if they have committed certain prescribed offences that would call into question their integrity (such offences will be listed in the tender documents). Some levels of government – notably the provincial government in Quebec – also implement a blacklist for suppliers with a track record of questionable conduct.

Second, where the bidder and purchaser have a conflict of interest, the bidder may be liable to be disqualified. Third, the eligibility criteria must comply with any applicable trade agreements. Fourth, purchasers have a duty to run a fair competition, and this duty may be breached where purchasers establish eligibility criteria that unduly favour one or more bidders. Finally, there may be additional restrictions specific to certain levels of government. For example, the procurement regime in Quebec generally requires purchasers to specify in their compliance requirements that the filing by a supplier of several bids for the same call for tenders entails automatic rejection of all of that supplier’s tenders.40

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

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40 See Regulation respecting certain supply contracts of public bodies, CQLR c C-65.1, r 2, Section 7; and Regulation respecting service contracts of public bodies, CQLR c C-65.1, r 4, Section 7.
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$32,900.41

As a signatory to the GPA, Canada has agreed to provide suppliers of more than 40 trading partners in Europe, Asia and North America the right to bid without discrimination on a broad range of public sector tender calls by federal government entities. The GPA is not applicable to provincial or municipal governments, or to private industry or private individuals. The monetary thresholds applicable to procurements by federal government agencies, departments and enterprises are C$237,700 for goods, services or any combination thereof, and C$9.1 million for construction services contracts.42

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$237,700 for goods, services or any combination thereof and C$9.1 million for construction services contracts.43

As a signatory to the CPTPP, Canada has agreed to provide suppliers of Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam with eliminated or significantly reduced tariffs on imported goods.44 With regard to procurements by federal government departments and agencies, the monetary thresholds are C$237,700 for goods and services or any combination thereof and C$9.1 million for construction services contracts.


services contracts. With regard to federal government enterprises, the monetary thresholds are C$649,100 for goods, services or any combination thereof and C$9.1 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:

a. the Canadian Free Trade Agreement (CFTA), of which the federal and all provincial and territorial governments are signatories;

b. the New West Partnership Trade Agreement, which applies to the British Columbia, Alberta and Saskatchewan governments;

c. the Atlantic Procurement Agreement, which applies to the New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island governments;

d. the Quebec–New Brunswick Trade Agreement; and

e. the Ontario–Quebec Trade and Co-Operation Agreement.

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

VII AWARD

i. Evaluating tenders

Public entities issuing a call for tenders must disclose all criteria by which the purchaser will evaluate bidders. Purchasers that use undisclosed criteria to evaluate bidders risk 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, the CPTPP and the CFTA.46 Under the CFTA, Canadian provinces and territories must also establish or designate an independent administrative or judicial authority to receive and review challenges by suppliers.

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

A supplier that seeks to complain about a provincial government procurement process is generally limited to suing under the common law of Canada and pursuant to any specific provincial public contracting regulations. Suppliers looking for redress for a breach of the CFTA may avail themselves of protest procedures set out in provincial regulations, any applicable dispute resolution process that has been established by the particular public body at issue and the courts. Public bodies’ internal policies do not have the force of law, and so breaches of these policies cannot found a lawsuit. Nevertheless, breaches of policies can be 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 Regulations47 provides that a complaint must be filed with the CITT within 10 working days of the date on which the potential supplier first became aware, or reasonably should have become aware, of its ground of complaint to either object to the contracting authority or file a complaint with the CITT. The CITT provides quick remedies, usually issuing its decision within 90 days of the complaint having been made. Costs vary depending on the complexity of the matter.

Besides communicating directly with the contracting authority, courts are the preferred forum for all other procurement-related complaints. Limitation periods on judicial

47 SOR/93-602.
proceedings differ depending on the court and jurisdiction. The Limitations Act (Ontario) assigns a basic limitation period of two years.\textsuperscript{48} Costs vary depending on the complexity of the matter.

\textbf{ii \hspace{1em} 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.

\textbf{iii \hspace{1em} 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.\textsuperscript{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.\textsuperscript{50}

\textbf{X \hspace{1em} OUTLOOK}

This year has been marked by significant changes to the public procurement landscape in Canada, and we can anticipate additional changes to follow. New international trade agreements, such as the CPTPP and CUSMA, signal continued efforts by Canada and the international community to endorse and incentivise global trade in a manner that is more consistent, transparent and conducive to ensuring stakeholder accountability. Parallel efforts are reflected in changes to provincial procurement legislation. Finally, while nascent, Canada's new DPA regime promises a profoundly novel approach to the prosecution of corporate entities in Canada.

\textsuperscript{49} RSC 1985, c C-34.
\textsuperscript{50} ibid., Section 47.
Chapter 8

EUROPEAN UNION

Clare Dwyer, Michael Rainey and Andrew Carter

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

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.\(^7\)

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

II YEAR IN REVIEW

The past year has seen more gradual development of procurement case law.

In relation to technical specifications the CJEU has stated that: equal treatment and proportionality remain the key touchstones and that, in particular, the more detailed the technical specifications, the higher the risk to equality and proportionality;\(^8\) and that where the technical specification refers to a specific mark, origin or production and permits bidders to propose equivalents, the bidder must be required to prove equivalence in their bid and not afterwards.\(^9\)

Case law has considered multi-authority framework agreements,\(^10\) with the CJEU ruling that an authority that is not a signatory to the framework can award a subsequent contract to the contractor provided that it is clearly identified in the bid documents as a potential beneficiary. The quantity of services that may be required by all potential beneficiary authorities must be taken into account when determining, and advertising, the maximum volume of services under the framework.

The CJEU has considered the rules applicable to exclusion of bidders, confirming that where bidders in a procurement process are related (for example, being part of the same corporate group) there is no general requirement on them to disclose the links between them to the authority.\(^11\) Also in connection with exclusion, the CJEU has ruled on the level of evidence that can be required from a bidder where a statutory ground for exclusion applies.\(^12\)

In the case in question, the ground for exclusion arose from cartel activity, and the evidence required could include a copy of the decision of the investigating competition authority, even though the provision of that document could assist the contracting authority in bringing a civil claim against that bidder arising out of the cartel.

\(^6\) With the exception of the Defence and Security Procurement Directive.
\(^7\) Articles 258 and 260 of the Treaty on the Functioning of the European Union and the Remedies Directives (e.g., Public Sector Remedies Directive, Article 3).
\(^8\) C-417/16 Roche Lietuva UAB.
\(^9\) C-14/17 VARSrl, Azienda Trasporti Milanesi SpA (ATM) v. Iveco Orecchia SpA.
\(^10\) C-216/17 Autorità Garante della Concorrenza e del Mercato – Antitrust, Coopservice Soc coop, arl v. Azienda Socio-Sanitaria Territoriale della Vallecamonica – Sebino (ASST) and others.
\(^11\) C-531/16 Šiaulių regiono atliekų tvarkymo centras, Ecoservice projektai UAB.
\(^12\) C-124/17 Vosloh Lackis GmbH v. Stadtwerke München GmbH.
The CJEU has also confirmed that the procedural rules for the open procedure do permit authorities to apply a minimum technical score threshold before bids proceed to full evaluation. 13

The CJEU has again considered the ‘inherent de facto advantage’ of incumbent providers and reiterated that this advantage was only to be ‘neutralised’ insofar as this was technically easy to carry out, economically acceptable and where it does not infringe the rights of the incumbent.14

Other topics that featured in CJEU rulings included: national security interests15 and the secrecy and special security measures exemption;16 limitation17 and the advertising rules18 applicable under the specific public procurement regime for public passenger transport services.19

III SCOPE OF PROCUREMENT REGULATION

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.20

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,21 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.22

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

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13 C-546/16 Montte SL v. Musikene.
14 T-211/17 Amplexor Luxembourg Sarl v. European Commission.
16 This exemption is found in all of the 2014 Procurement Directives, for example, 2014 Public Contracts Directive, Article 15(3).
17 C-54/18 Cooperativa Animazione Valdocco.
18 C-518/17 Stefan Rudigier.
20 Article 2(1)(4).
21 Article 13.
22 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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23 Article 34.
24 Article 1(2).
25 Article 5(1).
27 For example, 2014 Public Contracts Directive, Article 5.
28 2014 Public Contracts Directive, Article 74 and Annex XIV, 2014 Utilities Contracts Directive, Article 91 and Annex XVII. Some (but not all) of these services are also subject to lighter regulation under the Defence and Security Procurement Directive, Article 16 and Annex II.
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:

a) the acquisition or rental of land;  
b) employment;  
c) certain research and development services; and  
d) certain financial services.

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. Often, the distinction turns on whether the economic operator is obliged to undertake the works 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, 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. Where the Directives do not apply, some form of advertisement is generally required if there is certain cross-border interest in the resulting contract.

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.

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. 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); 40

c dynamic purchasing systems (DPS) (the 2014 Utilities Contracts Directive and the 2014 Public Contracts Directive); 41 and

d qualification systems (the 2014 Utilities Contracts Directive). 42

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).

A Commission Interpretative Communication 43 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.

39 Respectively, Articles 33, 51 and 29.
40 Respectively, Articles 37, 55 and 10.
41 Respectively, Articles 52 and 34.
42 Article 77.
43 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).
Contracts between authorities are in principle subject to the Directives. There are certain exceptions, although these all prohibit private participation or shareholdings.\textsuperscript{44}

The 2014 Utilities Contracts Directive has separate rules on joint ventures between utilities and on intra-group supplies.\textsuperscript{45}

\section*{V THE BIDDING PROCESS}

\subsection*{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.\textsuperscript{46}

\subsection*{ii Procedures}

The Directives envisage various contract award procedures:

\begin{itemize}
  \item[a] open procedure: a one-stage process where bidders must show their good standing and their tender proposals in a single bidding round;\textsuperscript{47}
  \item[b] restricted procedure: a two-stage process where, based on financial standing, qualification and past experience, at least five bidders are shortlisted to tender;\textsuperscript{48}
  \item[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;\textsuperscript{49}
  \item[d] competitive procedure with negotiation\textsuperscript{50} or negotiated procedure with advertisement:\textsuperscript{51} 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;
  \item[e] innovation partnership for the development of innovative products;\textsuperscript{52} and
  \item[f] exceptionally, negotiated procedure without advertisement.\textsuperscript{53}
\end{itemize}

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.

\textsuperscript{44} 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.

\textsuperscript{45} Articles 29 and 30.

\textsuperscript{46} http://ted.europa.eu.

\textsuperscript{47} For example, 2014 Public Contracts Directive, Article 27.

\textsuperscript{48} For example, 2014 Public Contracts Directive, Article 28.

\textsuperscript{49} For example, 2014 Public Contracts Directive, Article 30.

\textsuperscript{50} 2014 Public Contracts Directive, Article 29.

\textsuperscript{51} For example, 2014 Utilities Contracts Directive, Article 47.

\textsuperscript{52} For example, 2014 Public Contracts Directive, Article 31.

\textsuperscript{53} For example, 2014 Public Contracts Directive, Article 32.
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.54

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.55 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.56 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.57

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);58

b  enrolment on a professional or trade register as required in the bidder’s state of establishment;59

c  financial standing;60 and

d  technical and professional ability.61

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54 For example, 2014 Public Contracts Directive, Articles 27 to 31 and 47.
55 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.
56 For example, 2014 Public Contracts Directive, Article 30(6).
57 For example, 2014 Public Contracts Directive, Article 30(7).
58 For example, 2014 Public Contracts Directive, Article 57.
59 For example, 2014 Public Contracts Directive, Article 58(2).
60 For example, 2014 Public Contracts Directive, Article 58(3).
61 For example, 2014 Public Contracts Directive, Article 58(4).
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.62

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.63 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.64

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;65 a blanket ban on involvement of those with prior knowledge has been held to be disproportionate and in breach of the equal treatment principle.66

iii Foreign suppliers

The Directives do not prohibit non-EU suppliers from bidding for public contracts. The GPA requires providers from GPA states67 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) 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.68

62 For example, 2014 Public Contracts Directive, Article 63.
63 For example, the 2014 Public Contracts Directive, Article 24.
64 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.
65 For example, the 2014 Public Contracts Directive, Articles 41 and 57(4)(f).
66 See joined cases C-21/03 and C-34/03 Fabricom SA v. Belgium, Paragraphs 25 to 36.
67 In addition to the 28 EU Member States, the other GPA states are Armenia, Australia, Canada, Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Moldova, Montenegro, the Netherlands (with respect to Aruba), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States. A revised and expanded GPA, modernising certain aspects of its rules, entered into force on 6 April 2014.
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. 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.

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.

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

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. These exceptions are narrowly construed.

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69 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.

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

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

72 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.

73 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.

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

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’ and ‘as rapidly as possible’, in accordance with the Remedies Provisions. ‘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.

75 For example, Public Sector Remedies Directive, Article 2a.
77 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.
78 Article 1(1).
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.

ii  Grounds for challenge

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

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81 C-583/13 eVigilo Ltd v. Priegaisrines apsaugos ir gelbejimo departamentas prie Vidaus reikalu ministerijos.
82 Article 3.
83 Article 1(1).
84 See national chapters for details of numbers and prospects for challenge.
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’.  

### Remedies

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

- **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;

- **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

- **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:

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

- **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

- **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.

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85 Article 3(1).
86 Article 2(1).
87 Article 2d.
X OUTLOOK

While the wider impact of the UK leaving the EU cannot be known with any certainty, the changes to the Directives are likely to be minor.

No major legislative changes are expected in coming year. In terms of case law, it is notable that the CJEU case law on concessions is very light; in particular there is a lack of rulings on the application of the 2014 Concession Contracts Directive. Greater guidance in this area would be welcomed, with the 2014 Procurement Directives now having been in place for a number of years.
I INTRODUCTION

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

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

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

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1 Jan Bonhage is a partner and Simone Terbrack an associate at Hengeler Mueller Partnerschaft von Rechtsanwälten mbB.

2 See, e.g., the CJEU decision of 21 March 2019, C-266/17 and C-267/17, Rhein-Sieg-Kreis et al. v. Verkehrsbetrieb Hättebräucher GmbH et al.
Below the EU thresholds, public tendering is in principal considered a matter of budgetary law. The recently introduced harmonised Rules on the Award of Public Supply and Service Contracts below the EU Thresholds (UVgO) of 2017 have been enacted at the federal level as well as enacted or expected in most states except for Hesse, Saxony and Saxony-Anhalt. Pursuant to the federal and state (budgetary) laws, the first Chapter of the VOB/A remains applicable for public works contracts. While the UVgO and the first Chapter of the VOB/A generally mirror the provisions of the VgV and the second Chapter of the VOB/A, the contracting authorities have some more flexibility below the EU thresholds.

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

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

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

II YEAR IN REVIEW

After the comprehensive procurement law reforms in 2016 (transposition of the EU Procurement Directives into German law) and 2017 (reform of framework for tenders below the EU thresholds), 2018 has seen only little legislative changes. In particular, the states have essentially iteratively enacted the UVgO.

The transition to electronic communication remains a major challenge, especially, but not only, at the municipal level. Communication by electronic means at all procurement stages is generally mandatory in Germany at or above the EU thresholds since 18 October 2018. Below the EU thresholds, comprehensive electronic communication is mandatory only beginning on 1 January 2020, but contracting authorities already have to accept electronic submission of tenders since 1 January 2019. Unlike other EU Member States, use of an electronic European single procurement document (ESPD) is not statutorily mandatory, but the contracting authorities have to accept electronic ESPDs. The contracting authorities use several, in many respects not interoperable platforms, which leaves substantial room for improvement.

A new version of the VHB has been used since 1 January 2018, and the revised EVB-IT provisions have to be applied since 13 June 2018.

On the impact of past anti-competitive behaviour in current tender procedures and self-cleaning requirements, the CJEU ruled on 24 October 2018 on a GWB provision 3

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3 This chapter covers exclusively tenders above the EU thresholds, unless specifically indicated otherwise.
pursuant to which self-cleaning requires tenderers to actively collaborate not only with the investigating authorities, but – beyond the requirements of the 2014 Procurement Directives – also with the contracting authorities. The CJEU held that requirements for collaboration with contracting authorities may not go beyond what is strictly necessary for the contracting authorities’ effective assessment of the economic operator’s reliability.4

Several further decisions by procurement chambers and Higher Regional Courts have been published since 2016, applying the new procurement laws of 2016.5

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

German procurement law implements the EU procurement definitions of contracting authorities and contracting entities, including in particular the common contracting authorities (i.e., federal, state, regional and municipal authorities and their respective special funds) and the bodies governed by public law (i.e., public and private legal entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, either publicly financed or majority controlled by the common contracting authorities, as well as their respective associations).6 For example, the CJEU confirmed qualification of statutory health insurances and public broadcasting corporations as contracting authorities. Further, public and private entities qualify as contracting authority for certain projects that are more than 50 per cent state-funded.7

Contracting entities in the utilities sector comprise all contracting authorities as well as any persons or companies that have a specific activity in the water, energy and transport sector, and either operate on the basis of special or exclusive rights granted by a competent authority or over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership, their financial participation, or the rules that govern it.8 Unlike the 2014 Utilities Contracts Directive, postal services are not covered by the German Utilities regime. Production and wholesale of electricity from conventional sources, retail supply of electricity and gas9 and, to a certain extent, exploration and extraction of petroleum, gas and coal10 have been exempt based on their exposure to competition.

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

ii Regulated contracts

Generally, public contracts on services or supply of goods (VgV) and works (VOB/A) as well as concessions (KonzVgV) are subject to public procurement requirements, each with specific provisions for utilities (SektVO) and defence and security (VSVgV). The VSVgV

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4 C-124/17 Vosloh Laeis GmbH v. Stadtwerke München GmbH.
5 See, inter alia, nn. 19, 33 and 40.
6 Section 99 No. 1-3 GWB.
7 Section 99 No. 4 GWB. Cf. Article 13 of the 2014 Public Contracts Directive which does instead define regulated contracts, not authorities, in these cases.
8 Sections 100, 102 GWB.
9 Section 140(1) GWB; Commission implementing decisions of 24 April 2012 (OJ L 114, p. 21) and of 15 September 2016 (OJ L 253, p. 6).
10 Section 143 GWB.

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covers contracts on the supply of military equipment or equipment awarded under a classified contract as well as other supplies, works and services directly connected to such equipment, and works and services specifically for military purposes or works and services awarded under a classified contract. The definition of works and service concessions of the 2014 Concession Contracts Directive has been exactly transposed into the KonzVgV. For public passenger transport services by rail and road, see Section I on the application of the Regulation (EC) 1370/2007.

Certain social, health, legal and other services are subject only to less restrictive public procurement requirements. ¹¹

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

Competitive procedures for concessions for the use of public roads for electricity and gas pipelines ¹³ and for telecommunication licences are governed by sector-specific regulation. ¹⁴

Substantial modifications of public contracts or concessions generally require a (new) tender procedure. ¹⁵ Modifications are considered substantial in particular, if the modification extends the scope of the contract considerably or introduces conditions which would have allowed for the admission of other candidates or for the acceptance of other tenders, unless the modification has been provided for in a clear, precise and unequivocal review clause in the initial procurement documents. A transfer of the contract to another contractor generally requires a new procurement procedure, unless the transfer forms part of a corporate restructuring and the new contractor is eligible under the initial tender requirements.

IV  SPECIAL CONTRACTUAL FORMS

i  Framework agreements and central purchasing

Framework agreements can be awarded under the procurement schemes for both above and below EU thresholds. Frameworks agreements are defined as agreements between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. ¹⁶ Framework agreements are generally subject to the same public procurement requirements – including public notice requirements – like other public contracts. Individual contract orders under a framework agreement are awarded pursuant to the rules of the framework agreement which can provide for mini-competition among the framework contractors. The maximum contract period of

¹¹ Sections 130, 153 GWB.
¹² Sections 107, 116, 117, 137 to 140, 145, 149 to 150 GWB.
¹³ Section 46 EnWG.
¹⁴ Section 61 TKG.
¹⁵ Section 132 GWB.
¹⁶ Section 103(5) GWB.
framework agreements is generally limited to four years (seven years for security and defence contracts and eight years in the utilities sector), in each case possibly longer under exceptional circumstances.

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

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

ii Joint ventures

Germany has transposed the EU criteria for in-house procurement derived from CJEU case law, as specified in the 2014 Procurement Directives, in the GWB. In-house procurement is exempt from public procurement requirements if the contracting authority exercises control over the contractor which is similar to its control over its own departments, provided that the contractor provides more than 80 per cent of its services or supplies to the contracting authority or by other legal persons controlled by that contracting authority. The contractor may not have any private shareholders. The control may also be exercised jointly with other contracting authorities. The in-house exemption also applies in horizontal and inverse (bottom-up) control scenarios.

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

Public–private partnerships can require a public tender in different respects. For example, selection of a private partner has to be tendered for an ‘encapsulated’ contract. If the private partner has not been selected by public tender, the later award of a contract to the

17 Section 120(4) GWB.
18 Sections 37, 48 SektVO.
19 Section 108 GWB.
PPP has to be tendered, unless an exemption (e.g., the in-house exemption) applies. The PPP itself is bound by procurement requirements, if it qualifies as a contracting authority (e.g., due to predominant financing or control by a contracting authority); see also Section III.i.

V THE BIDDING PROCESS

i Notice
Above the EU thresholds, all calls for competition in Germany have to be transmitted via electronic standard forms to the Publications Office of the European Union, which publishes the notices in the online version of the supplement of the OJEU, the platform ‘Tenders Electronic Daily’ (TED). The notice may not be published at the national level before it has been published by the Publications Office of the European Union or 48 hours after confirmation of the receipt of the notice. Apart from essential data on the contracting authority and the subject matter of the contract (including CPV-codes for the goods, services and works), in particular all eligibility criteria and their respective proof requirements have to be published in the notice. The notice must also include a link by which the procurement documents can be retrieved for free. While case law used to be very strict to include all eligibility criteria explicitly in the notice itself, more recent decisions allow contracting authorities to make a precise reference in the notice to the eligibility criteria in the online procurement documents, and to only provide certain parts of the procurement documents at publishing of the notice in a two-stage or multistage procedure.\(^\text{20}\)

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

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

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

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

ii Procedures
The procurement laws generally provide for open, restricted and negotiated procedures (with or without a call for competition) as well as competitive dialogues and innovation partnerships.\(^\text{21}\) Any interested party is invited to submit a bid in an open procedure. Tenderers first have to submit a request for participation (RfP) in a restricted or a negotiated procedure. Contracting authorities typically limit the number of tenderers for the bidding phase of such procedures based on evaluation of the eligibility of the RfPs. Different from an open or restricted procedure, a negotiated procedure allows for negotiation of the (initial) bids.

\(^{21}\) Section 119 GWB.
provided that the substance of the tender is not modified. Competitive dialogues are rarely used in Germany. Innovation partnerships are still fairly new, but certainly an interesting option for contracting authorities and contractors.

Contracting authorities are generally free to choose an open or restricted procedure. A negotiated procedure is only available under limited circumstances, for example, if the procurement needs cannot be met by readily available solutions without adaption or if the contract includes innovative solutions.

Under the Utilities Ordinance, contracting entities are free to choose any procedures with a call for competition. Under the Security and Defence Procurement Ordinance, the open procedure is not available.

The procedures for tenders below the EU thresholds are similar to the procedures at or above the EU thresholds, but provide more flexibility.

### iii Amending bids

Before the end of the submission deadline, tenderers can typically withdraw their bid and also submit a new bid instead. Once the submission deadline expired, amendments to bids are not permissible and tenderers may only clarify their bids upon the contracting authority’s request, unless the applied procurement procedure allows for negotiations (see Section II). The contracting authority may subsequently request missing or incomplete information. Such information may not change the application or bid. The contracting authority has to further evaluate the pricing and underlying calculation if the price of the tender appears unusually low.

Amendments of or additions to the contracting authority’s procurement documents by the tenderers are inadmissible. They qualify as mandatory ground for exclusion, if the procurement documents were clear and if they cannot be interpreted in a way that is in conformity with the procurement documents. The contracting authority may, however, explicitly permit variants if it sets up minimum requirements for the variants and the award criteria apply to both the main tender and the variants.

### VI ELIGIBILITY

#### i Qualification to bid

Contracting authorities typically define selection criteria for the tenderers’ eligibility. These criteria may concern the tenderers’ suitability to pursue their professional activity, their economic and financial standing and their technical and professional ability. The criteria must be adequate and proportionate for the subject matter of the contract and be published in the contract notice. They regularly include a request for references on past comparable contracts. Any minimum eligibility requirements have to be stipulated clearly. Self-declarations are sufficient, unless the contracting authority requests particular documents for proof.

A tenderer can rely on the capacity of other economic operators, provided that the tenderer can prove that he or she will have at his or her disposal the other operators’ capacities necessary for the contract (i.e., ‘capacity loan’). The availability of the capacities can be proven through a declaration of commitment signed by the respective capacity lending operator. A

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22 Section 122 GWB.
joint liability can be required in case of a capacity loan for economic and financial ability. Actual performance shall be required in case of a capacity loan for technical and professional ability.

Contracting authorities may have to exclude economic operators from a particular tender. They are generally obligated to exclude economic operators (mandatory grounds for exclusion) \textit{inter alia} in case of criminal convictions or administrative fines for bribery or money laundering.\textsuperscript{23} Convictions can – in the German implementation of the directive – be imputable to a tenderer, if the convicted person has acted as the responsible person for the management of the undertaking, including supervision of management or the exercise in another manner of control in a managerial position. Contracting authorities discretionarily decide on exclusion of an economic operator (facultative grounds for exclusion) \textit{inter alia} for having provided false information to influence the contracting authority’s decision, having violated a major requirement under a former public contract, or indications for anti-competitive behaviour.\textsuperscript{24} Economic operators shall not be excluded based on convictions or past major failures if they can prove self-cleaning (see Section II) or if specific time periods have lapsed.\textsuperscript{25} The envisaged federal competition register has not been activated yet (see Section X).

The Utilities Ordinance provides for some more leeway of the contracting entity. The eligibility criteria are not enumeratively restricted, but essentially have to be adequate, objective, transparent and non-discriminatory. Further, any exclusion – even if based on grounds that are mandatory grounds for exclusion in the general procurement regime – is at the discretion of the contracting entities.

\textbf{ii Conflicts of interest}

Representatives of a contracting authority exposed to a conflict of interest may not participate in a tender procedure.\textsuperscript{26} A conflict of interest exists if the representative is on the one hand involved in the conduct of the procurement procedure or may influence the outcome of that procedure, and if the representative – or his or her close relative – on the other hand has a direct or indirect financial, economic or personal interest which might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure. This conflict is assumed for persons that are tenderers, that advise, support or represent a tenderer, are employed or work for a tenderer or for a company that has business relationships both for the contracting authority and the tenderer. In principle, any violation may be challenged by tenderers and may require repetition of the steps in question without the conflicted person. As \textit{ultima ratio}, a violation may lead to the suspension of the procurement process, if necessary.

The principle of secrecy of competition requires that tenderers – as well as the contracting authority – keep generally confidential the tenderer’s participation in a tender as well as information on his or her bid. A bid that has been prepared in knowledge of relevant details of another tenderer’s bid generally has to be excluded from the procurement procedure.

\textsuperscript{23} Section 123 GWB.
\textsuperscript{24} Section 124 GWB.
\textsuperscript{25} Section 125, 126 GWB.
\textsuperscript{26} Section 61 VgV; 61 SektVO; 51 KonzVgV.
Having been involved in the preparation of a procurement procedure does not automatically lead to exclusion.\textsuperscript{27} The contracting authority has to take all necessary measures to ensure a level playing field for all bidders before considering exclusion as a last resort.\textsuperscript{28}

iii Foreign suppliers

In accordance with the EU principle of non-discrimination, no difference shall be made directly or indirectly between tenderers from Germany or any other EU Member State.

The German procurement provisions further generally do not discriminate against non-EU tenderers — coming from GPA signatory states or even from countries without a multilateral bilateral procurement agreement. These third-state tenderers can generally resort to the same rights as tenderers from Germany and the EU. However, contracting entities in the utilities sector can reject bids for supply contracts where the proportion of the products originating in third countries exceeds 50 per cent. Third countries are countries other than members of the EU/EEA that have not signed an agreement on reciprocal access to markets.

VII AWARD

i Evaluating tenders

The contract has to be awarded to the most economically advantageous tender.\textsuperscript{29} This can be the best price or a combination of the price and qualitative criteria adequately linked to the subject matter of the contract. In the field of security and defence, three specific quality criteria are explicitly mentioned: interoperability, operating capability and supply reliability. The award criteria and their relative weight have to be published in the notice or in the procurement documents.

The award criteria must be comprehensible and concrete to allow all bidders to prepare their bids accordingly. The Federal Court of Justice has recently clarified that ‘school grades’ or other point scales for evaluating qualitative criteria can generally be used with certain specifications.

For the award of concessions, the authority may \textit{inter alia} subsequently change the weighted order of the criteria in cases of bids with an unpredictable, innovative solution.\textsuperscript{30} In that case, the authority has to inform the bidders of the modification and issue a new invitation to submit tenders.

ii National interest and public policy considerations

Considerations of national interest cannot be used as award criteria. The principles of non-discrimination and equal treatment generally prohibit preference of domestic suppliers (see Section VI.iii). However, particular considerations of national interest may exceptionally lead to the exemption from public procurement requirements where it is necessary for the protection of the essential interests of the security of the Federal Republic of Germany (cf. Section III.ii) or may imply strict requirements of handling sensitive or classified information pursuant in particular to the VSVgV.

\textsuperscript{27} C-21/03 and C-34/03 – Fabricom.
\textsuperscript{28} Section 7 VgV; Section 7 SektVO.
\textsuperscript{29} Section 127 GWB.
\textsuperscript{30} Section 31 II 1 KonzVgV.
Among other criteria, public policy considerations can generally be included in procurement proceedings if they are related to the subject matter of a contract. Social and environmental criteria can in particular be used as award criteria (e.g., life-cycle costs), and tenderers may have to be excluded for violations of environmental or social law. Further, contracting authorities can require certain social or environmental conditions for contract implementation (e.g., adherence to tariffs or energy consumption limits).

If the contracting authority requires certain quality labels for the offered product or service, these quality labels must be based on objective, reviewable and non-discriminatory criteria and have been designed in an open and transparent procedure involving all interested parties. Comparable quality labels must be accepted.

VIII INFORMATION FLOW

The notice and in particular the procurement documents must contain all information relevant for an economic operator to decide whether to participate in the procurement proceedings and to prepare his or her bid. Tenderers may ask questions about the tender documents or the performance specifications. To ensure equal treatment and a competitive tender process, the answers to these questions have to be made available to all tenderers.

The contracting authority has to inform the tenderers whose bids have not been successful prior to the contract award. This information has to include the name of the successful tenderer, the reasons for the rejection of the tenderer’s tender and the earliest date the contract can be awarded. The contracting authority may award the contract at the earliest 10 days after the information has been sent out electronically or via fax (15 days after dispatch in case of a postal information letter). Contracting authorities can restrict the information to unsuccessful bidders in the field of security and defence, inter alia if the information would be contrary to the public interest, or if it would prejudice the legitimate commercial interests of a particular economic operator. So far, information to unsuccessful bidders with a stand-still period is not required for contracts below the EU thresholds (except in few federal states).

During and after the procurement procedure, the contracting authority has to protect confidentiality of the tenders submitted. Equally, tenderers may not disclose confidential information received from the contracting authority.

IX CHALLENGING AWARDS

i Procedures

A tenderer can file an application for review to the respective Vergabekammer, the competent procurement chamber, based on alleged violations of procurement law above the EU thresholds, provided that he or she has previously raised an objection against the alleged violation vis-à-vis the contracting authority within 10 days of positive knowledge of the potential infringement or, as applicable, prior to the end of the respective RfP or bid deadline.

31 Section 134 GWB.
33 Section 155 et seq. GWB.
Procurement chambers are part of the federal or state administration, but the proceedings are quasi-judicial. Each state has one to three regional procurement chambers and, at the federal level, two procurement chambers have been set up at the Federal Competition Authority.

Review procedures are only admissible if the applicant can show an interest in the public contract (usually indicated by its participation in the procurement procedure) and is potentially harmed by the alleged procurement law violation. Not more than 15 calendar days may have passed since a denial decision of the contracting authority on the alleged violation.

Review procedures should generally be concluded within five weeks with a potential two week extension; however, these are further extended on several occasions. The decision of the procurement chamber can be appealed to the competent Higher Regional Court. The Federal Court of Justice only decides on deviation referrals by a Higher Regional Court to ensure harmonized application of procurement law in Germany. Procurement chambers can, and Higher Regional Courts have to, refer a question on the interpretation of the procurement directives and regulations or the EU treaties to the CJEU if they consider that a decision on the question is necessary to enable them to give judgment.

More than 700 applications for review have been filed to the procurement chambers in 2018. Approximately 7.5 per cent of the applications have not been submitted to the contracting authority because they were considered obviously inadmissible or without merits (see Section IX.iii). The applicants have been successful in approximately 13 per cent of the procurement chamber decisions. In approximately 170 cases, the unsuccessful party appealed to a Higher Regional Court. The appellant was successful in approximately 23 per cent of the appeal decisions.

Only Hesse, Saxony-Anhalt and Thuringia provide for particular review proceedings for tenders below the EU thresholds. Apart thereof, the civil or administrative courts – depending on the subject matter of the envisaged contract – have jurisdiction.

ii Grounds for challenge

The review body assesses whether the contracting authority has violated the applicant’s rights under procurement law, namely any provision that shall protect the tenderers or competition among tenderers, which is essentially almost all public procurement provisions (apart from, in particular, the obligation of contracting authorities to consider the energy efficiency of products or to limit the contract award to bidders with a tariff conformity declaration).

Infringements of other requirements beyond public procurement laws are only reviewable if they are referred to in the procurement provisions and have a close link to the procurement or procurement procedures, namely in particular certain aspects of competition, state aid law and the provisions on the economic activity of municipal undertakings. It remains highly controversial, and rather appears not to be in accordance with the limited scope of procurement review procedures, whether potential non-compliance of contractual provisions with requirements for standard terms and conditions can and have to be raised in procurement review procedures, as recently held by the Higher Regional Court of Celle.34

34 OLG Celle, decision of 18 January 2018, 11 U 121/17.
iii Remedies

Unless the procurement chamber considers the application obviously inadmissible or without merits, it forwards the application to the contracting authority which is then barred to award the contract (at least) until two weeks from the procurement chamber’s decision in the review proceedings. In the event of an appeal to the higher regional court, the appellant can apply for, and is typically granted, an extension of the suspensory effect of the review proceedings until the court’s decision.

In its decision, the procurement chamber has to require from the contracting authority to take the appropriate measures to redress the violation of the applicant’s rights and to prevent damages to the applicant’s interests. The procurement chambers have broad discretion, but may only define suitable and proportional actions necessary to remedy the infringement. They typically require repeating the deficient procurement steps under consideration of the legal consideration of the review body, if the contracting authority still intends to proceed on the procurement.

After an award of the contract, a procurement chamber can declare a contract ineffective only if the contracting authority did not adhere to the prior award notice and stand-still period or if the contracting authority has not published a required contract notice or not conducted a required public tender (de facto procurement). The complaint must be filed within 30 days of the bidder information letters or award notice, absent this information or notice not later than 6 months from conclusion of the contract.

The review bodies cannot impose administrative fines for breach of procurement law. Procurement procedures may though be subject to administrative supervision and review by audit offices.

Bidders can claim compensation for costs of bid preparation and participation, if they would have had a reasonable chance to be awarded the contract absent the infringement of procurement law. Other grounds for compensation remain applicable; however, a claim for compensation of expected profits (i.e., the positive interest in the contract) is rarely founded. Compensation claims generally have to be filed to the civil law courts (seldom to the administrative law courts).

X OUTLOOK

The CJEU decided on 21 March 2019 on the German provision exempting certain emergency services from the scope of the GWB in light of the 2014 Procurement Directives. The definitions of danger prevention and non-profit organisations and associations deviate from the wording of the EU provisions. The CJEU clarified that transport by qualified ambulance is only covered by the exemption if it is in fact undertaken by personnel properly trained in first aid and if it is provided to a patient whose state of health is at risk of deterioration during that transport. It further concluded that – contrary to the German legislator materials – legal recognition of certain organisations such as the German Red Cross as suitable for civil protection and fire protection does not make them non-profit organisations or associations

35 Section 169(1) GWB.
36 Section 135 GWB.
37 Section 181 GWB.
38 See Section 107(1) No. 4 GWB; Article 10 lit. h 2014 Public Contracts Directive.
as required by the exemption.\textsuperscript{39} The Higher Regional Court of Düsseldorf that requested the preliminary ruling by the CJEU will have to determine whether the recognised tax exempt status of organisations carrying out activities intended to bring about, in a disinterested way, material, spiritual or moral benefits for the community, may lead to recognition of \textit{inter alia} the Workers’ Samaritan Federation as non-profit organisations within the meaning of the exemption of emergency services.

Further, the European Commission pursuant to Article 258 TFEU requesting Germany to rectify violations of EU rules regarding a provision for architectural planning services pursuant to which only lots for similar planning services have to be taken into account in the calculation of the contract value of the respective construction project.\textsuperscript{40} The German federal government may now submit its observations. The first German review bodies showed reluctance to apply the provision because of the alleged conflict with EU law.\textsuperscript{41} The topic has been controversially discussed between the German government and the European Commission over the past years. A further proceeding in the area of architects’ services pending before the CJEU concerns the conformity of the minimum and maximum tariffs of the binding German Fee Ordinance for Architects and Engineers with the freedom to provide services.\textsuperscript{42}

A revised version of the first Chapter of the VOB/A of 2018 for works below EU thresholds is effective from 1 March 2019 at the federal level. It aligned the provisions with the 2016 procurement reform and the UVgO, in particular also introducing the free choice of open and restricted procedure. Further modifications of other Chapters and Parts of the VOB/A have been envisaged for 2019. Consolidation of procurement provisions for services and supply contracts at the one hand, and works contracts at the other hand into one single ordinance has been discussed for quite some time. Given the experiences from these discussions in the past years, an integration of the works contracts provisions in the VgV currently appears rather unlikely.

The Competition Register Act on protection of competition for public contracts and concessions providing information on exclusion grounds to contracting authorities and entities has been in force since 29 July 2017, with the technical implementation still in preparation. A start of the federal register is currently not expected before 2020. Until then, the state competition and (anti-)corruption registers remain in place.

\textsuperscript{39} C-465/17 Falck Rettungsdienste GmbH, Falck A/S v. Stadt Solingen.
\textsuperscript{40} Section 3 VII 2 VgV.
\textsuperscript{41} OLG München, decision of 13.3.2017, Verg 15/16; ECJ, C-574/10 \textit{Commission v. Germany}.
Chapter 10

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), Law Decree No. 50/2017 and recently by Law Decree No. 32/2019 (the Sblocca Cantieri Decree), published in the Italian Official Gazette No. 92 of 18 April 2019. 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.3

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 years, pivotal developments in public procurement legislation have been made: the PCC came into force implementing the 2014 Procurement Directives and a number of ANAC guidelines and ministerial decrees have been adopted.

ANAC guidelines already in force provide specific regulations about:

a architectural and engineering services tenders;4

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1 Filippo Pacciani is a partner and Ada Esposito is a counsel at Legance – Avvocati Associati.
2 Legislative Decree No. 50/2016.
3 Legislative Decree No. 163/2006.
4 ANAC Guidelines No. 1, adopted by Resolution No. 973 of 14 September 2016, then updated, following the Corrective Decree, by the Resolution No. 138 of 21 February 2018 (awaiting for publication in the Official Gazette).

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b the ‘most economically advantageous’ tender criterion;  
c the role of the tender procedure manager;  
d below threshold contract tenders;  
e selection criteria of members of the tender committee;  
f exclusion of candidates due to material professional misconducts;  
g in-house providing;  
h negotiated procedures without prior publication of the contract notice in case of non-fungible public supply and service contracts;  
i monitoring of contracting authorities on the activities of the economic operator in public-private partnership contracts;  
j awarding of the private security service;  
k indications for verifying compliance with the limit referred to in Article 177 of the PCC by public or private entities holding works, services or supply concessions already in existence at the date of entry into force of the PCC and not awarded through the project finance formula or public tendering procedures in accordance with European Union law;  
l awarding of legal services;  
m the regulation of social clauses.

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.
Note that pursuant to Article 216 Paragraph 27 octies of the Sblocca Cantieri Decree, a number of ANAC guidelines (e.g., ANAC Guidelines Nos 3 and 4) will be replaced by a new Regulation implementing the PCC, which will be adopted within 180 days of 19 April 2019. 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;
g. Decree of the Ministry of Interior, dated 21 March 2017, published in the Italian Official Gazette No. 81 of 6 April 2017 concerning the monitoring of relevant infrastructures and criminal infiltrations;
h. Decree No. 122, dated 7 June 2017, published in the Italian Official Gazette No. 186 of 10 August 2017 concerning meal ticket services;
i. 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;
k. 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;
l. Decree No. 14, dated 16 January 2018, published in the Italian Official Gazette No. 57 of 9 March 2018 concerning the planning of works, services and supplies of the Public Administration;
m. Decree No. 560, dated 16 January 2018, concerning the BIM platform for tenders and concessions of works;
n. Decree of the President of the Council of the Ministers, dated 10 May 2018, No. 76, published in the Italian Official Gazette No. 145 of 25 June 2018, concerning methods of execution, types and thresholds of the works subject to public debate;
o. Decree of Ministry of Infrastructure and Transport, dated 12 February 2018, published in the Italian Official Gazette No. 88 of 16 April 2018, concerning the calculation of the registration fee for the members of the adjudicating commissions;
Decree of Ministry of Infrastructure and Transport, dated 19 January 2018, No. 31, published in the Italian Official Gazette No. 83 of 10 April 2018, concerning the standard contract forms for surety guarantees provided for in Articles 103, Paragraphs 9 and 104 of the PCC;

Decree of Ministry of Infrastructure and Transport, dated 7 March 2018, No. 49, published in the Italian Official Gazette No. 111 of 15 May 2018, concerning the guidelines on how to carry out the functions of the Director of Works and the Director of Execution of the contract;

Decree of Ministry of Infrastructure and Transport, dated 31 January 2018, published in the Italian Official Gazette No. 88 of 16 April 2018, concerning the determination of the limits of the remuneration of the Arbitration Board;

Decree of Ministry of Infrastructure and Transport, dated 7 March 2018 No. 49, published in the Italian Official Gazette No. 111 of 15 May 2018 concerning the approval of guidelines on how to carry out the duties of the Director of Works and the Director of Execution of the contract; and

Decree of Ministry of Foreign Affairs, dated 2 November 2017 No. 192 published in the Italian Official Gazette No. 296 of 20 December 2017, concerning the general directives governing the procedures for selecting the contractor and performing the contract abroad, pursuant to Article 1 paragraph 7 of PCC.

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;17 contract award annulment;18 bidders’ ability to rectify documentation filed with the contracting authority;19 and qualification requirements based on social security contributions.20

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;

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 that are the subject matter of the contract. The part of the risk transferred to the
concessionaire or private partner in a PPP contract shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire or private partner in a PPP contract shall not be merely nominal or negligible.

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 rebalancing of the financial plan.

Moreover, the Corrective Decree has strengthened the power and role of the ANAC in the PPP and concessions sector. Particularly, the ANAC is entitled to adopt guidelines on the monitoring of PPP contracts conducted by the contracting authorities to ensure the correct allocation of the operational risk on the PPP contractor over the duration of the contracts. These guidelines are currently under discussion and expected imminently.

Article 211, Paragraphs 1 bis, 1 ter and 1 quater of the PCC (as recently introduced by 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 €200,000; 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 three economic operators (for works), or five economic operators (for supplies and services) where available, selected on the basis of a market survey, or from special lists and in compliance with a criterion of rotation.21

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.

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21 Article 36 of the PCC as amended by the Sblocca Cantieri Decree.

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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:

a. failed procurement;
b. works, supplies or services that can be supplied only by a particular economic operator;
c. extreme urgency;
d. supply contracts where the products involved are manufactured purely for the purpose of research, study or development;
e. additional deliveries by the former supplier, intended as a partial replacement or extension of existing supplies where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in technical difficulties in operation and maintenance;
f. supplies quoted and purchased on a commodity market;
g. purchase of supplies or services on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, or the liquidator in an insolvency procedure; and
h. new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract.22

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.23

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.

22 Article 63 of the PCC.
23 Article 54 of the PCC.
Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement. For the award of those contracts, contracting authorities may consult the economic operator that is party to the framework agreement in writing, requesting it to supplement its tender if necessary.

Where a framework agreement is concluded with more than one economic operator, contracts based on that agreement shall be awarded either with or without reopening competition among the economic operators parties to the framework agreement, depending on the conditions provided for by the PCC and on the basis of a reasoned decision of the contracting authority.

Contracting authorities may use a dynamic purchasing system for commonly used purchases. 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. According to recent case law, until the Decree is approved, each local contracting authority is entitled to launch and manage any tender procedure.

Non-qualified contracting authorities shall necessarily purchase works, supplies or services from or through a central purchasing body (which can be used by qualified contracting authorities as well).

The role of central purchasing bodies has been strongly enhanced by recent legislation in the context of a national spending review programme. The main operating functions of central purchasing bodies are: to award supplies and services contracts as well as certain types of works contracts; to enter into framework agreements that can be used by qualified awarding authorities to award public tenders; and to manage dynamic purchasing systems and electronic markets.

The main central purchasing body is Consip SpA, a joint-stock company entirely held by the Ministry of Finance. Moreover, each region has its own central purchasing body, 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.

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24 Article 55 of the PCC.
25 Article 38 of the PCC.
26 Administrative Court of Lombardy – Brescia, Section I, Decision No. 266/2019.
with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person.

Pursuant to Article 192 of the PCC, a special register of the contracting authorities operating through in-house awards is held by the ANAC.

Further, in the utilities sectors, the PCC does not apply to contracts awarded by: a joint venture (JV) set up by public entities or public undertakings to an entity that is affiliated with a member of the JV; or a JV’s member to the JV itself.

V THE BIDDING PROCESS

i Notice

As a general rule, contracting authorities comply with the general principle of transparency, according to which all their acts concerning public tenders must be formally published. 27

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; 28

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; 29

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; 30

d negotiated procedure without prior publication, which can be used by awarding authorities under specific circumstances set forth by the PCC; 31

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

27 Article 29 of the PCC.
28 Article 60 of the PCC.
29 Article 61 of the PCC.
30 Article 62 of the PCC.
31 Article 63 of the PCC.
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; and

f innovation partnership, introduced by the PCC implementing the 2014 Public Contracts Directive.

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;
• ones 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.

32 Article 64 of the PCC.
33 Article 65 of the PCC.
34 Article 80 of the PCC.
Moreover, it is worth mentioning that the Sblocca Cantieri Decree has further amended Article 80 of the PPC, by extending the clauses of exclusion from the tender. Specifically, it has been provided that the economic operator may be excluded when it fails to pay taxes and social contributions if a specific violation is ascertained by means a final ruling or administrative measures or if the contracting authority is able to demonstrate the violation occurred regardless of the issuance of a judicial or administrative decision.

On the other hand, the Sblocca Cantieri Decree has deleted the provision whereby the economic operator could be excluded from the tender as a consequence of a final condemnation decision or loss of requirements of its subcontractors.

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 institori and general attorneys; and

c) clarifying the period of exclusion from the tender in case of application of a exclusion cause other than the criminal offences listed by Article 80.

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.35

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.36

35 Article 42 of the PCC.
36 Article 49 of the PCC.
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, the Sblocca Cantieri Decree has extended the applicability of the criterion to services and supplies having an amount equal to or higher than €40,000. 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.

Following the amendments introduced by the Sblocca Cantieri Decree, currently the lowest-price criterion can be used only for services and supplies with standard features or whose terms are defined by the market; the Sblocca Cantieri Decree has also deleted the provision whereby the economic component of the 30 per cent that may not exceed the global score.

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 satisfactorily meet the specifications.
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 of receipt of a written request, inform:

a any unsuccessful tenderer of the reasons for the rejection of its tender;

b any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and

c any tenderer that has made an admissible tender of the progress of negotiations and dialogue with tenderers.

Contracting authorities withhold information regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.

Further, contracting authorities shall as quickly as possible, and in any event within five days of receipt of a written request, inform:

a the awardee and other recipients identified by the PCC of the contract award, as well as the signing date of the contract;

b excluded bidders of their disqualification;

c any candidate of the decision not to award a contract or not to conclude a framework agreement; and, following the amendments introduced by the Sblocca Cantieri Decree;

d any candidates of the measures aimed at excluding from or admitting in the tender procedure following the requirements checks provided under Article 80 of the PPC.

Once the contract is awarded, each bidder having a qualified interest can ask to have access to the bidding documents of the awardee as well as other undisclosed procurement documents. However, contracting authorities shall not grant access to information with regard to:

a information concerning technical or trade secrets of the bidder, unless access to this information is necessary for filing a legal action;

b legal opinions obtained for the solution of potential or ongoing disputes concerning public contracts; and

c technical solutions or software used by the contracting authority for electronic auctions, where covered by industrial property rights.

40 Article 76, Paragraphs 1 and 2 of the PCC.
41 Article 76, Paragraph 4 of the PCC.
42 Article 76, Paragraph 5 of the PCC.
43 Article 53 of the PCC.
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.44 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.45

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)46 to accelerate the duration of judicial proceedings in the field of public procurement.

i Procedures

In the Italian legal framework, enforcement of public procurement rules is granted not only through judicial review, but also by means of alternative dispute resolution (ADR), encompassing the following procedures:

a friendly settlement agreements, which can be used by contracting authorities in the event the amount of the exceptions raised and quantified by the contractor is equal to or higher than 5 per cent and up to 15 per cent of the contract value;
b civil settlements;
c the arbitration panel of the ANAC; and
d pre-litigation advice to be issued by the ANAC with regard to disputes arising during the tender procedures.

The Corrective Decree introduced some changes to the ADRs, in particular:

a the removal of the technical advisory board, which could be entrusted by the parties with the task of submitting a non-binding solution to disputes; and
b in the case of friendly settlement agreements, the enterprise refusing the proposal of friendly settlement will only be entitled to challenge it before a court within the peremptory term of 60 days.

Finally, some amendments have been introduced in relation to the provisional regime, providing that the arbitration procedures shall be applied to contracts whose call for tender or invitations to the tender have been published before the entrance into force of the PCC.

As far as judicial reviews are concerned, a distinction must be drawn between actions regarding the awarding procedure, which are subject to the jurisdiction of administrative courts, and actions concerning the performance of the contract once it has been awarded, which are subject to the jurisdiction of civil courts.

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44 However, exceptions to the standstill rule are set forth by Article 32 of the PCC.
45 Article 32, Paragraph 11 of the PCC.
46 Legislative Decree No. 104/2010.
Judicial claims are regulated by the ATC. As a general principle, any interested party is entitled to challenge measures adopted by the contracting authority within 30 days of the communication (or acknowledgment) of the measure itself. Should the contract notice not be published, the 30-day period starts from the day following the publication of the contract awarding notice. If no such notice is issued, challenge must be filed within six months of the day following the contract signing.

The appeal may be filed with the competent regional court of first instance, whose decisions may be challenged before the administrative court of second instance (the Council of State).

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 of their publication on the buyer profile, otherwise claimants are prevented from challenging any subsequent deed issued in the procurement procedure.

ii Grounds for challenge

Appeals before administrative courts may be grounded on the breach of the procurement rules set forth by the law and the procurement documents as well as on the infringement of the general principles governing the exercise of administrative power (such as lack of competence, lack of a preliminary investigation and failure to state sufficient reasons, illogical and contradictory motivation).

iii Remedies

Generally, claimants are entitled, inter alia, to challenge administrative measures issued by contracting authorities (such as calls for tender, admission or exclusion of a candidate) and ask for interim measures aimed at suspending the effectiveness of the challenged measure. Administrative courts may also award damages, including the loss of chances.

Should the court set aside the contract award, the former is bound to declare the contract ineffective, in whole or in part, only in cases of material violations set forth by the ATC.47

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;48 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.

47 Article 121 of the ATC.

48 Pursuant to Article 123, Paragraph 1(a) of the ATC, the contract value is intended as the award price.
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 180 days of 19 April 2019, after the entry into force of the Sblocca Cantieri Decree.

Moreover, as anticipated, the PPC has been further amended by the Sblocca Cantieri Decree.

Among the main changes to the PCC (not mentioned before), the following are worth noting:

a the percentage of works, services or supply that may be subcontracted to third parties has been increased from 30 per cent to 50 per cent of the contract amount; moreover, the previous obligation to indicate at least three subcontractors in the tender has been deleted as well as the prohibition to award the subcontract to another competitor in the same tender;

b the prohibition on jointly awarding the design and construction of works (i.e., an ‘integrated contract’) provided under Article 59 of the PCC will be applicable only in relation to works whose definitive design will be approved after 31 December 2020;

c the awardee of design services could become awardee of a work concession provided that the contracting authority adopts suitable measures to ensure competition; and

d for the purposes of the SOA qualification of the requirements of economic and technical capacity, the period of documentable activity has been extended to 15 years preceding the signing date of the contract.

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.
Chapter 11

MEXICO

Federico Hernández A, Ana P Rumualdo Flores and Julio S Zugasti González

I INTRODUCTION

Article 134 of the Mexican Constitution sets forth the values for the use of financial resources and public procurement at all governmental levels in Mexico. At the federal level, government procurement is particularly subject to: (1) the Law of Procurement, Leasing and Services for the Public Sector (LAASSP); and (2) the Law of Public Works and Related Services (LOPSRM), both with their respective regulations (jointly the Procurement Laws). Under the Mexican Constitution and the Procurement Laws, the general rule for public procurement shall be through public biddings and exceptionally by means of invitation to at least three participants or direct awards.

The entities subject to the Procurement Laws include: (1) the Presidency's administrative agencies; (2) the federal Ministries of State and the Legal Executive Office; (3) the Chief Federal Prosecutor; (4) federal state-owned companies or trusts; and (5) Mexican States, municipalities and its public agencies that totally or partially use federal resources. Generally the entities mentioned in items (1) to (4) issue specific internal policies, rules and guidelines that further detail the procurement of goods, leases, services and public works.

On the other hand, certain federal entities known as state productive companies, the legislative and judiciary branches, and autonomous constitutional bodies have their own specific regulations for public procurement (see Section III). States and municipalities also have their own specific public procurement rules.

On an international level, Mexico may carry out public procurement with local or foreign bidders by following the relevant free trade agreements' applicable chapters on government purchases. ‘Public Procurement’ chapters have been included in the agreements executed by Mexico with: the US and Canada (i.e., the North American Free Trade Agreement (NAFTA)), Colombia, Costa Rica, Nicaragua, Israel, European Union, European Free Trade Association, Japan, Chile and the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP). Although Mexico has been a member of the World Trade Organization since 1995, the Government Procurement Agreement does not apply.

Government contract regulations shall follow the principles set forth on Article 134 of the Mexican Constitution: (1) efficiency to obtain services, leases and make acquisitions at a low cost; (2) efficacy in order to obtain the best results; (3) economy to take advantage of

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2 Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.
and save the resources obtained; (4) transparency in the public procurement process, with standard procedures applicable to all participants and straightforward procurement results; and (5) honesty, including the proper exercise of authority by public officials.

According to recent amendments introduced by the new administration, with the exception of the Ministry of Finance and Public Credit (SHCP), Ministry of National Defence and Ministry of Navy, the heads of the new Administration and Finance Units (in charge of planning, budget, human and material resources, and accounting) of each federal entity will be appointed by the SHCP. Also, the SHCP has now the responsibility to establish and conduct the general policy on public procurement and consolidate procurement procedures for goods that it considers relevant (e.g., medicines), including the exercise of the corresponding budget.

The federal Ministry of Public Function (SFP) is the main agency in charge of verifying that public procurements comply with the Procurement Laws. The SFP may request information related to a specific project from public officials and suppliers that are involved with such procurement. Also, the Ministry of Economy is also empowered to oversee the enforcement of the Procurement Laws, particularly with respect to the promotion of small and medium businesses. The SFP may sanction conducts that violate the Procurement Laws by following the rules on the new General Administrative Responsibilities Law (LGRA). At the federal level, the Federal Superior Auditor (and autonomous body of the Chamber of Deputies) may also conduct oversight investigations of the use of public funds in government contracts. Similar accountability mechanisms exist on a state or municipal level.

On the other hand, public-private partnerships (PPPs) are also used by the Mexican government to promote long term competitive projects as an alternative to traditional public procurement procedures contemplated in the Procurement Laws. There are specific federal, state and even municipal regulations applicable to PPPs.

Finally, the granting of concessions regarding the use of public goods or the provision of public services are regulated under the relevant sector specific regulation and follow the principles of Article 134 of the Mexican Constitution.

II YEAR IN REVIEW

The last quarter of 2018 saw the change of the control of the federal Congress and the Presidency to a new party. In November 2018, the Organic Law of Federal Public Administration was amended to include the new powers to the SHCP mentioned before.

In December 2018, the US, Mexico, Canada Trade Agreement (USMCA) was executed to replace the NAFTA once the relevant internal ratification procedures conclude in each country. The main differences between the government procurement chapters between both treaties are that the USMCA specifies: (1) that the parties are only Mexico and the US, excluding Canada; so government procurements between Mexico and Canada would be established under the CPTPP, which became effective in December 2018; (2) the use of electronic means to carry out public procurement procedures; and (3) a compliance chapter.
III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The entities subject to the Procurement Laws are those set forth in Section I. The entities listed below have their own procurement regulations, which follow the guidelines of Article 134 of the Mexican Constitution:

a autonomous constitutional bodies, such as the National Institute of Access to Public Information, the Federal Institute of Telecommunications, the Federal Economic Competition Commission, the National Commission of Human Rights and the National Institute of Elections, among others;

b entities that have a specific regime on public procurement such as the state productive companies (including its subsidiaries): Mexican Oil Company (Pemex) and the Federal Electricity Commission (CFE); and

c public investigation centres conducting acquisitions, leasing and services with their own funds for scientific investigations and for technology development encompassed under the Technology and Science Law.

ii Regulated contracts

In general terms, the contracts that are regulated by the LAASSP are the following: (1) the acquisitions and leasing of movable goods; (2) the acquisitions and leasing of movable goods that must be incorporated into immovable goods to accomplish the public works; (3) the acquisitions of movable goods that will be installed into an immovable good under the responsibility of public agencies or bodies; (4) the hiring of services relating to the incorporation of movable goods into immovable goods; and (5) the hiring of consultants, advisers or investigators.

On the other hand, the contracts regulated by the LOPSRM are those whose main purpose is building, installing, extending, remodelling, restoring, preserving, maintaining, modifying and demolishing immovable goods, such as: (1) maintenance, restoration and modification of goods incorporated into immovable goods; and (2) acquisition and installation of movable goods into immovable goods.

The Procurement Laws provide that public procurement may be carried out by means of the following procedures:

a public bidding (as a general rule) as an administrative procedure through which the relevant entity summons suppliers to offer the best conditions for procurement purchase;

b an invitation procedure to at least three participants (as an exception) where the relevant entity selects at least three suppliers that must have the capacity for immediate response to provide the relevant goods, lease, services or works under specific cases; and

c direct award (as an exception) where one supplier who has been previously selected by the relevant entity is directly awarded with the relevant contract under specific cases.

The LAASSP provides 20 and the LOPSRM 14 specific cases in which the invitation and direct award procedures could be conducted as exceptions and subject to the responsibility of the relevant entity. Some common examples are the following (in both laws): (1) where a single supplier has a special licence or exclusive rights (e.g., IP rights); (2) in cases of risk or danger to the economy, social order, public services or environmental security; (3) in the
event of circumstances in which there could be important and justified additional losses or costs; (4) for procurements on defence, military and national or public security matters; and (5) in the event of force majeure and acts of god.

Under the Procurement Laws, government contracts must contain the following: (1) the name of the contracting entity; (2) the type of procurement used; (3) the budget of the contract; (4) whether the price is fixed or may be modified; (5) for leasing, whether there is an option to purchase the goods; (6) percentages for advance payments; (7) payment dates and terms; (8) penalties; (9) currency; (10) non-assignment clause (except payment rights); (11) causes for termination; (12) whether licences, authorisations and permits are required; and (13) alternative dispute resolution, among others.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The LAASSP provides the possibility for the SFP to execute framework agreements with two or more suppliers that would allow a relevant entity to follow a direct award or invitation exceptional procedure. The framework agreement must establish the price, quality, conditions and scope of the project. Some examples of these types of agreements are food vouchers as payments, granting software licences, and administering vaccines, among others.

Consolidating public purchases are relatively increasing in Mexico. As a way of example, the Mexican Social Security Institute (IMSS) and the Institute of Security and Social Services for State Workers (ISSSTE) have carried out purchasing of medicines and medicine supplies by means of consolidating public procedures in recent years. By doing so, the Mexican government pretends to obtain competitive prices and assuring quality efforts. Also, the new government has announced additional consolidation of public procurement procedures controlled by the SHCP.

ii Joint ventures

According to the Procurement Laws, agreements or any other procurement documents that are executed by and between the federal or state agencies and entities that are not subject to these regulations. However, these agreements are governed by the Procurement Laws when the relevant entity that is bound to deliver or provide the appropriate goods or services does not have the capacity to do it by itself and hires a third party.

Moreover, unless otherwise provided, PPPs are not subject to the Procurement Laws, and the relevant works or services that must be performed by the relevant private entity to fulfil its duties on a PPP project are not subject to the Procurement Laws.

V THE BIDDING PROCESS

i Notice

According to the Procurement Laws, the call for competition for public contracts must be advertised in an electronic system called CompraNet, which is a governmental access-free mechanism. Among other things, the following information must be provided:

a name of the contracting entity;
b if the bidding process is national or international;
c description of the goods, leases, services or works that are going to be contracted;
requirements to participate in the bidding process; criteria for evaluation of proposals and for the award of contracts; and draft of the contract.

Additionally, a summary of the call must be published in the Federal Official Gazette (DOF) including at least: (1) purpose of the bidding process; (2) volume of good, lease, services or public work to be procured; (3) number of the bidding process; (4) schedule process; and (5) the date on which the call was published in CompraNet.

Although autonomous constitutional bodies have their own regulations regarding public procurement, the rules established in those regulations for bidding process are quite similar from those established in the Procurement Laws.

On the other hand, as a result of Mexico’s 2013 energy reform, procurement of hydrocarbons and electricity are out of the scope of the Procurement Laws and Pemex and the CFE have their own special regulations. Regarding hydrocarbons, private companies are currently able to enter into contracts with the state productive company Pemex for the exploration and extraction of hydrocarbons in oil fields under the special rules applicable. In a nutshell, the Ministry of Energy decides the form of public procurement process and establishes the guidelines of the call, as well as the draft of the contract, while the SHCP establishes the fiscal terms of such contracts. After that, the National Hydrocarbons Commission prepares and publishes the call, carries out the bidding process and awards the contract. The procedure for procurement of electricity is practically the same as the above, but carried-out by the CFE.

Procedures

In general terms, according to Article 134 of the Mexican Constitution and the Procurement Laws, the public procurement procedure must be conducted in the following manner:

a. A call for competition must be published in CompraNet.
b. At least one clarification meeting must be carried out. There must be at least six calendar days between the clarification meeting and the next stage of the procedure (submission and opening of proposals).
c. Proposals must be submitted and publicly opened. Between the call for competition and the submission and opening of the proposals there must be at least: 20 calendar days for international biddings, and 15 calendar days for national biddings.
d. All proposals must be evaluated in accordance with the bidding rules. The contracting entity shall issue a decision awarding the contract to the tender that meets the applicable requirements.
e. The contract must be signed during a period of 15 calendar days after the award of the contract is declared.

The Procurement Laws provide that the bidding process may be carried out using electronic means, in which case the whole process must be carried out through CompraNet using electronic identification means.

In the bidding process of oil fields, it is not possible to use electronic means since the submission and opening of the proposals are broadcasted live on the National Hydrocarbons Commission website. In contrast, the entire bidding process of electricity projects could be done on the CFE’s procurement electronic system.
iii Amending bids

Before issuing a call for competition, public entities are able to publish the project on CompraNet during at least 10 business days to receive relevant feedback from potential bidders. Comments and opinions received shall be analysed by public entities aiming to consider them in the final bidding document.

The contracting entities may change some terms and conditions of the bidding rules, provided that such changes are issued at least one week before the submission and opening of the proposals. All changes must be published on CompraNet.

VI ELIGIBILITY

i Qualification to bid

According to the Procurement Laws, bidders may be disqualified from bidding for a number of reasons, such as:

a not signing more than one public contract during a two-year period;
b insolvency;
c not complying with their obligations in a public contract, causing severe damages to the contracting entity;
d delivering goods, services or public works that do not comply with the requirements of the bidding rules;
e providing false information;
f if one bidder is linked to another through the same partner or partners;
g lack of authorisation to provide goods or services protected by intellectual property rights.

Other disqualification causes could be included in the bidding rules as needed or requested by the contracting entity.

ii Conflicts of interest

In order to avoid conflicts of interest, public entities are not able to receive proposals or award contracts to:

a companies in which relevant public officers have a financial, personal or family interest in the result of the bidding;
b companies in which public officers or their relatives are part of or have formed part, during a two-year period before the date of execution of the relevant contract; and
c persons who work for the government, unless it is authorised by the SFP.

As a general rule, in all bidding processes, participation of bidders who have conflict of interest is prohibited in order to avoid corruption, and particular rules could be included in the bidding documents. The LGRA also prohibits participation of bidders and authorities who have a conflict of interest.

iii Foreign suppliers

Foreign suppliers are able to bid in international bidding procedures. There are two types of international bidding procedures: (1) under international treaties, and (2) open. In the first
case, only Mexicans and national of foreign countries that have signed a free trade agreement with Mexico that contains a public procurement Chapter are able to bid. In the latter case, Mexicans and any foreign supplier are allowed to participate in the bid.

In general terms, the Procurement Laws do not establish that foreign suppliers must set up a local branch or subsidiary. However, depending on the subject matter, the industry and activities of the bid, there may be restrictions under the Foreign Investment Law or other sector-specific regulations that require the incorporation of a Mexican company or having Mexican participation. For example, foreign companies that are awarded an oil fields contract must constitute a special purpose company if they do not have a Mexican branch or subsidiary, because exploration and extraction contracts of hydrocarbons can only be executed with Mexican companies. For contracts awarded by the CFE to consortium bids, the consortium has to register a company with a specific purpose in Mexico, aimed at executing the contract.

VII AWARD

i Evaluating tenders

The criteria for evaluating proposals must be disclosed in the call. According to the Procurement Laws, there are three criteria that can be used to evaluate the proposals:

a points and percentages, which evaluates the best combination of quality and price;
b binary, which consists in the evaluation of whether the bids comply with all the requirements. The contract is awarded to the bidder who fulfils such requirements and offers the lowest price; and
c cost-benefit, which consists in the evaluation in monetary terms of the costs and benefits associated with the purchase, execution and operation of the good, lease, service or public work involved.

During the stage of submission and opening of proposals (economic and technical), all the proposals are received in a sealed envelope. Afterwards at the same act, proposals are publicly opened in order to put on the record what documents were submitted. The content of the documents is detailed but not evaluated at that moment.

Subsequently, the contracting entity evaluates the proposals according to the evaluation criteria contained in the bidding rules. Proposals that fail to comply with the requirement established are disqualified.

The award resolution must be notified in a public meeting within a 30 calendar day period since the submission and opening of the proposals. This notice must contain: (1) a list of the bidders whose proposals were disqualified; (2) a list of the bidders whose proposals were in compliance with the requirements; (3) the name of the awarded bidder; (4) place, date and hour for signing the contract; and (5) name, position and signature of the public officer issuing the award.

ii National interest and public policy considerations

In bidding procedures regarding public works, public entities must consider the effects of such works in the environment. If the works can cause damages on the environment, the contract project must include the necessary works to preserve or restore such conditions.
The LAASPP sets forth that the procurement of wood goods, the bidders must submit a certificate that guarantee the origin and sustainable manage of the forest where the wood comes from. For the acquisition of office paper, the paper must contain a minimum of 50 per cent of recycled material or natural fibres not derived from wood or raw materials.

Regarding environmental considerations, domestic suppliers cannot be favoured. In national bidding procedures only national goods, services and public works can be offered. For goods to be considered national, they must be produced in Mexico and have at least 50 per cent of national content. For public works and services to be considered national, they must be provided by nationals or companies registered in Mexico. These procedures are aimed to strengthen national industry.

VIII INFORMATION FLOW

When submitting the information to the calling entity, the bidder must provide all the information requested, which may include information regarding the shareholders, financial information, legal details and information alike. Confidential information submitted by participants shall remain confidential. Bids are not available to the public on CompraNet.

During the procurement process, the bidders do not have access to the information provided by other bidders. During the event for the opening of the envelopes containing the economic and technical proposals, the bidders have the right to know if their proposal has been accepted because it met the requirements set out in the bidding rules. At that time the bidders do not know the details of other bidders’ proposals, but they receive information during the event on whether their proposal will be analysed by the public servants of the relevant public entity and how many of the proposals were turned down because the bidders failed to provide legal, financial or other information.

The outcome of the bid is notified in a public meeting that all the bidders can attend. In the case of electronic bids or bids conducted by electronic means, the outcome is notified through the CompraNet and both winning and unsuccessful bidders receive formal notification. When the outcome is revealed to the bidders, it is explained and detailed by the relevant calling entity the reasons why the contract is awarded to a specific bidder, as well as the reasons others’ proposals were rejected.

The relevant entity determines whether the type of goods to be purchased, or the services to be hired, must remain confidential because may adversely affect, for instance, national security. In such a case, the relevant entity may decide to follow a direct award process instead of a public bid. Then the entity and the company to which the contract is awarded must keep sensitive information confidential, and for that purpose, the relevant entity classifies the information as reserved to keep its confidentiality in terms of the relevant regulations. This classification is made at the time the information is requested to be disclosed according to the provisions of the Transparency Law and Access to Public Information.

Regarding access to public information, in general terms, all the government information is public, although it could be reserved under specific scenarios, in which case it is prevented for disclosure. Although the data protection authority has ruled that the purpose, as well as the amounts of the contracts, are public information, the details of the activities to be carried out could be reserved by the calling entity. While the contracts are public, the information contained in the ‘technical exhibit’ could become reserved to prevent its disclosure to the general public.
If national security could be jeopardised, the relevant defence and security entities could carry out either an invitation procedure or a direct award in order to keep the confidentiality of the project.

**IX  CHALLENGING AWARDS**

Challenges are not so frequent and the chances of success are slim mainly because the government body that handles the challenges at the federal level (SFP) is also an entity of the executive branch and therefore, most of the times it validates the outcomes or the decisions made by the relevant calling entity.

The complaint must be filed before the calling entity within six business days of the occurrence of the act that motivates the filing of the complaint (as explained below).

The complaining party may request an injunction. If the authority determines that by granting an injunction would not cause damages to the public interest (because in such case the injunction is denied), the complaining party must contract a surety bond to guarantee any damages if the complaint is finally rejected. Such bond must be between the 10 and 30 per cent of the amount of the economic proposal of the complaining party.

**i  Procedures**

According to the Procurement Laws, only a formal complaint can be filed with the SFP in the following cases:

- against the official call and the clarification meetings: Only bidders that have expressed interest in participating in the bid process are able to file the complaint within six business days of the last clarification meeting taking place;
- the official invitation to at least three participants: Only parties that received such an invitation are able to file the complaint within six business days of receiving the invitation;
- the act of presentation and opening of the proposals: Only bidders that submitted a proposal are able to file the complaint within six days of the official notification of the outcome of the public bid process;
- the cancellation of the bidding process: The complaint could be filed only by the party or bidder that submitted a proposal, within six business days of receiving official notification of the cancellation; and
- acts and omissions on behalf of the relevant calling public entity that prevented the execution of the contract as set forth either in the official call or the Procurement Laws. Only the awarded bidder is able to file the complaint within six business days of the expiration of the term set forth for the execution of the contract.

On the other hand, a bidder who considers affected during the public procurement process might file an *amparo* (constitutional challenge) before a federal court instead of following the provisions of the Procurement Laws. Nevertheless, courts are unlikely to rule in such situations and find the *amparo* invalid if the bidder first does not first follows the challenge procedure set out in the Procurement Laws. The relevant party can file an *amparo* against the resolution resolving the challenge procedure.
ii Grounds for challenge

The Procurement Laws only set forth the cases mentioned above as grounds for challenge acts within a public procurement procedure.

Remedies

Normally, the SFP may determine the granting of injunctions, set aside contracts, order new tenders, replacing of one or more stages of the process, and measures alike.

For breach of procurement procedures, it is possible to impose fines on both the public servants that conducted the procedure and the private bidders as long as the latter agreed the breach with the former in order to obtain an illegal advantage (this may also constitute a felony under criminal laws). Breach of contracts can be sanctioned with fines that could range from around US$225 to US$4,500 and debarment for procurement procedures from three months to five years.

The public servants that breach a procedure can face dismissal, suspension and debarment, as well as fines if the consequence of the breach resulted in economic damage to the relevant calling entity.

From an antitrust perspective, the Federal Economic Competition Law (LFCE) prohibits absolute monopolistic practices, including any agreements, arrangements or combinations between competitors with the object or effect to coordinate positions or abstention in public procurement processes and exchange information towards this coordination. The LFCE sanctions this conduct as follows. From an administrative standpoint, fines for companies could be up to 10 per cent of annual income, and fines for individuals could be up to around US$900,000. From a criminal standpoint: individuals may receive from five to 10 years’ imprisonment and fines from around US$4,500 to US$45,000.

X OUTLOOK

The new federal administration that started in December 2018 originally announced that, to prevent acts of corruption, it will support public bids being carried out instead of restricted invitations or direct awards, to provide more transparency to such procedures. However, so far we have seen the opposite even in complex infrastructure projects, which is frustrating because public bids should be the general rule.

Also, the new government has announced that instead of official calls issued by the public entities of the federal government that would result in the carrying out of public procurement procedures in all the government, only the SHCP would be able to issue official calls to centralise the process. In that way, according to the government, acts of corruption would also be prevented as only one goes. Currently, the foregoing has not been carried out, and we need to wait and see how these centralised procedures are structured and at the end implemented.

It is also expected that the Procurement Laws will suffer changes in order to incorporate the different views and ideas of the new government.
I 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. Taking into consideration that this large amendment to the PCC entered into force on 1 January 2018, it raised several new challenges in the Portuguese legal system during 2018.

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.

II YEAR IN REVIEW

In 2018, a major change to the Portuguese legal system was implemented through the entering into force, on 1 January 2018, of the 11th amendment to the PCC, approved by Decree-Law No. 111-B/2017 of 31 August (of which the most recent wording derives from the amendments foreseen in Decree Law No. 33/2018, of 15 May). This amendment provoked...
a profound revision to the previous legal regime as it has revoked 35, added 54 and changed 155 Articles, modifying significant aspects of public procurement procedures and contracts. This significant 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.

Additionally, Decree Law No. 123/2018, of 28 December, which regulates an organisational model for the implementation electronic invoicing in public procurement, was recently approved. Tersely, this legal document foresees two important matters: (1) the delay of the dates from which the electronic invoicing is mandatory in public procurement; and (2) the delegation, in ESPAP (the Public Administration Shared Services), of the coordination task regarding the implementation of electronic invoicing.

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;
- the autonomous regions;
- regional authorities;
- local authorities;
- municipalities;
- public institutes;
- independent administrative authorities;
- the Central 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*:

- public works contracts;
- public works concessions;
- public service concessions;
- acquisition or lease of goods;
- acquisition of services; and
- 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 negotiation procedure without publication of a notice;
- rules concerning qualitative selection including quality or environment management;
- confidential proceedings;
- protection of confidential information or security of supplies;
- an extension to a seven-year term of duration for framework agreements; and
- publicity and transparency rules.

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; and

\( d \) 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:

\( a \) affect the main scope of the contract;
\( b \) prevent, restrict or distort competition;
\( c \) 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 bodies, and 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 bodies 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 bodies 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 bodies must comply with the rules applicable to each contracting authority. Procurement through central purchasing bodies is purely optional.

The PCC also sets forth the special proceedings instruments, which include:

a concept tenders;

b 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;
c qualification systems, which may only be adopted in the context of executing contracts designed for activities in the special utilities sectors; 

d specific rules for the alienation of movable property; and 

e 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, 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 2017.

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.

In fact, Decree No. 57/2018, of 26 February, regulates the operation and management of the public procurement portal (called ‘BASE’). This portal was designed to centralise the most important information relating all pre-contractual procedures, which must be carried out electronically as required by the PCC. It is a virtual space where the elements regarding to the pre-contractual procedure and performance of public contracts are publicised, thus enabling their follow-up and monitoring.

### 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 the 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, the 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:

a. insolveny or similar;
b. conviction for crimes affecting professional reputation;
c. administrative sanctions for a serious professional breach;
d. non-payment of tax obligations;
e. non-payment of social security obligations;
f. sanction of prohibition to participate in public tenders set forth in special legislation;
g. sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;
h. conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set in the PCC;
i. direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage;
j. unlawful influence on the competent body for the decision to contract, or obtainment of confidential information granting undue advantages, or provision of misleading information;
k. conflict of interest; and
l. significant faults on the execution of a previous public contract in the past three years.

In the situations referred to above in (b), (c), (g) or (l), the PCC allows bidders to demonstrate that enough measures have been implemented in order to demonstrate a bidder’s moral integrity 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, these 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 the 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, the award criteria is the most economically advantageous tender, that may assume one of two methodologies: (1) best relation price-quality, in which the award criteria consists in a group of factors and subfactors concerning several aspects of the performance of the contract to be executed; or (2) evaluation of the price or of the cost, where the tender documents shall establish all other components of the performance of the contract to be executed. Moreover, the Portuguese legal framework also establishes the possibility to award the lowest price, where this is the most appropriate award criterion.

In accordance with the first criterion, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, namely quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

Regarding the latter, only the price of the proposals is evaluated.

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.

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 sends 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 for its rectification.

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 based on 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.

In accordance with 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 contract 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 Public Procurement Directives were published in the OJEU on 28 March 2014 and entered into force on 17 April 2014, and Portugal has fully implemented the provisions of the 2014 Directives, with the 11th amendment to the PCC, which entered into force on 1 January 2018.

Additionally, as a consequence of the entering into force of the General Data Protection Regulation (GDPR) on 25 May 2018, there are several administrative activity and the public procurement implications of the GDPR, which will continue to operate in 2019.

With regard to possible legislative amendments currently being considered, two bills referring to administrative and tax reform were recently submitted to, and approved by, the Portuguese parliament. In addition to other measures, these bills aim to develop tools to speed up administrative justice and to fight against procedural delays.
I  INTRODUCTION

Broader speaking, Russian government procurement (as 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 a system of planned procurement based on annual and three-year procurement plans;
b additional methods of selecting a supplier, including rules relating to requests for proposals, tenders with limited participation and two-stage tenders;
c monitoring, auditing and public oversight of procurement; and
d anti-dumping measures intended to ensure that procurement participants comply with their price undertakings and select suppliers on the basis of important criteria other than price.

This Law led to the adoption of many new subordinate legal acts, and has been updated numerous times since its enactment to keep up with economic policy developments and new practical challenges.

Law No. 44-FZ regulates relations aimed at meeting state and municipal needs for the purpose of enhancing the productivity and efficiency of the procurement of goods, works and services, promoting transparency and preventing corruption and other abuses in this area. Thus, the contract system under Law No. 44-FZ is based on the following principles:

a uniformity of the contract system;
b transparency;
c competition;
d professionalism of contracting authorities;
e promotion of innovation;
f responsibility for productivity in meeting state and municipal needs; and
g efficiency of procurement.

However, while certain principles are developed further in the provisions of the relevant procurement laws, some are more general in nature. Consequently, whether the action of a contracting authority will be in accordance with the legal principles may depend on how those are interpreted by the Russian courts and other competent bodies.

With regard to procurement involving public entities (as opposed to public authorities), the main law in this area is Federal Law No. 223-FZ on the Purchase of Goods, Works and Services by Certain Types of Legal Entities, dated 18 July 2011 (Law No. 223-FZ), which provides for a more liberalised procurement mechanism in comparison with Law No. 44-FZ. The following entities fall within the scope of this law:

a state corporations, state-owned companies and public companies;
b natural monopolies;
c companies engaged in regulated activities in the fields of electric power, gas, heat, water, etc.;
d autonomous institutions;
e legal entities where the Russian Federation holds a stake exceeding 50 per cent;
f subsidiaries where the entities listed above hold a stake exceeding 50 per cent;
g subsidiaries where the above-mentioned subsidiaries hold a stake exceeding 50 per cent;
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 by competitive and non-competitive methods, as well as conditions for its application, procedure for conclusion and execution of contracts, and other related provisions. Until a contracting entity approves its own procurement policy, it must follow the procedures established by Law No. 44-FZ.

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.

Model policies must establish a date by which all the relevant policies will need to be brought in line with the model policy, and contain provisions regarding the procurement procedure, method and conditions of its application, and the term for entering into the agreement as a result of the competitive procurement, which may not be changed in policies elaborated pursuant to the model one. In addition, subsidiaries listed under the above-mentioned items (f) and (g) regarding the types of public entities defined under Law No. 223-FZ may join the procurement policy established by their parent company.

Following a legislative change that introduced the concept of public companies, these 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, these enterprises must conduct procurement in accordance with the more stringent provisions of Law No. 44-FZ. Unitary enterprises may nonetheless engage in procurement under Law No. 223-FZ in a limited number of instances, provided that they have adopted their procurement policy and published it in the unified information system within the requisite deadline.

II YEAR IN REVIEW

Since January 2019, a significant number of changes in procurement legislation have entered into force. An extensive package of amendments was adopted with respect to electronic forms of procurement. A number of changes were adopted regarding the enforcement of the contract, the possibility of changing the contract price and purchasing from a sole source.

Among other legislative changes, the Russian government has approved a plan for transformation of the business climate, which envisages a number of procurement reforms (see the Decree of the Government of the Russian Federation of 17 January 2019 No. 20-r). For example, by 2020, the government plans to increase to 18 per cent the proportion of procurement procedures held under Law No. 223-FZ whose participants are limited to small- and medium-sized businesses.
Administrative and criminal liability measures have been introduced for providing a deliberately false expert opinion in the procurement process under Law No. 44-FZ (Federal Laws No. 510-FZ and 520-FZ of 27 December 2018). In addition, Federal Law No. 99-FZ, according to which a wider range of individuals involved in the procurement under Law No. 44-FZ may be subject to criminal liability (see Articles 200.4 and 200.5 of the Criminal Code of Russia), entered into force in 2018.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

A wide range of bodies are deemed contracting authorities pursuant to Law No. 44-FZ, including the following:

a state (federal or regional) and municipal authorities;
b state and municipal unitary enterprises;
c the State Atomic Energy Corporation Rosatom;
d the State Corporation for Space Activity Roskosmos;
e regulatory bodies of state non-budgetary funds (pension fund, social insurance fund, federal and territorial compulsory medical insurance funds);
f treasury enterprises that perform state functions or render state services based on the right of operative management;
g certain budgetary non-commercial institutions; and 
h other institutions and entities in certain cases provided by law.

According to Law No. 44-FZ, any legal entity, regardless of its form of incorporation, ownership type, place of business or place of origin of its capital, and any individual, including those registered as a self-employed entrepreneur, may be a procurement participant. Since August 2015, an exception to this rule exists that prohibits offshore companies from participating in procurement. The list of offshore territories is established by the Ministry of Finance. For more information regarding procurement participants, see Section VI.iii.

ii Regulated contracts

Government procurement rules regulate contracts for the supply of goods, carrying out of works and provision of services (including the acquisition of immovable property or lease of property).

There are specific rules with regard to utilities and defence procurement contracts, as well as to contracts in relation to provision of goods to be used in emergency situations. Specific rules also apply to:

a goods supplied for federal needs in accordance with federal and interstate target programmes;
b energy service agreements;
c communication services for the needs of public authorities, national defence, national security and law enforcement;


d development of drugs and psychotropic substances;
e agricultural products supplied for state needs;
f gas supplied for federal (or municipal) needs;
g scientific research and experimental development;
h educational services;
i production and distribution of national films;
j regular automobile and city electric transport transportation;
k design and exploration works or construction and reconstruction of capital construction projects;
l procurement of goods the manufacturing process of which has been established, modernised or developed in Russia; and
m some other procurements.

Concession agreements, privatisation and the provision of services by international financial institutions are not within the scope of the government procurement law. Concession agreements are regulated by Federal Law No. 115-FZ on Concession Agreements, dated 21 July 2005.

One innovation of Law No. 44-FZ is a type of service contract called a ‘life-cycle contract’, which allows for the establishment by the government of a contract providing for the procurement of goods or works, covering different stages of the life cycle of the object (design, construction, subsequent maintenance, operation, etc.). Under the previous regulation it was impossible to enter into one contract covering different types of works, and it was necessary to conduct a separate tender for each different type of works.

The provisions of Law No. 44-FZ do not provide for a competitive dialogue procedure, and in this respect the procurement rules are quite strict. Thus, the current legislation generally does not provide for the possibility of amending a draft public contract that is an integral part of procurement documentation at the stage of submission of bids. Bidders may only submit requests for clarification of documentation requirements. However, in certain cases stipulated by Law No. 44-FZ, the parties may agree to amend certain provisions of the public contract at the execution stage.

The amendment of material conditions in contracts following their execution is prohibited, except for the following amendments, which do not require a new procurement procedure: a change of contracting authority; a change of supplier in cases of legal succession; or a change of the contract price by mutual agreement as provided by Law No. 44-FZ in certain cases. An existing contract may only be transferred to another supplier without a new procurement procedure in the case of legal succession.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Given that Law No. 44-FZ presumes the mandatory conclusion of public contracts without any amendments to contractual rights and obligations, framework agreements are not used in Russian procurements.

Contracting authorities are entitled to hold joint tenders or auctions in cases where they make purchases of the same goods, works and services. The authorities’ rights, duties and liabilities when holding joint tenders or auctions are to be defined by an agreement between
the relevant parties. A contract with the winner of a joint tender or auction is required to be concluded by each contracting authority. The government establishes the procedure for holding joint tenders and auctions.

According to the procurement legislation, for the purpose of centralised purchasing, the function of determining suppliers may be transferred to existing or specially created bodies (namely, state and municipal bodies or treasury enterprises). Under centralised purchasing, delegation of the functions of justifying purchases and determining the terms of a contract is not permitted, in particular for the fixing of the initial (maximum) price of a contract and the signing of the contract. Contracts must be signed by the contracting authority that procures the goods, services or works.

ii Joint ventures

Depending on the nature of the project, a company established by state public bodies may act in accordance with special legislative acts regulating their activity or under Law No. 223-FZ.

Procurement procedures stipulated by Federal Law No. 44-FZ are not applicable to public–private partnerships (PPPs). At present, PPP projects may be implemented under Federal Law No. 224-FZ on Public–Private Partnership, Municipal–Private Partnership in the Russian Federation and Amendments to Certain Regulatory Acts of the Russian Federation, dated 13 July 2015 (the PPP Law); or Federal Law No. 115-FZ on Concession Agreements, dated 21 July 2005, which provides for a two-stage tender procedure for awarding concessions: pre-qualification and evaluation of bids. The PPP Law, which came into force on 1 January 2016, has introduced a unified legal regime for the implementation of long-term infrastructure projects based on PPP agreements at the federal level. Previously, PPP agreements were structured based on the general rules of the Civil Code and regional legislation. The adoption of the PPP Law is a positive legislative development that has resolved problems arising from the prior lack of clear and uniform regulation of PPP agreements. Currently, there are discussions and legislative plans to improve the provisions of the PPP Law for the purpose of increasing the number of projects implemented under it.

V THE BIDDING PROCESS

i Notice

Public procurements must be published within a unified information system that is located on a designated website. 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;

services in the areas of water supply, heat supply and gas supply (except for services
related to the sale of liquefied gas); and
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:

- tenders (namely, public tender, tender with limited participation, two-stage tender,
closed tender, closed tender with limited participation and closed two-stage tender);
- auctions (including closed auction);
- requests for quotations; and
- requests for proposals.

As of 2019, amendments to Law No. 44-FZ entered into force, obliging the contracting authorities to conduct all competitive procedures specified above in an electronic form. However, Law No. 44-FZ sets out an exhaustive list of exceptions (e.g., procurement from a sole source, procurement conducted in foreign countries and procurement conducted via closed procedures).

Electronic procedures (including filing applications for participation in procurement) and contracting are carried out through an electronic platform. Law No. 44-FZ provides a detailed regime for conducting electronic procurements.

The prevailing type of procurement procedure is an electronic auction. Procurement from a sole source means procurement from a particular supplier without a tender, which may be done in exceptional cases envisaged by Law No. 44-FZ. These exceptional cases include, for instance, the conclusion of the following contracts:

- 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;
- 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);
- services in connecting to (cutting in) engineering networks at prices (tariffs) controlled in compliance with Russian legislation;
- storing, importing or exporting narcotic agents and psychotropic substances;
- 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.).
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;

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);

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);

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

some other exceptional cases provided by Law No. 44-FZ.

With effect from 1 July 2018, Law No. 223-FZ lists competitive and non-competitive procurement methods, but as opposed to the provisions of Law No. 44-FZ, the list is not exhaustive. A procurement policy, established in accordance with Law No. 223-FZ, may set forth other competitive methods aside from tenders, auctions, requests for quotations and requests for proposals, provided that such methods comply with the conditions established by Law No. 223-FZ. Non-competitive methods, in turn, include methods that do not comply with these conditions (e.g., procurements from a sole supplier). Similarly to Law No. 44-FZ, competitive procurement procedures under Law No. 223-FZ must be held in an electronic form, unless otherwise stipulated in the procurement policy. Competitive procurement procedures under Law No. 223-FZ whose participants are limited to small- and medium-sized businesses must be held in an electronic form only.

All procurement policies adopted in accordance with Law No. 223-FZ had to be brought in line with the current version of Law No. 223-FZ and published in the unified information system by 1 January 2019. Procurement policies that do not comply with Law No. 223-FZ after this date are deemed to be not published and, therefore, may not be used for holding procurement procedures.

iii  **Amending bids**

A bidder is entitled to modify or withdraw its application before the expiry of the period for filing applications, subject to the provisions of Law No. 44-FZ. In these cases, a tender participant or auction participant does not forfeit the right to the monetary assets provided to secure the application thereof. The modification of an application or a notice of its withdrawal is deemed valid before the expiry of the period for filing applications. In relation to requests for quotations, a bidder is entitled to change or withdraw its application for participation in the request only if the contracting authority has amended the notice making the request for quotations. Once the period for filing applications has expired, no changes to the bid may be made.
VI ELIGIBILITY

i Qualification to bid

There are two types of procurement procedures depending on whether they are one-stage or two-stage tenders. A separate pre-qualification stage is used in most tenders (tenders with limited participation, two-stage tenders, closed tenders with limited participation and closed two-stage tenders). The winner in the latter case is determined during the second stage of the tender from the bidders who passed the pre-qualification stage.

In any type of procurement procedure, the procurement commission must first verify whether a bidder meets mandatory unified requirements and any mandatory additional requirements established by the government.

Thus, a bidder may be excluded when the supplier is being determined, or the conclusion of a contract with the winning supplier may be cancelled at any time prior to concluding the contract if the contracting authority or procurement commission finds that the bidder does not satisfy mandatory unified and additional requirements, or has provided unreliable data in respect of satisfying the requirements.

Unified requirements include, in particular, the following:

a satisfaction of the requirements established in compliance with the legislation of Russia for persons engaged in the supply of the goods, carrying out of the work and the provision of the services that are the object of the procurement;

b a bidder shall not be in the process of liquidation, and there must be no decision of a court declaring a bidder bankrupt and initiating bankruptcy proceedings;

c a bidder's activities are not suspended in accordance with the Code of Administrative Offences of the Russian Federation as of the date of filing an application for participation in purchases;

d a bidder shall have no arrears on taxes, fees, debts or other mandatory payments to budgets of the budget system of Russia;

e a bidding individual or the general director, members of the board of directors or chief accountant of a bidding legal entity have not been subject to criminal liability for certain crimes related to economic activities;

f a bidder that is a legal entity has not been subject to administrative liability in accordance with the Code of Administrative Offences for illegal gratification of an official on behalf of a legal entity;

g a bidder possesses the necessary intellectual property rights in case, as a result of the procurement, the contracting authority shall acquire such rights;

h the absence of any conflict of interests, etc., between bidders and the contracting authority; and

i a bidder is not an offshore company.

The contracting authority may also establish a requirement for the exclusion of any bidder that is included in the register of unfair suppliers maintained by the FAS.

The government is entitled to establish additional mandatory requirements for participants in procurements of certain kinds of goods, works and services that are procured by way of tenders (except for public and closed tenders) or auctions, in particular for the availability of the following:

a financial resources for a contract's execution;

b equipment and other material resources for a contract's execution held under ownership or on other legal grounds;
work experience connected with the subject of a contract and business reputation; and
a required number of specialists and other employees with a definite qualification level for a contract’s execution.

The government is also entitled to establish additional mandatory requirements for participants in procurements of audit and related services and consulting services. These additional requirements have been elaborated and are expected to be adopted.

In Russia, much attention is given to compliance with formal requirements. Thus, in practice, the bidder may be disqualified if the application does not comply with all formal requirements or if certain documents are missing even when the bidder substantially meets all requirements.

ii Conflicts of interest
Law No. 44-FZ prohibits participation in procurement commissions by persons that have a personal interest in the results of the procurement or that may be influenced by a bidder.

In particular, the following persons cannot act as members of a procurement commission:

- individuals who were involved as experts in respect of the procurement documentation;
- individuals personally interested in the results of the selection of suppliers;
- individuals who are influenced by the procurement participants (member or shareholder of a relevant organisation, member of governing bodies, creditor, etc.);
- individuals married to the head of a procurement participant; or
- individuals who are members of the procurement control authority.

In the event that any member of a procurement commission is found to fall within any of the categories set out above, that member must immediately be replaced by another person.

Commission members may only be replaced by the decision of the contracting authority that adopted the decision on the establishment of the commission.

iii Foreign suppliers
Generally, contracting authorities can accept bids from foreign suppliers provided that they comply with the qualification criteria. There is no requirement to set up a representative office or a subsidiary in the territory of Russia for the purpose of bidding. However, the participation of foreign suppliers may be restricted in a procurement if the procurement involves state secrecy. In addition, according to Law No. 44-FZ only Russian legal entities may participate in tenders for entering into a state contract envisaging mutual investment undertakings of a supplier or investor to establish, modernise or develop the manufacturing of goods in the territory of one of the Russia’s regions. This type of investment contract has been introduced with a view to support the national industry and manufacturing. Such a contract must provide for an investment amount of no less than 1 billion roubles and must be entered into for a period of no longer than 10 years. With regard to national interest issues, see Section VII.ii.
VII AWARD

i Evaluating tenders

The procurement documentation (in the case of tenders and auctions) along with the information specified in a notice of holding a procurement must also contain the criteria for the evaluation of bids, the weighting of these criteria and the procedure for consideration and assessment of bids in compliance with Law No. 44-FZ.

The process of the assessment of bids in relation to all procurements, except for auctions, requests for quotations, sole-supplier procurements and certain requests for proposals, is based on value and non-value assessment criteria. Value criteria include price, costs for operation and repair or life-cycle value (if applicable), and non-value criteria include qualitative, functional and environmental characteristics of the procurement object and qualification of the bidders. The latter refers to, in particular, the existence of financial resources, equipment and other material resources held by them under ownership or on some other legal grounds; work experience connected with the subject of a contract and business reputation; and specialists and other employees holding a specific level of qualification. To determine the winner, the use of at least two criteria is required, provided that price is one of these.

The legislation specifies the weightings for the assessment criteria. The sum of the respective weightings for the assessment criteria must total 100 per cent. Thus, the proportion of minimum value to maximum non-value criteria is generally 70:30 in relation to procurement of goods, and 60:40 in relation to procurement of works and services. However, there are certain exceptions. Thus, the proportion of 40:60 is established, for instance, for such goods, works and services as the performance of emergency rescue works, restoration of cultural heritage objects, and provision of medical, educational and legal services. In the case of creating and developing state (municipal) information systems and official websites, a 30:70 proportion applies, and in the case of scientific research works, 20:80.

ii National interest and public policy considerations

Under the procurement regulations, national interest can only be taken into consideration to a limited extent. Equal treatment and non-discrimination of suppliers is presumed. However, Russian suppliers may be granted certain advantages over foreign suppliers in certain cases in accordance with Article 14 of Federal Law No. 44-FZ.

Law No. 44-FZ establishes the following regimes for the admission of foreign goods, works and services to procurements:

a national regime: applies when and where the international agreements of Russia so provide; within the framework of the WTO, the application of the national regime will depend on the accession of Russia to the GPA and the conditions of that accession;

b prohibition or limitation of admission: established by the government to guarantee national defence and state security to protect the fundamentals of the constitutional system, internal market and the development of the Russian economy and to support Russian manufacturers. It is worth noting that some of the prohibitions or limitations currently in force do not apply to suppliers coming from Eurasian Economic Union Member States; and

c admission conditions: established by the Ministry of Economic Development upon the government’s instruction.
Environmental considerations have become more important in recent years, although there is still generally little knowledge of how such considerations can best be taken into account in public procurements. There is as yet no wide practising of ‘green’ procurement in Russia. However, Law No. 44-FZ introduced new criteria for bid evaluation (ecological characteristics of the procurement object), which is a first step towards establishing a system of green public procurement.

VIII INFORMATION FLOW

In Russia, access to information about the contractual system in the area of procurement is required to be unimpeded and free of charge. The openness and transparency of this information is to be ensured, in particular, by way of its placement in the unified information system. The information required by Law No. 44-FZ to be placed in the unified information system must be full and reliable. Data constituting a state secret are not published in the unified information system. From 31 December 2017, entities falling within the scope of Law No. 223-FZ may introduce corporate information systems connected with the unified information system. These systems exchange information and, in the event of any discrepancies, the information in the unified information system prevails.

Based on the principles of transparency and ensuring competitive procedures, the contracting authority must provide all procurement participants with the same information and inform them about the proceedings of a public procurement. The procurement participants are entitled to receive clarifications regarding the provisions of procurement documentation.

It is a legal obligation of the tender commission to inform any unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of the bid and the earliest date of the conclusion of the contract. However, there is no requirement to be specifically notified – the publication of the minutes of the tender commission regarding the procurement procedures is sufficient. Once the winner has been determined, the commission should publish the minutes of the bid evaluation no later than the day following the expiry of the period for consideration of applications by the commission.

Bidders are not granted access to the comprehensive procurement file (encompassing all procurement documents, submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation and the award process). However, they are granted access to the procurement documentation and minutes of decisions taken by the procurement commission, and can check the registers of concluded contracts.

Further, contracting authorities must ‘stand still’ for a certain period; for example, in the case of electronic auctions or tenders, a contract may not be concluded until 10 days after the date of the publication in the unified information system of a protocol with the results of an electronic auction. This period allows unsuccessful bidders time to bring claims to prevent the contract award if they consider the award decision to be unlawful.

There are confidentiality obligations in relation to personal data and other types of data (e.g., commercial secrecy) in cases stipulated by federal law. The data constituting a state secret must not be published in the unified information system. Specific obligations to ensure confidentiality of information apply in the field of defence and security.
IX  CHALLENGING AWARDS

i  Procedures

There are two key procedures for reviewing complaints:

a  administrative review through the authorised state body dealing with such claims, the Federal Antimonopoly Service. In relation to the procurement procedure for state defence orders or other federal needs that deal with state secrets, the Federal Service on Defence Orders is the body for reviewing complaints; and

b  court review through state arbitrazh courts.

Complaints regarding the actions (or inaction) of the contracting authority and procurement commissions can be filed no later than 10 days from the date of posting the minutes with the results of assessments of bids by the contracting authority on the official website except for certain cases established by Law No. 44-FZ.

Administrative review takes up to five business days. A copy of a decision taken as a result of an administrative review is published and sent to the interested parties within three business days of the decision being taken.

The deadline for court review of administrative decisions taken under administrative review is three months from the date of the decision.

Court appeals may be filed within three years from the date the applicant finds out or should have found out that his or her rights were violated (including for claims for the application of consequences of contract invalidity).

Court reviews must be performed within a ‘reasonable time’, which is determined based on the specific nature of each case. In practice, a first-level judicial review usually takes up to three months.

ii  Grounds for challenge

Any procurement participant that believes a violation of the public procurement procedure has taken place may file an application for administrative review (complaint) or submit a claim to court. The application or claim should include certain information and needs to be accompanied by documents evidencing the grounds for the claim. Authorised state bodies may also submit applications and claims in the event of violations of the procurement legislation on a general basis.

iii  Remedies

An application for review does not lead to an automatic suspension of the procurement procedure or the conclusion of the contract; however, the antimonopoly authorities are entitled to suspend the procurement process until the application for review is examined. In the event of court proceedings, the claimant can apply to a court for the adoption of injunctive measures, which include the suspension of the conclusion of the contract.

Upon review of the complaint, the FAS can either issue a binding order to the affected contracting entity (including obliging it to rectify the relevant violations) or cancel the results of the procurement procedure.

A concluded contract may be cancelled by a court decision if the court rules that the procurement procedure that led to the conclusion of the contract violated procurement law.

The current legislation provides for various penalties for the breach of the procurement legislation by contracting authorities (or their officers) depending on the procurement law
breached and the character of the administrative offence. Procurement participants may bear criminal liability, liability in accordance with antimonopoly laws or liability for the non-performance of the relevant contracts provided that material harm has been inflicted on the interests of the state and society.

X OUTLOOK

Law No. 44-FZ came into force on 1 January 2014 and represents a progressive step in improving regulation of government procurement. This Law also requires the adoption of a significant amount of new subordinate legislation and government regulations to put a new contractual system into successful operation. A number of new legal acts have been issued, and the work on adopting the appropriate regulations in Russia is ongoing. There are also certain initiatives to amend procurement legislation.
I INTRODUCTION

Spain is a party to the WTO’s Agreement on Government Procurement (GPA) and a member of the European Union. Therefore, the GPA and the public procurement Directives are applicable in Spain and its authorities are bound by them.

On 9 March 2018, Law 9/2017 of 8 November on public sector contracts came into force. This law transposes the 2014 Public Contracts Directive into Spanish law, as well as the 2014 Concession Contracts Directive. Law 9/2017 is the comprehensive regulation in public procurement in Spain and focuses on works, supplies, services and concession contracts. This Law applies to all the awarding entities in the different levels of government (the central government, the 17 autonomous regions and the local authorities – mainly municipalities) and the entities related to them.

The 2014 Utilities Contracts Directive has not yet been transposed into Spanish law. The current regulation in force is Law 31/2007 of 30 October on the procurement procedures in the water, energy, transport and postal services sectors (which transposed the 2004 Utilities Directive).

Also worthy of note is Law 24/2011 of 1 August on defence and security public sector contracts, which sets forth a specific public procurement framework in this sensitive sector.

Finally, public procurement in Spain is bound by the principles of freedom of access to tenders, publicity and transparency of the procurement proceedings, and non-discrimination and equal treatment between bidders. Also of paramount importance is the principle of efficient use of public funds in the execution of works, the acquisition of goods and the hiring of services, for which the needs of the awarding entity have to be previously defined, the free competition needs to be protected, and the best tender needs to be selected. All of these principles are directly applicable to any public procurement procedure.

II YEAR IN REVIEW

The main development in 2018 has been Law 9/2017 entering into force on 9 March 2018. Law 9/2017 is a very extensive and detailed regulation that has introduced significant innovations into Spanish public procurement regulation. In particular, Law 9/2017 introduces the works concession contract and the services concession contract in transposition of the 2014 Concession Contracts Directive with important differences with the former public works concession and public services concession contracts, as is discussed in Section III.

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III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

In accordance with Law 9/2017, public procurement regulations apply to three different categories of awarding entities, which belong to the public sector. These regulations will apply to differing degrees depending on the category of awarding entity (the closer to the core of the public sector, the greater the degree of regulation that will apply).

Public authorities in the narrow sense

These are the authorities that have been created by the Constitution and the law in order to exercise public powers and prerogatives in order to achieve purposes of public interest. The main public authorities are classified in three different levels (from a territorial perspective): (1) the central government; (2) the 17 autonomous regions; and (3) the local authorities. The Spanish Constitution and the law attribute each of these authorities with different powers in accordance with the principle of subsidiarity, by which every power or action will be carried out by the level of government that is more adequate and efficient to do so in each case. Each level of government will be responsible for the provision of different public services or the promotion of different infrastructure.

There are other public authorities in the narrow sense, such as public universities; public entities or agencies with a special autonomy recognised by law, which have been entrusted with external regulatory or control duties in a given sector or business activity; and public entities related to, or dependent on, other public authorities for which their main activity is not to produce goods or services for the market, or that are not financed primarily by income from an activity in the market.

The tender proceedings of these public authorities will be bound by more strict procedural requirements. In addition, these authorities will award ‘administrative contracts’, governed by ‘administrative law’, which means that very strong prerogatives of the public authority will apply to the performance, modification and termination of the contracts.

Awarding entities

These are the contracting authorities as defined in the EU directives. This category includes (1) the public authorities in the narrow sense (as explained above); and (2) any other entity (of a public law or private law nature) established for the specific purpose of meeting the needs of the general interest, which does not have an industrial or commercial purpose, provided that public authorities finance most of their business, control their management, or appoint more than half of the members of the governing, management or supervisory boards.

These awarding entities include private companies or corporations controlled or financed by public authorities. In addition, political parties, labour unions, business organisations and foundations will also be considered to be awarding entities if they meet the above-mentioned requirements of being financed by public authorities in most of their activity.

The awarding entities are also bound by the strict procedural requirements of the public procurement regulations. However, the awarding entities that are not public authorities in the narrow sense will execute private contracts subject to private law and without the strong prerogatives of public authorities.
Other entities in the public sector  
Finally, there are some entities, not included in any of the above categories, with links with the public sector that would not fulfil the definition and requirements to be considered a public authority in the narrow sense, or an awarding authority. An example would be a private company with more than 50 per cent of its shares owned by a public authority, which is not controlled or financed in most of its activity by that public authority.

These entities will apply the simplified procedural requirements of the public procurement regulations and will grant private contracts (i.e., with no public prerogatives of public authorities regarding the performance, modification and termination of the contracts).

ii Regulated contracts  
Law 9/2017 identifies works contracts, supply contracts and services contracts as the typical regulated contracts (as regulated in the 2014 Public Contracts Directive). In addition, two new categories of contracts have been introduced in Spanish law in order to transpose the 2014 Concessions Contracts Directive: works concession contracts and services concession contracts (these contracts replace the former public works concessions and public services management contracts, previously regulated in the Spanish public procurement regulations). In both cases, the remuneration of the contract consists in the carrying out the construction project or service (alone or together with the payment of a price). The defining element of these concession contracts is the transfer of operational risk to the concessionaire, which may cover the demand risk, the supply risk or both. The definition of supply risk refers to the supply of the works or services object of the contract, in particular the risk that the provision of the services does not meet the demand. This supply risk is what has traditionally been called the risk of availability of infrastructure. Law 9/2017 establishes that the transfer to the concessionaire of the operational risk must imply that it is not guaranteed that, under normal operating conditions, the concessionaire will recover the investments made or cover the costs incurred as a result of the exploitation of the works. Thus, any estimated potential loss incurred by the concessionaire cannot be ‘merely nominal or negligible’.

The Spanish legislator has transposed the EU Directives by creating a specific category of contracts that are subject to harmonised regulation. In order to fall within this category, the contracts have to exceed an economic threshold and be bound by the most strict requirements of the EU Directives. Therefore, the Spanish legislator has decided to apply the European public procurement requirements to this specific category of the contracts subject to harmonised regulation, and apply less strict requirements to the contracts that have a lower economic threshold. The contracts subject to a harmonised regulation are: (1) works contracts, works concession contracts and service concession contracts with a value above €5,548,000; (2) supply contracts and service contracts with a value above €144,000 (if the contract is awarded by the central government or several entities related to it) or to €221,000 (if the contract is awarded by other contracting entities).

Nevertheless, it has to be noted that public procurement regulations do not apply to the authorisations and concessions to use goods and properties in the public domain (such as the coast, beaches, streets and public infrastructure) and transactions over goods and properties owned by a public authority, which are areas regulated by their own respective pieces of legislation.

Public contracts can be modified if the modification complies with the strict requirements established by Law 9/2017 (if the contract had been awarded before 9 March 2018, the modification of the contract would be governed by the public procurement law in force
at the moment of its award and by the EU law restrictions that are applicable in any case). In the event that the required modification of the public contract did not comply with the mentioned requirements, the contract would have to be terminated and a new public procurement procedure would have to take place to award a new contract. As regards these restrictions to modify a contract, Law 9/2017 differentiates between two situations:

\( a \) modifications foreseen in the contract awarded: These modifications need to be specifically established in the contract and cannot exceed 20 per cent of the initial price, introduce new unanticipated unit prices, or alter the overall nature of the contract;

\( b \) modifications not foreseen in the contract awarded, or that were foreseen but do not comply with the restrictions mentioned above: These modifications must be limited to introducing the necessary variations to address the objective cause that makes them necessary. In addition, one of the following requirements need to be fulfilled: (1) it is necessary to add new works, supplies or services and it is not possible to change the contractor for economic or technical reasons, and the modification does not exceed 50 per cent of the initial price; (2) an unforeseen and unpredictable circumstance for a diligent awarding entity occurs, the modification does not exceed, jointly or separately with other unforeseen modifications, 50 per cent of the initial price, and does not alter the overall nature of the contract; or (3) it is not a substantial modification (i.e., it does not introduce conditions that if known would have allowed another bidder to be chosen or attracted more bidders, it alters the economic balance for the benefit of the contractor in a manner not provided for in the contract or it significantly expands the scope of the contract).

Public contracts can be transferred to other contractors and that will not imply the termination of the contract, as a general rule. However, this possibility has to be expressly foreseen in the tender documentation, and it needs to be authorised by the contracting authority. This authorisation will only be granted if: (1) the contract has been performed for at least 20 per cent of the price or one-fifth of the duration for concessions (unless the contractor is in a insolvency situation and meets specific legal requirements); and (2) the new contractor has the capacity and solvency required at the specific phase of performance of the contract (which requires that the contractor is not in a ‘prohibition to tender’ situation). For concession contracts, the Law introduces what is known as a step in right of the pledge or mortgage creditors. Thus, it provides that, if it has been foreseen in the specifications, the creditor can, at any moment, request the assignment of the concession in favour of a third party if it proves its non-viability (at present or in the future) and provided that this third party meets the other requirements.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements establish a stable framework of contractual conditions that may have a duration of up to four years. The contracts that are entered into during that period of time with the companies incorporated into the agreement must comply with the pre-established scheme, in particular with regard to prices. These conditions cannot be substantially modified in the contracts signed.

A dynamic system for the purchase of works, supplies and services that are ordinarily offered in the market can be used. This system only employs electronic means. The awarding
entity will publish the notice of the start-up of the system, indicating the nature of the contracts in the specifications that may be entered into and the information necessary to be incorporated into the system, in particular that relating to the electronic equipment used and to the technical arrangements or specifications of the connection.

Central purchasing consists in the creation of a specialist contracting body that awards and manages works, services and supplies contracts that have essentially homogeneous characteristics and are needed in a very large scale (for example, the acquisition of furniture or other goods).

ii Joint ventures

Public–public joint ventures established between awarding entities will not be subject to the public procurement regulations if they do not have the essential elements of a public contract (the provision of works, supplies or services and an onerous nature). However, if the relationship has the object and onerous nature of a public contract, public procurement regulations will apply, and a public procurement procedure will need to be called. An example of these public–public joint ventures are the joint, horizontal cooperation between awarding entities, by which they cooperate to reach a common goal in the public interest but without establishing a bilateral relationship with reciprocal obligations that would be equivalent to a public contract.

If a public–public joint venture created a separate entity for the provision of works, services or goods, the requests to that separate entity would not be subject to the public procurement regulations if that separate entity was a joint ‘controlled legal person’ under the terms of the EU directives. In this case, the controlled legal person would have to meet the following requirements: (1) to be jointly controlled by the awarding entities that hold a joint power of control over it; (2) it cannot have any private shareholder; (3) it cannot perform more than 20 per cent of its activity in the market; and (4) it must have been invested with the adequate personal and material means to fulfil the assignment (the percentage that can be subcontracted is limited, although there are some exceptions). If those requirements are not met, the allegedly controlled legal person could not receive direct requests from the awarding entities, which will be obliged to call for a public procurement procedure.

Public–private partnerships (PPP) are completely bound by public procurement rules. The selection of the private partner of a PPP needs to comply with the tender rules of the public procurement regulations. In addition, if the awarding entity decided to award a contract to the PPP, if that contract was not included in the tender to select the private partner, a new tender will have to be called.

On the other hand, a PPP whose major shareholder is an awarding entity will be included in the Spanish public sector, and, therefore, it will have to comply with the public procurement regulations when requesting the provision of works, supplies or services. The requirements that will need to be complied with by the PPP will depend on the category of public sector entity, as stated in Section III.i. PPPs operating in the utilities sector (water, energy, transport and postal services) will have to request the provision of works, supplies and services in accordance with Law 31/2007, which regulates public procurement in these sectors.
V THE BIDDING PROCESS

i Notice

The notices of every tender process have to be published in the internet profile of the awarding entity. This profile needs to be accessible from the website of the awarding entity.

In addition, it will be mandatory to publish the notice of the tender process in the Official Journal of the European Union for contracts subject to harmonised regulation (described in Section III.ii).

Finally, the public authorities and the entities related to them will have to publish the notice in the applicable official journal: (1) central government and related entities in the Spanish Official Journal; (2) the 17 autonomous regions and related entities in the regional official journal; and (3) local authorities in the official journal of their province.

ii Procedures

The awarding entities will need to follow one of the following public procurement procedures in order to award a public contract. As a general rule, public procurement procedures shall be handled through electronic means.

On the other hand, contracts for small amounts (below €15,000 for supplies and services, and below €40,000 for works) can be directly awarded without the need for a public procurement procedure. The awarding entity will have to justify the need to execute this contract, the approval of the expense and the incorporation of the invoice in the file. It will also have to be ascertained that the contractor has not signed more contracts than, individually or jointly, exceed the maximum thresholds of the smaller contracts.

Open procedure

This is the ordinary proceeding. Any company interested to tender can take part in it by submitting an offer, and by proving that it has the capacity and solvency required by the awarding entity. There is no margin for negotiation between the bidders and the awarding entity. The procedure consists of:

a publication of the notice by the public authority;
b submission of the offers by the bidders;
c evaluation of the offers by the awarding entity; and
d the award of the contract to the best offer followed by the signing of the contract.

Restricted procedure

Restricted procedure can also be used as an ordinary proceeding. There is a preliminary phase in which potential bidders express their interest to take part in the tender. Among those interested candidates, the awarding entity will select the bidders who will be invited to submit and offer. The tender process will only take part with the invited candidates. In this procedure there is no margin for negotiation.

Negotiated procedure

This is an exceptional procedure that can only be used in the following cases:

a it is necessary that the bidders design or adapt the object of the contract to the specific case and circumstances;
b the object of the contract includes a project or innovative solutions;
there is a need for negotiation linked to the object of the contract or to the risks that its implementation may entail;

de the technical prescriptions of the service cannot be previously established with sufficient precision;

e in open or restricted procedures followed previously, only irregular or unacceptable offers have been submitted; and

f they are services that can only be carried out by a specific person. The procedure is very similar to the restricted procedure and it will lead to a negotiation of the terms of the contract with the invited bidders, which may be developed through successive selective phases.

**Competitive dialogue**

Competitive dialogue is also an exceptional procedure. It will only be applicable in the same cases as the negotiated procedure. The awarding entity has a need, but it does not know how exactly this need can be satisfied. The awarding entity will invite selected bidders to take part in the procedure, and will establish a dialogue with them in order to develop one or several solutions that are capable of satisfying the needs of the awarding entity. These solutions will be the basis on which the bidders will make their offers and the awarding entity will award the contract to the best offer or offers.

**Partnership for innovation**

Partnership for innovation is also an exceptional procedure. It can only be used when it is necessary to carry out research and development activities regarding works, services and innovative products, for subsequent acquisition by public sector entities.

**Amending bids**

Offers submitted by the bidders cannot be amended. As stated above, the negotiated procedure and the competitive dialogue allow stages of negotiation between the awarding entity and the bidders. Once the final offer has been submitted, however, there is no possibility of any further modifications.

**VI ELIGIBILITY**

**Qualification to bid**

Law 9/2017 establishes situations in which a company will be subject to a ‘prohibition to tender’ with the public sector and, therefore, they will not be able to take part in public procurement procedures. These situations are: (1) to have been convicted for serious crimes (such as terrorism, unlawful association, illegal financing of political parties, corruption in business transactions, influence peddling, bribery, fraud and tax fraud, crimes against the Public Treasury and the Social Security, crimes against the rights of workers, and crimes related to environmental protection); (2) to have been sanctioned for serious infringements (in matters such as unlawful competition, labour integration, equal opportunities and non-discrimination against disabled persons, social legislation or environmental legislation); (3) insolvency; (4) to have failed to fulfil the tax and social security obligations; (5) to have
issued false statements in the documentation of the offer regarding the capacity and solvency of the bidder. In such circumstances, prohibitions to tender have a limited period of time depending on the specific cause and circumstances.

Furthermore, bidders will need to prove that they have the capacity and solvency required in the tender documents, in order to be admitted in the tender. The solvency required has to be proportionate and adequate to the object of the contract. Excessive solvency requirements, which would not allow suitable bidders to take part in the tender, would constitute a breach of the public procurement principles. Public procurement regulations require, in general terms, proving the bidder’s financial solvency and technical capacity. Bidders can make up their financial solvency with the resources of other companies (of the same group of companies or of third parties) if they can prove that such means are at their disposal.

ii  Conflicts of interest

Conflicts of interest imply a prohibition to tender in the following cases: (1) bidders who have a public official or public representative as an director or as a significant shareholder who is affected by the Spanish legislation regulating their incompatibility (this conflict of interest affects spouses and very close relatives); (2) bidders who have employed former public officials or former public representatives who have taken decisions that affected that company or who hold responsibilities related it within the last two years.

iii  Foreign suppliers

Companies from EU or European Economic Area countries can take part in public procurement procedures with the same rules and rights as Spanish companies.

Companies from third countries (i.e., from outside the EU or the EEA) will have to prove that their country allows Spanish companies to take part in public procurement procedures. This will be proven by a report of the Spanish Economic and Commercial Office in that country. This report will not be necessary in the event that the country of origin was a member of the WTO GAP and a contract was tendered subject to a harmonised regulation.

In addition, the documents of the specific tender can require that bidders from these third countries create a subsidiary in Spain.

VII  AWARD

i  Evaluating tenders

The evaluation criteria of the offers must have been set forth and published in the tender documents (i.e., the notice and specifications) with the maximum detail and transparency. Likewise, the weight attributed to each of the criteria must have been published. These criteria must be directly linked to the object of the contract and its performance.

If there is only one single evaluating criterion, it must relate to the costs, which may be the price or a criterion based on profitability. If there is more than one evaluation criteria, preference should be given to those that refer to characteristics of the object of the contract that can be assessed by figures or percentages obtained through the mere application of the formulas established in the specifications. However, it may be necessary to introduce subjective criteria that cannot be evaluated through the application of a mathematical formula, such as the evaluation of innovations or technological aspects offered by bidders. In this case, the evaluation criteria should be defined in the most specific way, in order to reduce the discretion of the awarding entity in its evaluation.
Bidders will submit two sealed envelopes. The first envelope will contain the information relating to the subjective criteria and the second one to the objective criteria. The award entity will first evaluate the subjective criteria, and once the evaluation is concluded, the envelope with the objective criteria will be opened. Therefore, the awarding entity does not know the nature of the objective criteria when evaluating the subjective criteria.

ii National interest and public policy considerations
Domestic bidders cannot be favoured. The principle of equality between bidders and non-discrimination apply. Therefore, solvency requirements and evaluation criteria must be related to the object of the contract and be proportionate.

The public procurement regulations incentivise the use of social and environmental considerations in public procurement. However, they cannot create discrimination between domestic bidders and foreign bidders. Social and environmental considerations can be used as evaluation criteria only when they are related with the object of the contract (for instance, the control of pollution in the provision of a public transport service). They can also be used as a condition that the contractor will have to comply with, but they are not an element on which bidders can compete and obtain a better evaluation (for instance, the obligation to hire a specific number of unemployed people for the performance of the contract). The position of bidders has to be equal.

VIII INFORMATION FLOW
The awarding entity is obliged to publish all the relevant information regarding the tender in its internet profile (such as the tender specifications, technical requirements, qualification and evaluation criteria, etc.). All bidders have access to the same information.

Unsuccessful bidders will have access to all the relevant documents (such as the evaluation reports for the offers) and decisions of the awarding entity. They will be expressly notified with the awarding resolution before the signing of the contract, and with any other relevant decisions affecting their offer in order to guarantee their right to challenge these decisions.

Unsuccessful bidders, at their request, can have access to the offer of the successful bidder in order to prepare their appeal. However, confidential information provided by bidders will not be disclosed. This information has to be expressly declared as confidential by the bidders at the moment of submitting their offer, and it has to be justified in order to protect, for instance, technical or commercial secrets or to avoid situations of unlawful competition.

IX CHALLENGING AWARDS
Historically, unsuccessful bidders would rarely challenge the award of public contracts Spain. A judicial ruling in favour of the claimant might arrive too late to be effective because the contract would have already been executed and performed.

This situation has radically changed since the transposition of the Remedies Directive into Spanish law in 2010, by introducing recurso especial en materia de contratación, a new special and urgent appeal on public procurement. This special appeal on public procurement is decided by an administrative court that is completely independent from the awarding entity; it is free of charge, and its filing paralyses the signing of the contract until the appeal
is decided. This special appeal is not mandatory and bidders can file a direct appeal before the contentious-administrative courts. In any case, the special appeal on public procurement has been a successful and frequently used mechanism.

i Procedures

The special appeal on public procurement can be submitted to challenge decisions of the awarding entity (tender documents, award decision, etc.) regarding only the following contracts: (1) works contracts, services and works concession contracts with a value of more than €3 million; (2) supplies and services contracts with a value of more than €100,000; and (3) framework agreements and dynamic purchase system of works, supplies and services contracts with the value mentioned above.

The award decision can only be challenged by unsuccessful bidders and other entities who may hold a right or interest against it (such as, for instance, companies that have challenged the tender documents and specifications for not allowing them to take part in the tender).

The special appeal on public procurement has to be filed within 15 days of the date of the notification of the award decision (if the notification was sent electronically and it was published in the internet profile of the awarding entity, the 15 day period will start on the date on which it was sent).

The administrative court on public procurement will request the awarding entity to respond to the appeal within two days. Afterwards, the administrative court will request any other interested party (i.e., the preferred bidder) to file statements within five days. The parties can propose the production of evidence about the relevant facts.

The administrative court on public procurement will then issue its ruling, which will be directly executive in its nature. This ruling can only be challenged before the contentious-administrative courts.

ii Grounds for challenge

It will only be possible to admit grounds to challenge a decision that would modify the decision to award the contract to the preferred bidder. It can be claimed that the preferred bidder should have been excluded from the procedure because it did not have the capacity of solvency as required by the tender documents, or because its offer had breached requirements or obligations established in the tender documents. On the other hand, it can also be argued that the awarding entity evaluated the offers in a disproportionate and discriminatory way, because it unduly underrated the offer of the losing bidder in comparison with the content of the preferred bidder.

iii Remedies

The decision to award a public contract will automatically be suspended if a special appeal on public procurement is filed. The administrative court can exceptionally revoke that suspension on justified grounds of public interest. In a special appeal against other decisions of the awarding entity, injunctions can be granted.

The ruling of the administrative court can declare that the award decision is void, that the offer of the preferred bidder has to be excluded or that the bidder that filed the appeal should have been the preferred bidder. In that ruling, the administrative court can grant
damages for the claimant. In the event that the special appeal was rejected, if that appeal is considered to be grounded upon recklessness and bad faith, fines could be imposed upon the claimant (of between €1,000 and €30,000).

X OUTLOOK

The Spanish Parliament has been processing the draft bill of the law to transpose the 2014 Utilities Contracts Directive (for the water, energy, transport and postal services sectors). This law has not yet been approved. A Spanish General election was called for 28 April 2019, which may further delay the approval of this law.

The Spanish Government has approved Royal Decree-law 5/2019 of 1 March in order to approve the contingency plan in the event of a no-deal Brexit, with some measures relating to public procurement.
Chapter 15

UNITED KINGDOM

Amy Gatenby, Bill Gilliam, Ryan Geldart and Paul Minto

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, and the UCR and CCR came into force on 18 April 2016. 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 regulations 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.

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1 Amy Gatenby is a legal director, Ryan Geldart is a managing 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 The EU directives corresponding to the UK regulations currently in force are, therefore, 2014/24/EU, 2014/25/EC, 2014/23/EC, 2009/81/EC and 89/665/EEC. References in this chapter to the EU directives are to those EU directives currently implemented in the United Kingdom, unless otherwise stated.

4 The Procurement, Patient Choice and Competition Regulations (No. 2) 2013.

5 To date, only the Public Procurement (Electronic Invoices etc) Regulations 2019 have been made, covering electronic invoicing following the UK’s exit from the EU in a ‘deal’ scenario (see Section II).
Beyond the EU Directives and procurement regulations, it is also important to consider the case law of the Court of Justice of the European Union (CJEU) and the General Court, the general EU Treaty principles of transparency, equal treatment, non-discrimination and proportionality, and the decisions of UK courts.

The Cabinet Office (part of Her Majesty’s Treasury) has responsibility for central government procurement policy; it and the Crown Commercial Service (CCS), an executive agency of the Cabinet Office, publish guidance notes and procurement policy notes (PPNs) on a range of issues. One of the most recent sets of guidance issued by the CCS in relation to procurement was the publication of an Outsourcing Playbook, which is designed to improve government procurement and deliver better public services.6 In Northern Ireland, policy and guidance are issued by the Central Procurement Directorate, and the Welsh Minister for Finance and Government Business has issued the Wales Procurement Policy Statement. The Scottish Ministers issue guidance under the equivalent Scottish legislation.

Formal legal challenges to procurement decisions are made in the High Court. However, less formal options exist. The Cabinet Office’s Public Procurement Review Service7 allows bidders to make complaints, and the SBEE Act reinforces this by providing a statutory basis for its procurement investigations and enabling the investigation of procurement processes and practices of certain contracting authorities by a government minister. Bidders can also refer matters to NHS Improvement, where the contracting authority is a Clinical Commissioning Group or NHS England. NHS Improvement may use its investigation and enforcement powers under the Procurement, Patient Choice and Competition Regulations (No. 2) 2013 to prevent or remedy breaches of procurement law, and can even declare arrangements for the provision of NHS healthcare services ineffective if there has been a serious breach.

II YEAR IN REVIEW

This year has been dominated by Brexit as the UK and EU have continued to negotiate how Brexit will be implemented and the UK has sought to prepare for both a negotiated and a ‘no deal’ exit.

As part of the UK’s domestic preparation for Brexit, the UK government and Scottish Ministers have introduced Statutory Instruments (amending regulations8) that, on exit, will amend or remove provisions in the UK regulations that would otherwise be inoperable or inappropriate once the UK has left the EU. The key difference under these changes is that procuring entities will have to send notices (e.g., contract advertisements) to a new UK

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7 Previously called the ‘Mystery Shopper’ scheme but renamed on 29 November 2018.
8 Public Procurement (Amendment etc) (EU Exit) Regulations 2019 No. 560; Public Procurement (Amendment etc) (EU Exit) (No 2) Regulations 2019 No. 623; Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 No. 697; Public Procurement (Electronic Invoices etc) Regulations 2019; Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 No. 112; and Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 No. 114.
e-notification service instead of to the EU Publications Office. The UK government has also published a number of guidance notes on matters relating to public procurement as part of its preparations for Brexit.\(^9\)

In the event of a ‘no deal’ Brexit, the amending regulations would come into effect immediately. If the UK leaves under the proposed EU–UK Withdrawal Agreement (which the UK Parliament has so far not approved in a meaningful vote), it is intended that most of these changes would be deferred. Instead of coming into effect on exit day, the changes would come into force at the end of the expected transition period under the EU–UK Withdrawal Agreement (which currently runs to the end of 2020). In these circumstances the UK regulations and EU law would continue to apply unamended during the transition period. After any transition period, the changes made by the amending regulations would come into effect and Ministers would have powers, for a short period, to make further necessary amendments and corrections to the UK regulations to ensure they are workable in the UK context. However, more significant changes would need to go through the full parliamentary procedure and are unlikely in the short term.

The UK is currently a party to the World Trade Organisation Government Procurement Agreement (GPA) through its EU membership. The UK began negotiations in June 2018 to become a member in its own right following its withdrawal from the EU, and on 27 February 2019 the GPA members approved the UK’s accession to the GPA as an independent member when the UK leaves the EU. This will require the UK to open up higher value public procurement opportunities to other GPA parties (including EU Member States) in exchange for their public procurement market being opened up in a similar way.

Other developments have included the coming into force on 18 October 2018 of postponed provisions in the PCR which now require all procurement communications to be fully electronic and e-Certis coming into effect.

There have also been several key court decisions, including Faraday,\(^10\) which is the first case in England and Wales in which a court has declared a contract ‘ineffective’ (prospectively void). The case concerned a development of land where the developer had an option to draw down parcels of land for development under long leases. If the developer did not exercise the option, it would be under no obligation to carry out any works. However, if the developer did draw down the land it came under an obligation to develop. The Court of Appeal decided that this type of contingent obligation to carry out works was sufficient to amount to a public works contract caught by the PCR (and, therefore, should have been advertised and competed in accordance with those regulations). The judgment has raised significant issues for procurers seeking to structure development agreements in a manner that falls outside the public procurement regime.

The courts’ recent decisions in relation to the regular applications to lift the automatic suspension have tended to reinforce the difficulty for challenging bidders in maintaining the suspension. This is particularly the case when the procurements relate to significant projects of widespread or national importance. Key examples include Bombardier v. Hitachi Rail\(^11\)

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9 These include guidance on public-sector procurement under the EU Withdrawal Agreement; guidance on public-sector procurement after a no-deal Brexit; and PPN(2) 02/19 - Preparing for the UK leaving the EU (updated 25 March 2019).


11 Bombardier Transportation UK Ltd v Hitachi Rail Europe Ltd [2018] EWHC 2926 (TCC).
and *DHL Supply Chain*. In both cases, the procurement concerned had significant impact on large scale projects (in rail and health services respectively) and demonstrate the difficulty challenging bidders have in maintaining the suspension.

Finally, a potentially significant decision of the court was made in *Amey Highways* in which the court was prepared to extend the time limit for commencing proceedings to challenge the procurement. This case indicates a potential softening of the courts in England and Wales to the historically strict application of the 30-day limitation period.

### 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’. 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 competively 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. Pursuant to EU derogations, the UCR do not apply to exploration for and exploitation of oil and gas, or to the generation and supply (but not transmission) of electricity and gas, on the basis that these are competitive markets.

The 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.

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12 *DHL Supply Chain v. Secretary of State for Health & Social Care* [2018] EWHC 2213 (TCC).
13 *Amey Highways Ltd West Sussex County Council* [2018] EWHC 1976 (TCC); further detail in Section IX.i.
14 See Section IX. i.
15 PCR 2(1).
16 PCR 13.
17 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.
18 In this chapter, the term ‘above-threshold contract’ is used to refer to contracts meeting these EU financial thresholds and ‘below-threshold contract’ to those that do not meet them.
The financial thresholds applying from 1 January 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>Not applicable</td>
</tr>
<tr>
<td>Services*</td>
<td>£118,133 or 181,302**</td>
<td>£363,424</td>
<td>£4,551,413</td>
</tr>
<tr>
<td>Works</td>
<td>£4,551,413</td>
<td>£4,551,413</td>
<td>£4,551,413</td>
</tr>
</tbody>
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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.

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. As noted in Section II, a recent UK Court of Appeal decision has found that contingent legally enforceable obligations to perform works will constitute a public works contract that ought to be advertised and procured under the procurement regulations.

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19 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.
20 See CCS ‘Guidance on provisions that support market access for small businesses’, August 2015.
21 As listed in UCR 9 to 15.
24 See footnote 10.
IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. The CCS frameworks for central government are an example of this. Single-supplier frameworks are also common.

Framework agreements are often established by one authority on behalf of itself and a (frequently very large) number of other authorities.

Dynamic purchasing systems are not widely used at present.

Utilities have used both framework agreements and qualification systems widely to reduce the burden of procurement processes, often establishing single-supplier framework agreements for one or two control periods (i.e., five or 10 years). Under the UCR, frameworks must now be limited to eight years, unless a longer period can be justified.

ii Joint ventures

Public–public JVs are common. They have typically relied on the Teckal25 or the Hamburg Waste26 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.27

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.28 This has obvious similarities with competitive dialogue, but the greater flexibilities29 offered by the competitive dialogue procedure may mean that it remains the more attractive option.

The UCR have separate rules on JVs and intra-group supplies. In practice, however, they have not been as widely used as the public sector rules embodied in the Teckal and Hamburg Waste exceptions.

V THE BIDDING PROCESS

i Notice

Above-threshold30 contracts must be advertised in the Official Journal of the EU (OJEU). The PCR also require contracting authorities to publish details of these contracts on the government portal (Contracts Finder). Similarly, the PCR require that, where a contracting authority advertises contracts that meet lower minimum thresholds (£10,000 or more in

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25 C-107/98 Teckal Srl v. Comune di Viano and another.
26 C-480/06 Commission v. Germany.
28 See Section V.ii.
29 For example, under competitive dialogue the authority is not required to set out its minimum requirements at the outset of the procurement, and there is more flexibility to clarify, fine tune and optimise final tenders and to confirm financial commitments and other terms of the winning bid, provided essential aspects are not materially altered and there is no risk of distortion of competition or discrimination.
30 See footnote 18.
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 2017.31 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.32

Voluntary *ex ante* transparency (VEAT) notices can be used where authorities directly award a contract without a competitive process, to seek to overcome the risk of the contract being declared ineffective because it was not properly advertised in the OJEU. However, a VEAT notice is unlikely to offer such protection unless the authority, acting diligently, had a legitimate belief that the procurement regulations did not apply and has been sufficiently transparent in the VEAT notice about the proposed transaction.33

### 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 regimes34 for the award of contracts for health, social, education and other specific services.35 Subject to compliance with certain mandatory requirements (e.g., principles of transparency and equal treatment), contracting entities have significant flexibility in determining the procedures to be applied.

The PCR apply a number of procedural requirements to below-threshold contracts. In addition to the advertising requirements (described in Section V.i), these are a prohibition on including a separate pre-qualification stage in the tender process and a requirement to publish information on Contracts Finder in respect of contracts that have been awarded.

Under the CCR, contracting entities are free to decide on the procedure to be followed, subject to certain specified safeguards; even lighter requirements apply in respect of light-touch services.

The Defence Regulations offer unrestricted use of the restricted and the negotiated (with prior advertisement) procedures. The competitive dialogue procedure is available for particularly complex contracts and the negotiated procedure (without prior advertisement) in extremely limited circumstances.

31 PPN 02/17 'Promoting Greater Transparency', 13 December 2017.
32 Section 23, Procurement Reform (Scotland) Act 2014.
34 See CCS ‘Guidance on the new light touch regime for health, social, education and certain other service contracts’, October 2015.
35 Set out in PCR Schedule 3, UCR Schedule 2 and CCR Schedule 3.
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.\(^{36}\)

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.\(^{37}\) Although those provisions appear to allow authorities to request information or documentation to clarify or complete information or documents at tender stage (as well as pre-qualification stage), the authority must observe the principles of equal treatment and transparency in exercising this right. Therefore any decision to allow the submission of such information must be taken with care and with regard to those principles.

VI ELIGIBILITY

i Qualification to bid

The procurement regulations replicate the grounds for assessing bidders’ fitness to contract set out in the corresponding EU directives.

There are also Cabinet Office and CCS publications on the qualification stage, which require that:

\(a\) authorities use a standard Selection Questionnaire (which has been aligned with the requirements of the European Single Procurement Document) and have regard to associated CCS guidance on the selection stage that develops general principles including self-certification, ‘self-cleaning’ and proportionality;\(^ {38}\)

\(b\) 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;\(^ {39}\) and

\(c\) bidders convicted of tax offences or successfully challenged under the ‘General Anti-Abuse Rule’ may be excluded from public procurements.\(^ {40}\)

\(^{36}\) For example, \(R\) \((\text{on the application of Harrow Solicitors and Advocates}) \text{ v. The Legal Services Commission}\) [2011] EWHC 1087 (Admin); \(R\) \((\text{on the application of All About Rights Law Practice}) \text{ v. Legal Services Commission}\) [2011] EWHC 964 (Admin); and Hosacks \((\text{A firm of Solicitors}) \text{ v. The Legal Services Commission}\) [2011] EWHC 2700 (Admin).

\(^{37}\) PCR 56(4); UCR 76(4).

\(^{38}\) Cabinet Office and CCS PPN ‘Standard Selection Questionnaire (SQ)’, 9 September 2016. The guidance is issued under PCR 107(1).


\(^{40}\) PPN 03/14 ‘Measures to Promote Tax Compliance’, updated 15 May 2015.
ii Conflicts of interest

The PCR, UCR and CCR require authorities to take appropriate effective measures to prevent, identify and remedy conflicts of interest. 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*, the court noted that ‘other personal interest’ need not be financial but could amount to anything pertaining to the relevant individual. This has become an area of increased scrutiny by both challenging bidders and contracting authorities, as the circumstances where a conflict may arise, or an allegation of conflict could be made, are wide ranging. The CCS has issued a PPN reminding contracting authorities of their obligations in applying mandatory and discretionary exclusion grounds and managing conflicts of interest in public procurement.

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.

The PCR, UCR and CCR only confer a right to challenge a breach of the regulations upon:

- a person from an EEA state;
- a person from a World Trade Organization GPA state, where the GPA applies to the procurement concerned; and
- a person from another state if a relevant bilateral agreement applies.

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.

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41 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.

42 PCR 57(8)(e); UCR 80; CCR 38(16)(d).


44 PPN 01/19 ‘Applying Exclusions In Public Procurement, Managing Conflicts of Interest and Whistleblowing’.

45 UCR 85.

46 The EEA comprises the EU Member States plus Liechtenstein, Norway and Iceland.

47 For example, PCR 89.

48 In addition to the 28 EU Member States, the other GPA states are Armenia, Australia, Canada, Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Moldova, Montenegro, the Netherlands (with respect to Aruba), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States.

49 For example, PCR 90(1)(a).

50 For example, PCR 90(1)(b).
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. 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. 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. Nevertheless, in practice many authorities disclose full details of the marking scheme, regardless of whether this is strictly required by law.

ii National interest and public policy considerations

Under the procurement regulations, national interest can be taken into account only to a limited extent. Authorities may not favour local business. For example, while specifications may refer to British Standards, they must expressly permit equivalent standards from other European jurisdictions. The 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.

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51 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).
52 PCR 49; UCR 69; CCR 32.
53 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.
54 See Section VI.i.
Another key government policy is securing access to public contracts for SMEs. This policy is in part implemented through the PCR and reinforced by CCS guidance. 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.

The PPN on supply chain visibility, also 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:

a advertise on Contracts Finder any subcontract opportunities with a value over £25,000 that arise after contract award (although authorities may consider setting a higher threshold where the £25,000 threshold is overly burdensome to suppliers); and

b report on how much they spend on subcontracting and how much they spend directly with SMEs in the delivery of the contract.

From 1 September 2019, central government departments, executive agencies and non-departmental public bodies tendering public contracts valued over £5 million per year will be required to assess bidders’ approach to payment and supply chain as part of the selection process.

The Cabinet Office is currently consulting on a new evaluation model for taking account of social value as part of the award criteria for assessing tenders for central government contracts, where social impact is linked to the subject matter of the contract.

Further policies include obtaining commitments from suppliers to provide training and apprenticeships.

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). Where the distortion of competition cannot be effectively remedied by other less intrusive means, bidders may be excluded from the procedure.
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. Additionally, authorities must not disclose information reasonably stipulated by the bidder as confidential, and under the Defence Regulations an authority may impose measures to protect classified information.

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. This period allows unsuccessful bidders time to bring a legal challenge to prevent the contract award if they consider that the award decision is unlawful, provided that the bidders are otherwise within the limitation period for procurement claims. The standstill requirement often proves to be onerous for authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid to each unsuccessful bidder.

Many authorities consider that best practice is to give fulsome details of their reasons in the standstill notice, so as to be seen to be transparent, to flush out any complaints as soon as possible, to seek to ensure that the time for bringing a challenge in the courts is running on any complaints (see Section IX.i), and to reduce the risk of delay where a bidder asks for more information and claims that the standstill notice is defective. Authorities should also be mindful of the need to provide standstill information to all bidders, even those who have previously been disqualified, unless the disqualification has been upheld by a court or the full extended limitation period for any challenge stemming from that disqualification has passed.

IX CHALLENGING AWARDS

The EU rules on challenging procurement decisions, some of which are optional, have been implemented in the procurement regulations. The main options that have been adopted are that courts are not to make declarations of ineffectiveness where overriding reasons relating to the general interest require the contract to be maintained and that, in certain circumstances, courts may shorten the contract instead of declaring it ineffective.

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. Expedient 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) and the ability to adhere to a timetable, which means obtaining judgment on a mid-tender challenge before any contract is awarded.
Procurement challenges necessarily require the establishment of confidentiality rings to protect tenderers’ commercially sensitive and confidential information. The contracting authority will need to have recorded and be able to evidence its evaluation process, or face possible legal challenge and criticism by the court if it fails to do so. Disclosure of key information may be anticompetitive, prevent a fair and equal re-tender, or negatively affect the commercial interests of a bidder. The recent approach has been for contracting authorities to adopt a ‘neutral’ position on disclosure, as Merseytravel did in Bombardier v. Merseytravel, so that the real focus of any dispute is between the successful and challenging bidders who are often competitors in the same market. However, the court in that case ruled that costs will be payable by a successful tenderer (even if it is a non-party) if it does not permit the contracting authority and challenging bidder to agree sensible and reasonable disclosure directions.

The Technology and Construction Court in England and Wales published guidance in the summer of 2017 on confidentiality rings in procurement proceedings, disclosure and pre-action conduct in an annex to the Technology and Construction Court Guide. 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.

The trend continues towards increased challenges. Pre-action correspondence challenging a decision is frequently written and can be successful. In England, it is still rare for a bidder to be successful in a court challenge. There have been more bidder-friendly decisions in recent years, particularly on upholding the automatic suspension, as in Lancashire Care, Bristol Missing Link and Counted, but that is still the exception rather than the norm. 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 shows that the authority can succeed in Northern Ireland.

i Procedures

Procurements can provide their own complaints mechanisms, but High Court litigation is the main method of challenging awards.

70 See for example Lancashire Care (footnote 68) in which the court found a ‘pervasive inadequacy’ in the evaluation panel’s approach, in particular in documenting the evaluation process carried out.
74 See footnote 68.
75 Bristol Missing Link Ltd v. Bristol City Council [2015] EWHC 876.
76 See footnote 43.
Each High Court jurisdiction (England and Wales, Northern Ireland and Scotland) is separate, and has its own case law, save that the Supreme Court is the highest appellate court for all UK jurisdictions. Each court will have regard to relevant case law from the other jurisdictions.

The reason that challenges tend to be brought in the High Court stems largely from the very short time limit set for commencing these proceedings. At 30 calendar days (from when the claimant knew or ought to have known of grounds for bringing a claim), the limitation period for procurement claims is the shortest in English law. It can be extended (up to three months) where the court determines there is good reason. The trend in England has been to uphold the limitation period strictly; however, the recent case of Amey Highways provides an example of a case in which the court was prepared to extend time, albeit just for a few days. In Northern Ireland the courts are more flexible.

Claims under the procurement regulations can be brought in the High Court by economic operators, including contractors, suppliers and service providers.

Some bidders and third parties, such as subcontractors, who do not enjoy protection under the procurement regulations, bring claims in judicial review in the High Court, asking the Court to review the decision of the public authority. However, it does appear that the approach to procurement challenges by subcontractors is changing after the Sysmex case, when Sysmex challenged as an embedded subcontractor only, even when it was not in a position to sign the contract, nor to deliver the services required as a whole.

ii Grounds for challenge

Claims may be brought for breach of a duty owed to the bidder under the procurement regulations if the bidder either suffers or risks suffering loss. Examples include:

a undisclosed evaluation criteria and weightings, in breach of the obligations in the procurement regulations, or the duty of transparency under the Treaty on the Functioning of the European Union, or both;

b manifest error in evaluation; the error must be obvious, and expert evidence is not permitted to prove it;

c failure to exclude abnormally low tenders;

d unlawful abandonment of procurement, and

79 See footnote 13.
80 It should be noted that in this case the authority had agreed a ‘standstill agreement’ that time would not run for limitation purposes for a specified period of time. Whilst the authority did not seek to argue that the court should not exercise its discretion to extend time during that period, the court noted that ‘the existence of that agreement is good reason to extend time’. It is yet to be seen whether, as a result of this case, such agreements will become common practice in procurement claims.
82 Sysmex (UK) Ltd v. Imperial College Healthcare NHS Trust [2017]EWHC 1824 (TCC).

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There are four main grounds for judicial review of decisions:

a. error of law;

b. irrationality or Wednesbury unreasonableness (which is the closest that judicial review comes to a review of the merits);

c. procedural unfairness or breach of natural justice; and

d. legitimate expectation.

iii Remedies

The procurement regulations provide three main remedies: suspension, ineffectiveness and damages.

The ‘automatic’ suspension, which is unique to procurement challenges, arises when a claim form is issued before the contract is awarded, and does not require a court hearing. Once in place, the authority cannot award the contract until the court ends the suspension, or the parties end it by agreement or a consent order.

In England, in cases where authorities have applied to lift the automatic suspension, they have usually been successful (although much turns on the merits of those cases in which applications are actually made). Traditionally, it has been extremely difficult to maintain the suspension in contracts in the health and social care sector, where patient wellbeing and safety are paramount, but in Lancashire Care, Bristol Missing Link and Counted the courts were persuaded to do so. The most recent cases show that it is still more often than not that the suspension is lifted, particularly where significant procurements with large-scale impact or national importance are concerned, such as in Bombardier v. Hitachi Rail and DHL Supply Chain. In Northern Ireland, suspensions have generally been maintained.

Under the procurement regulations, the court may also set aside the decision or amend a document.

A declaration of ineffectiveness may be made when one of the grounds for ineffectiveness is satisfied. For the PCR, these are:

a. awarding a contract illegally without advertisement in the OJEU where this is required;

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88 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).


90 See footnote 68.

91 See footnote 75.

92 See footnote 43.

93 See footnote 11.

94 See footnote 12.


96 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.
b awarding a contract in breach of the standstill period or automatic suspension with another breach of the procurement regulations; and

c awarding a specific contract under a framework agreement when the requirements relating to the reopening of competition are not followed or when tendering procedures are not followed in a dynamic purchasing system.

Ineffectiveness means that a contract is prospectively, but not retrospectively, ineffective from the date of the declaration. The court can deal with matters consequent on the contract being declared ineffective. It must also impose penalties and may award damages. Some contracting authorities and utilities make contractual provision for the parties’ rights and responsibilities in the event of a declaration of ineffectiveness (as expressly permitted by the procurement regulations97 and encouraged by government guidance).98

2015 saw the first ever successful claim in the UK for a declaration of ineffectiveness. This was in Scotland in the Lightways Contractors case.99 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. Faraday100 is the first case in England and Wales in which the court has made a declaration of ineffectiveness, having decided that where a developer of land has an option to and does draw down land and, in doing so, comes under an obligation to develop that land, that contingent obligation to carry out works is sufficient to amount to a public works contract caught by the PCR (and, therefore, should have been advertised and competed in accordance with those regulations).

Unless grounds for ineffectiveness exist, damages are the only remedy that can be awarded under the procurement regulations after the contract has been entered into. Claims for damages are usually for wasted bid costs, or loss of profit or opportunities. The EnergySolutions101 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.

97 For example, PCR 101(5) and (6).
100 See footnote 10.
101 Nuclear Decommissioning Authority v EnergySolutions EU (Ltd) [2017] UKSC 34.
X OUTLOOK

Despite the current uncertainty around the timing and terms on which the UK will leave the EU, it is clear that the rules governing public procurement in the UK will remain largely unchanged in the short term. The framework and principles of the procurement regime are not being changed and will continue to apply post-Brexit, whether or not the UK reaches agreement with the EU on the terms of its exit. The European Union Withdrawal Act 2018, which received Royal Assent in June 2018, will preserve the current UK regulations (which implement the EU Directives) in domestic law, on withdrawal from the EU. The main impact of Brexit in the immediate term will be changes brought about by domestic amendment regulations designed to ensure that the current regime continues to operate effectively after the UK leaves the EU, including the requirement to use a new UK e-notification service for the publication of notices rather than sending notices to the EU publications office.

After Brexit, the future shape of UK procurement law will depend on the international agreements it chooses to make with the EU and other countries. As a signatory to the GPA, but outside the EU, the UK could have more freedom to set its own procurement policy than it currently has as an EU Member State, although many of the basic principles would remain the same. Much depends, however, on the nature of the UK’s future relationship with the EU. Further commitments on procurement could be made as part of any eventual UK–EU trade agreement or other arrangement, which could require the UK rules to stay in closer alignment with the EU rules.
I INTRODUCTION

Public procurement in the US is governed by a number of different statutes and regulations. Most of the statutes applicable to civilian agencies are found in Title 41 of the United States Code, and those statutes specific to military procurement are found in Title 10. In addition, government procurement policy and requirements are implemented through a uniform set of regulations, the Federal Acquisition Regulation (FAR), found in Title 48, Chapter 1 of the Code of Federal Regulations (CFR). Many agencies, including the Department of Defense, have their own supplemental regulations that supplement the FAR. The primary underlying principles are competition, transparency, integrity and fairness.

The agencies enforce federal procurement policy and rules through acquisition personnel, such as contracting officers, offices of inspectors general providing oversight to fight fraud, waste, and abuse and ensure compliance with the various statutes and regulations, and suspension and debarment officials with authority to suspend or debar contractors from doing business with the government. An additional enforcement tool, which can be invoked by a private person whistle-blower, is the civil False Claims Act (FCA), which imposes liability on persons and companies that submit fraudulent claims to the federal government.

The US has acceded to the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and federal procurement regulations are largely consistent with the procurement obligations of that agreement, with some exceptions, such as contract set-asides for US small businesses and preferences for domestic products.

II YEAR IN REVIEW

The US federal procurement system is constantly updated through legislation, including annual appropriations statutes that include new requirements or change existing requirements, agency rulemaking and case law interpreting the laws and regulations.

The Fiscal Year 2019 National Defense Authorization Act (NDAA), passed in late 2018, included several key provisions affecting government contractors, including the creation of the ‘Section 809 Panel’ to review and streamline the DoD acquisition process, which is expected to have a ripple effect on civilian agencies, and restrictions on the government acquisition and use of products manufactured by a number of Chinese technology firms, including ZTE and Huawei (following an earlier ban on use of Kasperky software products).

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In January 2018, the Department of Justice (DOJ) issued an internal memo relating to FCA cases (the ‘Granston Memo’), subsequently leaked, which encouraged DOJ attorneys to seek dismissals of qui tam FCA cases, where the DOJ has declined to intervene, that ‘lack substantial merit’. While the DOJ has always had this dismissal authority, it has been rarely exercised historically. Since the Granston Memo, however, there have been almost 20 motions to dismiss filed under this dismissal authority.

In bid protest cases, there were two significant decisions dealing with the scope of agency discretion. First, in Dell Fed. Sys, LP v. United States, 906 F.3d 982 (Fed. Cir. 2018), the US Court of Appeals for the Federal Circuit reversed the US Court of Federal Claims application of a ‘narrowly tailored’ standard of review of agency corrective action (i.e., actions taken in response to errors found through a protest), finding instead that an agency’s corrective action need only be ‘reasonably related’ to the underlying procurement errors. This decision favours the approach taken by the Government Accountability Office (GAO), which provides for wider agency discretion. Second, in Ernst & Young, LLP v. United States, 136 Fed. Cl. 475 (2018), the Court of Federal claims ruled in favour of protester’s allegation that the agency unreasonably failed to conduct discussions prior to awarding the contract (i.e., an exchange with the agency that provides an opportunity to revise proposals), finding the agency’s failure to conduct discussions unfair and unreasonable. This case highlights a key difference in decisional law between the US Court of Federal Claims and GAO, where GAO grants agencies nearly unfettered discretion in this area.

Two decisions from 2018 highlight the increased focus on supply chain security and defence, especially as it relates to foreign influence over the US government’s supply chain. In Kaspersky Lab, Inc v. United States Dept of Homeland Sec, 909 F.3d 446 (D.C. Cir. 2018), the US Court of Appeals for the DC Circuit upheld a legislative ban on Kaspersky products imposed by the 2018 NDAA, because of the potential Russian government influence over the company that could have compromised critical US government systems running Kaspersky software. In Iron Bow Tech, LLC v. United States, 136 Fed. Cl. 519 (2018), the US Court of Federal Claims upheld the US Social Security Administration exclusion of Iron Bow from a competition involving the supply of desktop printers based on the agency’s documented concern regarding Chinese government influence over Iron Bow’s main supplier, a US company owned by three Chinese investment firms, finding that the exclusion was consistent with the evaluation criteria and adequately documented.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

All federal executive agencies are subject to the FAR, subject to a few exceptions. Although the Federal Aviation Administration (FAA) is a traditional government agency, Congress specifically exempted the FAA from the FAR, and its regulations are found in the Acquisition Management System. Other federal entities not subject to the FAR have special legal status

2 The FCA allows private individual to bring a case against companies and individuals for violations of the FCA (referred to as qui tam cases), after which the DOJ decides whether it will take over the prosecution of the case (i.e., intervene) or not.
3 https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2017-2018/may2018/ granston/
and consequently their own procurement rules, including the United States Postal Service; the Tennessee Valley Authority, a government-owned corporation that provides electricity in parts of the south-eastern United States; and Amtrak, a government-owned corporation that delivers rail passenger service throughout the United States.

ii Regulated contracts

The FAR and various agency supplements to the FAR govern public procurement regardless of sector, though the specific FAR provisions that apply depend on the contract type (e.g., services versus goods versus construction, commercial items versus non-commercial items, firm-fixed price versus cost reimbursement), contract value and other considerations. With few exceptions, the FAR requires that all contracts be awarded competitively, which means that all responsible offerors are eligible to compete for award, or for awards set aside for certain types of business concerns (i.e., awards set-aside for small businesses).5 If an agency chooses to award a contract without competition, the contracting officer must typically complete a ‘justification and approval’ and obtain approval for a sole source award, based on the specifically identified circumstances set forth in the FAR.6

Certain clauses within the FAR are only included in contracts above a certain dollar threshold. While that threshold may vary by clause, all contracts that fall below the micro-purchase threshold (currently US$3500, but US$10,000 for GSA, DoD) are exempt from the requirements for competition.7 In addition, contracts at or below the simplified acquisition threshold (currently US$150,000, but US$250,000 for GSA, DoD) may be awarded using a simplified acquisition process and include only a limited number of FAR clauses.8 Furthermore, the FAR allows for a streamlined acquisition process for the acquisition of ‘commercial items,’ as defined by FAR 2.101, which includes both items and services, and generally includes products ‘of a type’ offered for sale to the general public, or such products that have undergone minor modifications or modifications ‘of a type’ offered to the general public.

For FAR-based contracts, the Anti-Assignment Act, 41 USC Section 6305, prohibits the assignment of a government contract from one entity to another without the government’s consent, and the FAR dictates specific procedures for executing a novation agreement among the parties (the transferee, transferor, and the government), a process that requires early and active engagement with the customer agency in the event of an internal reorganisation, merger, or an asset purchase.

Other transaction authority (OTA) refers to a set of statutes that allow certain agencies to enter into agreements which are exempt from the FAR and many statutes that apply to procurement contracts, grants, and cooperative agreements. While OTAs have been around since 1958, they have grown in popularity in recent years as the DoD has made a special push to leverage its OTA authority to quickly award contracts without having to engaging in the traditional, and sometimes lengthy FAR procurement process.9 Under the DoD’s OT

5 See FAR Part 6.
6 FAR 6.302, 6.303.
7 FAR 13.203.
8 FAR Subpart 13.3.
9 See Scott Maucion, OTA contracts are the new cool thing in DoD acquisition, Federal News Network, 19 October 2017.
authority, it currently has permanent authority to award OTAs for research, prototype and production purposes.\textsuperscript{10} Other agencies with OT authority include the National Aeronautics and Space Administration (NASA) and the Departments of Energy and Homeland Security.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing
Framework agreements, frequently referred to in the United States as indefinite-delivery/indefinite-quantity (IDIQ) contracts, are governed by FAR Subpart 16.5. Among other things, the solicitation for such a contract must:

\begin{itemize}
\item[a] specify the period of the contract, including any options;
\item[b] specify the total minimum and maximum quantity of supplies or services the government will acquire;
\item[c] include a statement of work sufficiently detailed to allow a prospective offeror to decide whether to submit an offer; and
\item[d] state the procedures to be used in issuing orders, including – if multiple awards may be made – the selection criteria to be used to provide awardees with a fair opportunity to be considered for each order.\textsuperscript{11}
\end{itemize}

There is a statutory preference for awarding multiple IDIQ contracts for the same or similar services or supplies.\textsuperscript{12} The competition requirements in the FAR do not apply to individual orders under such IDIQ contracts, but the contracting officer has to provide each awardee with ‘a fair opportunity to be considered for each award exceeding US$3,500 issued under multiple deliver-order contracts or multiple task-order contracts’.\textsuperscript{13} The contracting officer is not required to contact each of the multiple awardees under the contract before awarding an order that does not exceed US$5.5 million, so long as the contracting officer has provided the awardee a ‘fair opportunity to be considered’.\textsuperscript{14}

While central purchasing may occur on the state and local level, each federal agency (or sub-agency or sub-component) is generally responsible for making procurements on its own behalf. However, agencies frequently make purchases using interagency contracting vehicles, through government-wide acquisition contracts (GWACs), the Multiple Award Schedules (MAS) programme, and other multi-agency contracts used by more than one agency pursuant to the Economy Act, 31 USC Section 1535.

ii Joint ventures
In the United States, most public-private partnerships (PPPs), including joint ventures, are at the state (not federal) level, and approximately half of the states have (different) PPP-enabling statutes that, along with implementing regulations, define the procedures for establishing a PPP. The actual procurement procedures vary by state. While not as common, PPPs exist in the federal context as well, such as the National Institute of Standards and Technologies’ National Cybersecurity Center of Excellence, which seeks to generate solutions for cybersecurity

\textsuperscript{10} 10 U.S.C. 2371.
\textsuperscript{11} FAR 16.504(a)(4).
\textsuperscript{12} 10 USC 2304(a)(d), 41 USC 253b(h).
\textsuperscript{13} FAR 16.505(b)(1)(ii).
\textsuperscript{14} FAR 16.505(b)(1)(iv).
challenges, as well as various PPP opportunities with the Department of Transportation for design and construction projects. The requirements for private companies wishing to participate in a PPP vary by opportunity and agency.

V THE BIDDING PROCESS

i Notice

FAR Part 5 provides a central set of ‘policies and procedures for publicising contract opportunities and award information’. For contract actions expected to exceed US$25,000, federal agencies must post a synopsis of the contract action at a government-wide point of entry (GPE). The main GPE used for federal procurements is the Federal Business Opportunities (or FedBizOpps) website found at fbo.gov. The USASpending.gov site is also used by the US government as a repository for awarded contracts. Agencies are generally required to post a notice of proposed contract action for at least 15 days prior to the issuance of a solicitation for proposals or bids and must provide for a minimum response time of 30–45 days. For contracts utilising procedures other than full and open competition, a synopsis of the sole-source decision must be posted depending on the type of contract.

ii Procedures

Government agencies must utilise procedures for full and open competition of contracts wherever possible. The parameters of competition are delineated in the Competition in Contracting Act (CICA), 41 U.S.C. Section 253, and FAR Part 6. The two main types of competitive procedures are sealed bids and competitive proposals.

For sealed bidding procedures under FAR Part 14, offerors must submit a bid in response to an invitation for bids issued by the agency. Bids are opened publicly by the agency and evaluated without discussions. Award is made based on price and ‘price-related factors’ included in the invitation for bids, and is made to the lowest priced bidder found to be responsive based on the criteria set forth in the invitation.

Negotiated procedures under FAR Part 15 are more commonly used in competitive procurements. Under these procedures, offerors must submit proposals responding to specific instructions and evaluation criteria supplied in the solicitation. Once offerors submit proposals, agencies have the option to engage in exchanges with offerors in order to clarify points in their proposals or raise significant weaknesses or deficiencies.

Different procedures govern the more limited situations where full and open competition is not used. For example, federal supply schedule contracts with the General

17 See FAR 5.000.
18 FAR 5.203.
19 FAR 5.301.
20 FAR 6.102.
21 FAR 14.101.
22 FAR 15.304.
23 FAR 15.306(a), (d).
Services Administration are governed by specific procedures in FAR Part 8.4. Task and delivery orders issued under IDIQ contracts are governed by FAR Part 16. Small business contracts are governed by specific procedures set forth in FAR Part 19.

iii  Amending bids

Bids submitted under sealed bidding procedures may be amended or withdrawn if notice is provided prior to the time set for bid opening.24 Similarly, under negotiated procedures, proposal revisions or modifications must be received by or before the time set for submission of proposals.25 Proposals submitted under negotiated procedures may also be revised after submission in response to discussions with the agency.26

VI  ELIGIBILITY

i  Qualification to bid

Under FAR Part 9, only contractors that are found to be responsible by the procuring agency may bid on government contracts. Agencies will evaluate an offeror’s financial resources, record of performance, operational controls, means of performance, and its record of integrity and business ethics when determining responsibility.27 In situations where particular skills or resources are necessary, agencies may include additional ‘special standards’ in the solicitation.28

In addition, some procurements may be restricted to small businesses or small businesses with certain socioeconomic preferences (i.e., women-owned, veteran-owned, etc.). Procurements for classified defence programmes are limited to companies that meet certain standards for classified programmes. Agencies may also limit the issuance of certain solicitations to holders of existing GWAC or IDIQ contracts.

ii  Conflicts of interest

 Agencies are required to evaluate proposals for potential Organizational Conflicts of Interest (OCI) ‘as early as possible’ in the procurement process and must ‘avoid, neutralize, or mitigate significant potential conflicts before award’.29 In certain circumstances, OCI’s may also be waived by an agency at the request of the contracting officer and by approval of the ‘agency head or designee’.30 OCIs arise in three main scenarios: (1) impaired objectivity; (2) biased ground rules; or (3) unequal access to information.31 An impaired objectivity OCI arises where a contractor is in a position to evaluate its own or its competitor’s performance or products. A biased ground rules OCI arises where a contractor, as part of one government contract, sets the rules for another contract that it then bids on. An unequal access to

24 FAR 14.303.
25 FAR 15.208(a).
26 FAR 15.307.
27 FAR 9.104-1.
29 FAR 9.504(a)(2).
30 FAR 9.503.
31 FAR 9.505-2 (Biased Ground Rules); FAR 9.505-3 (Impaired Objectivity); FAR 9.505-4 (Unequal Access to Information).
information OCI arises where an offeror gains access to competitively useful non-public information under one contract that can be used to obtain another contract (e.g., competitor proprietary information, government confidential information, etc.).

Offerors may also be conflicted through a related doctrine known as ‘unfair competitive advantage’.\(^3\) An unfair competitive advantage is related to the same principle as an unequal access to information OCI, where access to competitively advantageous non-public information is obtained through a former government official.

Personal conflicts are dealt with through a variety of separate restrictions on US government employees that restrict their activities once they leave government service. The FAR also requires contractors to prevent personal conflicts of interest of their employees, providing specific restrictions on contractor employees that perform ‘acquisition functions’ that are ‘inherently’ governmental.\(^3\) Contractors participating in such functions must have specific procedures in place to screen for personal conflicts.

iii Foreign suppliers

Public procurement in the US is largely open to foreign companies, because historically, the US has placed restrictions on the procurement of foreign-origin supplies, services, and materials, through domestic preference regimes, and not the citizenship of the company providing the good.

Although US laws and regulations allow foreign companies to compete in the US government market, certain restrictions apply to contracts that implicate national security concerns. This includes contracts that require access to classified information, which are wholly limited to US companies and US citizen employees, and contracts that require access to items that are subject to US export controls. For contracts requiring access to classified information, there are certain steps that a foreign corporation can take to insulate a US subsidiary from foreign ownership, control, or influence (FOCI), allowing the government to award the US subsidiary contracts that require access to classified information. With respect to export controls, certain activities may trigger a requirement for a US presence and export authorisation.

VII AWARD

i Evaluating tenders

Agencies are required to include the standards and evaluation criteria used for evaluating offerors in the solicitation. For sealed bidding procurements, the agency will award to the lowest bidder that satisfies the requirements in the invitation for bids. For negotiated procurements, solicitations can include a variety of factors for evaluation but, at a minimum, must address price/cost, quality, past performance (with limited exceptions), and the extent of small and disadvantaged business concern participation (where subcontracts are used). Procurements can be evaluated on a low-price technically-acceptable basis (LPTA), but this evaluation methodology is becoming disfavoured due to recent policy and legislative changes. Many negotiated procurements are decided on a best value basis, and require the agency to

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\(^3\) See Health Net Federal Services, LLC, B-401652.3, B-401652.5, 4 November 2009, 2009 CPD ¶ 220.

\(^3\) FAR 3.1102-3.
conduct a trade-off between cost and non-cost factors if award is made to a higher-rated but higher-priced offeror. Agencies must document the rationale for their evaluation and selection decision.

ii National interest and public policy considerations

The United States has historically given preference to products made in the United States under the Buy American Act (BAA); however, the US has opened up its government procurement to reciprocal international competition, through multilateral and bilateral trade agreements (such as the WTO GPA), as implemented by the Trade Agreements Act (TAA). The BAA effectively acts as an evaluation preference for ‘domestic end products’, or ‘domestic construction materials’, which are products ‘manufactured’ in the United States and for which more than 50 per cent of the total cost of the components are for components produced or manufactured in the United States (though the component test is waived for commercially available off-the-shelf items). The TAA, which applies to acquisitions over certain dollar thresholds, waives the BAA for the acquisition of end products or services from ‘designated countries’ (including those countries with which the US has entered into bilateral or multilateral agreements opening up government procurement for reciprocal treatment), and prohibits the acquisition of end products or services from ‘non-designated countries’. The TAA requires products to be wholly made or ‘substantially transformed’ in the United States or a designated country. There are distinct domestic preferences that apply to procurement by the DoD, and to state and local projects funded by federal grants.

The United States has a policy to provide maximum practical opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns. Agencies are required to set-aside certain contracts for small business concerns when there are expected to be at least two small businesses that can perform the work or provide the products being purchased. This policy for contracting with small business concerns flows down to subcontracts as well; contracts exceeding certain dollar thresholds are required to subcontract with small business concerns to the maximum practicable extent and, if certain conditions are met, submit to the government a small business subcontracting plan that indicates the contractor’s goals for small business subcontracting.

The government also implements numerous public policy considerations through its procurement policy, including policies for equal employment opportunity, non-discrimination because of age and anti-human trafficking.

34 FAR 25.003, 25.101.
35 FAR 25.225-5.
36 See FAR Subpart 19.2.
37 FAR 19.502-2.
38 See FAR Subpart 19.7.
39 See FAR Subpart 22.8.
40 See FAR Subpart 22.9.
41 See FAR Subpart 22.17.
VIII INFORMATION FLOW

The FAR encourages agencies to engage with industry to identify and resolve concerns during the procurement process. In the acquisition strategy phase, this includes seeking input through requests for information or issuing a draft solicitation requesting feedback from potential bidders. Once the solicitation is issued, agencies will often provide for a question and answer period and the agency will incorporate its responses in the solicitation, to clear up any issues with interpretation prior to submission of a bid or proposal.

In negotiated procurements, after proposals are submitted, the agency can engage in several different types of exchanges with offerors. Clarifications are often used to clear up ambiguities in an offeror’s proposal through the issuance of clarifying questions that do not provide for proposal revisions. Agencies may also engage in discussions, which provide an opportunity for offerors to revise or modify their proposals in a material way. Discussions must be meaningful, equal and not misleading, and must address significant weaknesses and deficiencies identified by the agency in an offeror’s proposal. If engaging in discussions, the agency must establish a competitive range of the most highly rated proposals. Offerors who are not included in the competitive range are required to be notified of their exclusion. If the agency intends to award without discussions, it must state its intent in the solicitation.

Offerors in negotiated procurements are entitled to request a debriefing if they are eliminated from consideration prior to award or after the award is made. A debriefing provides the offeror with an overview of its evaluation, the rationale for award, and any significant issues with its proposal that may have prevented it from being selected for award. The debriefing will normally include the awardee’s price, overall technical rating, and ranking of offerors if any such ranking was developed, but not specific information about the awardee’s proposal or evaluation. DoD now allows offerors to ask additional questions after their initial debriefing, and expansion of debriefing rights is expected to follow in civilian agencies.

IX CHALLENGING AWARDS

Disappointed bidders can challenge an agency’s award decision by filing a bid protest. There are several different forums for protest including the contracting agency, GAO and the US Court of Federal Claims (COFC). The terms of the particular procurement may affect which forum a contractor can and should select. For example, task or delivery order protests generally cannot be brought at COFC (except in very limited circumstances), and such protests at GAO are otherwise limited to orders over US$25 million for defence agency procurements and US$10 million for civilian agencies.

GAO tends to be the most popular forum for post-award bid protests. For Fiscal Year 2018, 2,607 protests were filed at GAO. Of those, 622 cases went to a decision on the merits, and 92 cases were decided in the protester’s favour. This is an effective sustain rate of 15 per cent; however, 44 per cent of protests are considered to have been resolved ‘effectively’, meaning they were either sustained or the agency took corrective action.
i  Procedures

The procedures for a bid protest vary by forum. To have standing to protest, a protester must demonstrate that it is an ‘interested party’ to the procurement, meaning that it has submitted a bid or proposal and has a direct economic interest in the award decision. Essentially, a protester must demonstrate that it would be ‘next in line’ for award if it prevails in its protest.

GAO has well-established procedures governing protests. A protester at GAO must file its protest within 10 days of when it knew or had reason to know of its grounds for protest. In the post-award context, a protest must be filed within 10 days of award or within 10 days of a required debriefing. If a debriefing is requested and required, the protest may not be filed prior to the debriefing date. CICA also provides for an automatic stay of performance if the protest is filed within 10 days of award or five days of a required debriefing, which may be overridden by the agency under limited circumstances. Any stay-override can be challenged at COFC. Once the protest is filed, the agency must respond by filing its agency report (the response to the protest arguments) within 30 days of filing. The protester then has 10 days to file comments to the agency report. Supplemental protests can also be filed if new information becomes available as long as they are independently timely (filed within 10 days of when the protester knew or should have known of the basis for its protest). GAO protests must be decided within 100 days of filing.

For COFC protests, there is no similar deadline to file a protest, but protesters generally file as quickly as possible. There is no automatic stay of performance for protests filed at COFC. In order to stay performance, protesters must either negotiate an agreement with the agency to voluntarily stay performance, or litigate a motion for preliminary injunctive relief. Protesters must demonstrate immediate and irreparable harm to receive an injunction. COFC is not subject to the same 100-day decision deadline as GAO, but protests at COFC are heard and decided on an expedited schedule.

Decisions from the agency, GAO, or COFC can also be reviewed further or appealed in the event of an adverse decision. If you lose an agency challenge, you can refile your protest with GAO, and after that COFC (although you only get one CICA stay, which expires at the end of your first protest with the agency or GAO). Adverse COFC decisions can be appealed to the US Court of Appeals for the Federal Circuit.

ii  Grounds for challenge

In order to prevail, a protester must show that the agency’s decisions were arbitrary or unreasonable. A protester must also demonstrate competitive prejudice for a protest to be viable, meaning that but for the alleged error, it would have had a substantial chance of receiving the award.

Common protest grounds include challenges to the reasonableness of the agency’s technical, past performance, or price evaluations, disparate treatment of offerors, flaws with the discussions process, errors with regard to the agency’s responsibility determination, challenges to the awardee’s qualifications, conflicts (OCIs, unfair competitive advantage, etc.), and flaws in the agency’s best value determination or trade-off decision. In GAO’s

annual report to Congress for FY 2018, GAO indicated that the most ‘prevalent reasons for sustaining protests during the 2018 fiscal year were: (1) unreasonable technical evaluation; (2) unreasonable cost or price evaluation; [and] (3) flawed selection decision’.47

### Remedies

Remedies for bid protests vary by forum. GAO may only make recommendations regarding an agency’s corrective action if it sustains a protest, but as a matter of practice, all agencies follow the recommendation because otherwise they must report to Congress. Common GAO recommendations include re-evaluation of proposals, reopening discussions and the submission of a new selection decision. COFC protests are decided by court order for declaratory or injunctive relief. In either forum, winning a protest will not necessarily result in award to the protester, but such directed awards are possible (if exceedingly rare). Successful protesters may also be able to recoup bid and proposal costs, and reasonable attorney’s fees. Punitive damages are not permitted.

### OUTLOOK

Cybersecurity and supply chain security continues to be a focus of government agencies, and we expect to see new and evolving evaluation criteria and contract requirements related to these issues. For cybersecurity, the administration is expected to finalise a new proposed clause in the FAR that will extend the application of stringent DoD cybersecurity standards to civilian contractors as well. With respect to supply chain security, in addition to expanding statutory authorities to mitigate supply chain risks in the procurement of information technology and allowing agencies to exclude sources or covered articles when warranted by circumstances, the DoD is also spearheading efforts to utilise supply chain security as the ‘4th pillar’ of acquisition, on par with technical capability, past performance and price/cost. Likely initiatives (driven by an August 2018 report by the MITRE Corporation entitled ‘Deliver Uncompromised’) include scoring contractors on the integrity of their supply chain, promoting the use of incentives for defence industrial base contractors who add value to supply chain security, and adding new contract requirements related to supply chain security. We expect both DoD and civilian agencies to continue to push forward on the cybersecurity and supply chain security front in 2019 and beyond.

Separately, related to the Section 809 Panel’s review of the DoD acquisition process (see Section II), we expect that at least some of the Panel’s recommendations to streamline the acquisition process will be implemented into regulations.

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INTRODUCTION

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. 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

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1 José Gregorio Torrealba R is a senior partner at LeGa.
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.
establishment of new criteria for determining advantages to the national industry in the bidding proceedings for the adjudication of contracts.

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.

II YEAR IN REVIEW

2018 was a complicated year for public procurement in Venezuela. The most significant of the sanctions imposed were the sanctions imposed by the government of the United States over the Venezuelan government and other public entities and state-owned companies, such as Petroleos de Venezuela, SA (PDVSA). Most sanctions related to Venezuela have targeted individuals, but in 2017 the US government issued the first sanction preventing the Venezuelan government, other public entities, PDVSA and its affiliated companies from accessing the US financial markets. This sanction imposed by Executive Order 13,808:

4 prohibits transactions by a United States person or within the United States related to: certain new debt of Petroleos de Venezuela, S.A. (PDVSA); certain new debt or new equity of the Government of Venezuela; existing bonds issued by the Government of Venezuela prior to August 25, 2017; and dividend payments or other distributions of profits to the Government of Venezuela from any entity owned or controlled by the Government of Venezuela. In addition, E.O. 13808 prohibits the purchase by a U.S. person or within the United States of most securities from the Government of Venezuela.4

This Executive Order contains two provisions particularly relevant to public procurement since it prohibits US persons from financing PDVSA for longer than 90 days, and the Venezuelan government (which is defined widely enough as to include any public entity) for longer than 30 days. The risk for contractors from the US to violate this prohibition because lack of payment by PDVSA or the Venezuelan government has made them take additional measures in order to avoid any liability when contracting with PDVSA or the government. The Office for Foreign Assets Control (OFAC) issued a licence No. 4 in order to exclude the application of sanctions on transactions related to agricultural commodities (food for humans or animals, seeds for food crops, fertilisers and reproductive materials for the production of food animals), medicines and medical devices.

4 US Department of State. Venezuela Related Sanctions. Available at www.state.gov/e/eb/tfs/spi/venezuela/ (Last visited 20 March 2018.)
More recently, pursuant to Executive Order No. 13,850, which provides for the freezing of assets and a general prohibition on dealing with designated persons because of their participation in the exploitation of gold or any other sector designated by the Treasury Department, PDVSA was included in the list of designated persons and, therefore, no US person is allowed to enter into any kind of contract with the Venezuelan state oil company, with the exceptions provided for in licences numbers 10, 11 and 12 issued by the OFAC, which allow certain activities in wind-down periods until July 27 as the latest case.

III SCOE 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.

iii 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:
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 or her 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:

a raw material;
b workforce;
c equipment;
d technology;
e basic and detailed engineering studies performed by companies domiciled in Venezuela;
f professional services rendered by Venezuelan professionals;
g financial costs paid in Venezuela; and
h 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;

c when the content of the decision is impossible to enforce or when enforcement would be illegal; and

d 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

The development of the political and economic crisis in Venezuela is difficult to foresee since it is a complex crisis with many aspects that come together. If the current political regime manages to maintain its position in the Venezuelan government, the trend of the crisis will be to get deeper. In this scenario, any change on the regulation of public procurement would be for the public entities to extend their prerogatives in the management of governmental contracts. Sanctions by the international community, starting with the United States, are likely to increase pressure on the government finances.

If there is a change in the current regime and the interim president manages to access real power in Venezuela, it is highly possible that the public procurement legislation will change dramatically. The current status of the infrastructure in any field (for instance, transport, energy (oil, gas and electricity), education and health) is almost completely destroyed. Therefore, the country will require the highest level of private investment for its own reconstruction. This will imply changes in the terms of government contracts and their regulation in order to establish controls over public spending practices and the performance of contractors. It would be desirable that the Venezuelan authorities enter into the international standards for the regulation of public procurement. If a change in the political situation actually occurs, Venezuela will become one of the busiest and most attractive markets for public contractors.

In both cases, one of the major concerns of the government (the current or the new one) will be dealing with providers of goods and services because of the high level of debt owed to them during the past several years. Some of these contractors have been exploring options for the enforcement of their contractual rights or those arising out of international law, when applicable.
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Dr Bonhage studied in Freiburg, Bologna, Berlin (Dr iur) and New York (LLM/ NYU). He was admitted to the German Bar in 2004 and to the New York Bar in 2005. He joined Hengeler Mueller in 2004 and has been a partner since 2011. He has published articles on public procurement, state aid, foreign investment screening and PPPs, as well as rail infrastructure and transport, environmental, constitutional and real estate law. He is recognised in several publications, including Chambers Europe.
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Andrew Carter qualified as a solicitor in England and Wales in 2015, and is an associate in Addleshaw Goddard’s commercial and procurement teams. 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 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.

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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 ‘[h]e 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, 2017 and 2018.

His experience includes leading the AG team advising the Danish government on the Fehmarnbelt Tunnel project, a €6 billion, 19 kilometre road and rail tunnel linking Denmark and Germany; advising the Department for Transport on aspects of rail franchising; and advising Parliament on its proposed multibillion-pound refurbishment programme.

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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 completed his 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 partner and Head of Practice of Public Law. In this capacity, he has been involved in several projects and transactions, mainly in public procurement, public regulation and matters concerning administrative concessions.

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Daniel R. Forman is a partner in Crowell & Moring’s Washington, DC office and is co-chair of the firm’s government contracts group. He is also a member of the firm’s management board. Dan’s practice focuses on a wide variety of government procurement law, including bid protests, False Claims Act and qui tam litigation, investigations of potential civil and criminal matters, ethics and compliance, contract claims and disputes, GSA schedule contracting and small disadvantaged business contracting. Dan is also experienced in negotiating and drafting teaming agreements and subcontracts, as well as providing counselling on the interpretation of FAR clauses and solicitations. Dan’s practice also focuses on state and local procurement matters, including State False Claims Act issues, lobbying and contingency payment compliance. He has been involved in bid protest litigation in six states and the District of Columbia. Dan has been named one of the top lawyers in the government contracts field by *Chambers USA*. Dan was also honoured as a 2015 Law360 MVP and named to BTI Consulting Group’s list of ‘Client Service All-Stars.’ In 2017, Dan was named a ‘leading lawyer’ in government contracts by *Legal 500 United States*. 
AMY GATENBY
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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.

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Ryan Geldart is a managing associate in Addleshaw Goddard’s commercial dispute resolution team. Ryan focuses on commercial dispute resolution with a particular emphasis on procurement challenge in the transport and health sectors, acting for both contracting authorities and bidder clients in those challenges. Ryan regularly advises clients on all aspects of procurement challenges, with particular interest in issues relating to disclosure and has input on the public consultation regarding the Disclosure Pilot in the Business and Property Courts. Ryan is also a member of the Procurement Lawyers’ Association.

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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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Klaas Goethals graduated with a Master of Laws from KU Leuven in 2016. He spent a part of his studies at the Université Paris 1 Panthéon-Sorbonne. He joined Liedekerke in 2016.

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Nowadays, Federico represents procurement companies, resellers, infrastructure and equipment providers before regulators on various matters, so he is able to advise major local and foreign companies in their daily operations in Mexico. He has also actively participated with various clients, obtaining public contracts published under local or federal regulations.

Federico has experience in obtaining regulatory authorisations for, among others, allowing foreign air carriers making flights to Mexico and operation of unmanned aircraft systems. Likewise, he has developed a strong reputation of defending his clients’ interests and facing issues with public and private situations.

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Frank Judo graduated with a licentiate in law from KU Leuven in 1998, where he also studied philosophy, modern history and canon law. He has been associated with Liedekerke since 1998 and has been a partner since 2008. Alongside his advocacy practice, he has also published numerous articles on a wide range of matters. Between 1998 and 2004, he was a lecturer at the Institute for Constitutional Law at KU Leuven. He is a member of the High Council of Justice.
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Theo Ling is a partner based in the Toronto office of Baker McKenzie. He heads the firm’s Canadian international commercial law practice group, and is chair of the firm’s global privacy and information management leadership team. His international commercial and regulatory practice is focused on technology-based issues and the converging computer, internet and communications industries, as well as supply chain, procurement and outsourcing issues. Beyond his international commercial and regulatory practice, Theo has been active in developing innovative solutions driven by data analytics in the areas of legal processes and compliance, where his work has been recognised by the Financial Times of London in 2016 as being at the forefront of innovation in the Canadian legal market.

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Philipp J Marboe is an attorney-at-law and counsel at Wolf Theiss. He is a member of the regulatory and procurement practice group. Prior to joining Wolf Theiss he was junior partner in a leading Vienna-based Austrian and central European practice. He has extensive professional experience in the planning and implementation of tender procedures, including railways and public passenger transport services, and project development. Mr Marboe also specialises in public commercial law and contract law. In recent years, he has advised on major infrastructure and PPP projects in Austria as well as in central and eastern Europe. Mr Marboe advises and represents Austrian and international clients – both bidders and contracting authorities – in review proceedings. He gained international experience in working at the Vienna office of a British multinational law firm and for a law firm in Paris.

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Radoslav previously worked for Kozloduy Nuclear Power Plant in Bulgaria as a senior counsel where he was involved in the units 3 to 6 modernisation programme and the decommissioning of units 1 to 2. He continued his energy career as head of regulatory management of E.ON Bulgaria, one of the three private distribution companies.

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He has a wealth of experience in drafting and negotiating public contracts for works, goods and services. His work is focused on a number of sectors, mainly transport, energy, local government, health and water.

Mr Rainey’s expertise covers managing and defending procurement challenges for authorities, including correspondence with unsuccessful bidders, explaining the risks and requirements of the contentious process, and guiding authorities through the detailed rules on standstill and limitation.

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Every year since 2007, Chambers Europe has ranked Olga Revzina in the highest tier of PPP specialists.

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Ana Paula Rumualdo is a senior associate with 15 years of experience, and is a recognised practitioner of public procurement matters. Using strategic thinking, Ana Paula has advised a number of clients in regard to all the stages of a procurement procedure, from analysis of the bidding document to the execution of the contract.

She also has particular experience in data privacy and IT. Her clients appreciate her tailored approach to tackling technology-related issues. Ana has provided several training and talks in the fields of public procurement, technology, data privacy and cybersecurity, and has been published several times.

Before joining Hogan Lovells in 2018, Ana worked in a prestigious boutique law firm focusing on public procurement.

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Simone Terbrack has a broad public law practice with a particular focus on public procurement matters, regulated industries and real estate matters. She advises and represents investors, companies and public entities in public law and regulatory matters. Her practice covers representation in public procurement and review procedures. Ms Terbrack also advises on a broad spectrum of litigation as well as in contract negotiations, restructurings and other transactions.

Ms Terbrack studied in Münster (Germany) and is writing her PhD thesis on procurement matters at the Bucerius Law School, Hamburg (Germany). She has worked as researcher and instructor on public procurement law at the Bucerius Law School as well as with several public procurement lawyers. She has published articles and chapters in legal commentaries on a broad range of procurement law issues and regularly provides lectures for clients, lawyers and practitioners. Ms Terbrack was admitted to the German Bar and joined Hengeler Mueller as an associate in 2016.

JOSÉ GREGORIO TORREALBA R

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José Gregorio Torrealba R has been a senior partner at Leğa since 2012. He leads the public law practice and the international arbitration team at the firm. His practice is focused on administrative law, competition law, public procurement, foreign investment and international arbitration. José Gregorio is a lecturer on postgraduate administrative law and commercial law courses at Universidad Católica Andrés Bello and has also taught at Universidad Central de Venezuela, Universidad Monteávila, Universidad Santa María and Universidad Católica del Táchira. He is regularly invited as a speaker in national and international conferences. José Gregorio holds a law degree from Universidad Santa María, and master’s degrees from Universidad Católica Andrés Bello and King's College London. He has been recognised by Chambers Global, Chambers Latin America, The Legal 500 and other legal directories as a leading practitioner on public law, energy, life sciences, competition law and dispute resolution.
OLGA VASILYEVA  
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Olga Vasilyeva is a Russian-qualified lawyer. She specialises in advising private investors, public authorities, state-owned companies and financial organisations on infrastructure and private–public partnership projects in Russia.

Olga graduated from the Moscow State Institute of International Relations (University) in 2015 with honours. Before joining Herbert Smith Freehills in 2015, she worked in the Moscow office of another international law firm. She speaks Russian, English, French and Italian.

GEOFF WOOD  
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Geoff Wood leads the construction team at Baker McKenzie, Sydney. He has over 30 years’ experience in the design and construction, and operations and maintenance aspects of major projects. His areas of expertise include all legal aspects of construction, infrastructure, public–private partnerships, water, alliancing and defence material procurement.

JULIO S ZUGASTI GONZÁLEZ  
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Julio Zugasti is an associate who advises on government contracts, helping clients look for opportunities in both state and federal public procurement matters. He has represented foreign and national clients involved with extensive public bids and direct awards at all levels of government. He has worked with companies in the preparation of public bid proposals through to the awarding of the contract, so he is able to assist clients on the challenges regarding public bid guidelines and public procurement awards.

Julio has experience working on corporate matters, which helps him to understand opportunities for clients within government contracts and administrative matters. Julio sees how government contracts, anti-corruption issues, and general business matters affect one another. Julio has helped clients resolve contract enforcement problems as painlessly as possible, and has been able to improve relationships between clients and public entities.

Julio has advises a worldwide IT company on a major government contract procedure with the Ministry of Finance for a long-term relationship. He has represented various companies in the public procurement procedures regarding Mexico City New International Airport and rail transportation.

Julio is dedicated to giving back to his community and has participated in activities in support of the Community Investment Program of the Mexico City office.
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